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THOMAS JOHNSON MICHIE.

JEFFERSON, WYTHE, 1 AND 2 WASHINGTON, AND GILMER.

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REPORTS OF CASES

DETERMINED IN THE

GENERAL COURT

OF

VIRGINIA.

FROM 1730 TO 1740;

AND

FROM 1768 TO 1772.

BY THOMAS JEFFERSON.

EASTERN DISTRICT OF VIRGINIA *to wit:*

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"Reports of Cases determined in the General Court of Virginia. From 1730 to 1740; and from 1768 to 1772. By Thomas Jefferson."

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Clerk of the Eastern District of Virginia.

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PREFACE.

When I was at the bar of the General Court, there were in the possession of John Randolph, Attorney General, three volumes of MS. Reports of cases determined in that court; the one taken by his father, Sir John Randolph, a second by Mr. Barradall, and a third by Hopkins. These were the most eminent of the counsel at that bar, and give us the measure of its talent at that day. All, I believe, had studied law at the Temple in England, and had taken the degree of Barrister there. The volumes comprehended decisions of the General Court, from 1730 to 1740, as well on cases of English law, as on those peculiar to our own country. The former were of little value, because the Judges of that court, consisting of the King's Privy Counsellors only, chosen from among the gentlemen of the country, for their wealth and standing, without any regard to legal knowledge, their decisions could never be quoted, either as adding to, or detracting from, the weight of those of the English courts, on the same points. Whereas, on our peculiar laws, their judgments, whether formed on correct principles of law, or not, were of conclusive authority. As precedents, they established authoritatively the construction of our own enactments, and gave them the shape and meaning, under which our property has been ever since transmitted, and is regulated and held to this day. These decisions, therefore, were worthy of preservation. With this impression, I undertook to extract from those volumes every case of domestic character. They constitute the earlier part of this volume.

During the subsequent period, which may be called that of Wythe, Pendleton, the Randolphs, Peyton and John, sons of Sir John, Mason, &c. until 1768, an interval of twenty-eight years, no Reports, I think, were ever taken. At the latter date, I began to commit to writing some leading cases of the day, confining myself still to those arising under our peculiar laws, and I continued to do so until the year 1772, when the Revolution dissolved our courts of justice, and called those attached to them to far other occupations. These cases I have added to the former series.

I have added, also, a Disquisition of my own on the most remarkable instance of Judicial legislation, that has ever occurred in English jurisprudence, or perhaps in any other. It is that of the adoption in mass of the whole code of another nation, and its incorporation into the legitimate system, by usurpation of the Judges alone, without a particle of legislative will having ever been called on, or exercised towards its introduction or confirmation.

TH: JEFFERSON.

EDITOR'S PREFACE.

At the suggestion of several professional friends, who thought that the publication of this volume of Reports, would be generally interesting on account of its source and the period to which it refers, and useful from the explanation which many of the cases afford, of the peculiar laws of this State, and of the modifications which they have undergone, the Legatee of Mr. Jefferson's manuscript papers, has been induced to give it to the public. He hopes that to gentlemen of the bar, particularly in Virginia, it may not be altogether unacceptable.

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CASES

DETERMINED IN THE

General Court of Virginia.

Marston v. Parish.

April, 1730.

Detinue—When It Lies.*—To support an action of detinue the things demanded must be certain, as in debt.

Wills—Devise to a Child in Ventre Sa Mere—Effect Where No Child Is Born.—Where a testator makes a devise to a child of which he believes his wife is enceinte, and no child is born, such devise is void, and the property vests in the wife to whom the residue of the estate is given.

Same—Same.—A devise to a child in ventre sa mere is a contingent devise.

John Williams was possessed of two negro boys, Arthur and Billy, and two negro women, Dinah and Nanny, and made his last will the 22nd of April, 1713. He willed his negroes, and all other goods and chattels, to be valued and appraised, and equally divided between his wife and three children, and that his wife should keep his children's estates till they came of age; and died soon after making his will. After his death, the negro woman Nanny, had two children, Obey and James, and the negro woman Dinah, had a child named Essex. Anthany, the widow, married John Marston, who, supposing his wife to be with child, by his will dated the first day of December, 1719, devised these negroes, viz. Arthur, Will, Nancy, Essex, Obey, and James, to the child his wife was ensient of, and gave all the residue of his estate, real and personal, to his wife and her heirs for ever, she paying his debts, and the orphans' estates in his hands; and died soon afterwards. But his wife did not prove with child, and the widow is married to her third husband, Parish, the defendant, and none of Williams's children are of age, and the plaintiff as heir at law to Marston, the second husband, hath brought an action of detinue, for Arthur, Will, Essex, Obey and James, which are properly Williams's estate, and for Nancy, which was Marston's proper estate.

The plaintiff, as to the negroes that were Williams's, cannot maintain an action of detinue, for by the will of Williams, they were to be equally divided between his wife and children, and until her part is ascertained by a partition, it is uncertain which of them is hers. Therefore, supposing her part vested in Marston, her second husband, and that it descended to the plaintiff as his heir at law, the plaintiff must know
2 which of the negroes are his, to *support this action; for in detinue, the things demanded, must be certain, as in debt. But there is a stronger objection, and that is, to the plaintiff's right to the thing demanded upon the will of his brother. The devise to the child in ventre sa mere never vested, because no child was born, but was for that reason void, and whatever was intended to have been given to this child if it had been born, by law vested in the wife, to whom the residue of the estate was given. A residuary legatee, is in loco heredis and universal successor to the testator, and must have every thing that is not given away by the will. Here was only an intention to give, but no gift for want of a person to take. Though in the case of Sprigg and Sprigg, 2 Vern. 394, it was admitted, that in the devise of the residue of a personal estate, if the legatee was dead at the time of making the will, the residuary legatee shall not have the benefit of that legacy, and that it should not fall into the residue, because nothing was intended to pass by that devise but the residue, after that and other legacies paid. Yet the principal case there, was for a legacy to Thomas Sprigg, if he came from beyond sea, and the Lord Keeper was of opinion, that the devise being contingent, and on a condition precedent, which never happened, was as if never given, and the residuary legatees should have the benefit of that legacy. So here the case of a devise in ventre sa mere is a contingent devise, for in reality the woman was not with child, and the intent of the testator appears plainly to be, that his wife should have all his estate if there was no child, taking notice of nobody but his wife, and the child he supposed she went with. And there is a great deal of reason and justice she should have it. For all the negroes except one, came by her, and she is chargeable with all his debts and the estates of the orphans, out of the residuary estate.

The court were of opinion that the plaintiff had no right to recover the five negroes that were Williams's, and that the plaintiff should recover the negro that was Marston's, as his heir at law.

Reported by Sir John Randolph.

*See monographic *note* on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

Edmonds v. Hughes.

April, 1730.

Slaves in Remainder—Validity.—Richard Alderson

being possessed of several slaves, made his last will and testament in these words: "My will is, that Margaret my wife, shall be sole possessor, and disposer of what estate it hath pleased Almighty God to endue me withal, during her life." etc. And by a subsequent clause he gave to his son Richard his whole estate, chattel and chattels. HELD, that the remainder of the slaves (which were chattels at the time of the testator's death) is a good remainder to the son.

The special verdict in this case is very imperfect and uncertain, so that no title in the plaintiff can be collected from it. But the case is thus.

3 *Richard Alderson was possessed of several negroes in the declaration mentioned, and made his last will and testament (dated the 15th of September, 1695) in these words, 'My will is, that Margaret my wife, shall be sole possessor, and disposer of what estate it hath pleased Almighty God to endue me withal, during her life, providing she keep herself unmarried, or in case she do marry again, that she, nor her husband, or any person or persons in their behalf, by any means or instruments to embezzle or make waste of the said estate, to any indemnity to my children.' Then by another clause, he gives his whole estate, chattel and chattels, to his son Richard, please God he lives, &c. Margaret, after her husband's death, married the plaintiff who carried off several of the slaves, and as it is said, married one of them, and had several children by her. Margaret died, and Richard Alderson the son, took the negroes in the declaration mentioned, and sold them to the defendant. And the question will be whether the remainder of the negroes (which were chattels at the time of the testator's death) first given to Margaret for life, be a good remainder to Richard; and I think clearly that it is. The devise that his wife should be sole possessor of his estate during her life, if it had gone no further, would have been construed as to chattels, no more than the devise of the use, and in that case, without doubt, a remainder might, by the rules of law, be limited over. But where he goes on and says, she shall be sole possessor and disposer of every part of his estate during her life, it may be a question whether it be not the same as if he had given his estate to his wife for life, remainder over. And admit it to be so, yet the remainder will be good, and Richard had a good right to the negroes after his mother's death. There is a difference taken in the old books: where the thing itself is devised, a devise over is void, but where only the use is devised to one for a certain time, is it otherwise; and the principal case to this purpose is 37 H. 6; 36 Bro. Abr. title devise pl. 13, upon which several other resolutions have been built, viz. Plowd. 521; C. Owen 33; Marsh. Rep. 106. But these authorities are certainly too rigid in the case of a will, where a construction ought to be made as far as the law will admit, that the intention of the testator may take place; for a man upon his death bed being supposed to be inops consilii, the Judges will so expound his words, that the whole will may stand and take effect. And as to the case here, of later times, it has often been resolved upon a great debate contrary to the old books, and at this day the law is not so strict as it was formerly taken to be in the disposition of personal chattels. For instance, in the case of Catchmay and Nicholas, anno 1673,

4 where one devised all his *estate to his sister during her life, and after her decease he gave four hundred pounds a piece to his four nieces, which estate consisted of personal things, there it was insisted that the legacy to the nieces was void, it being the devise of the remainder of a personal thing after the death of another, to whom it had been already given. The Master of the Rolls referred this point to Justice Ellis for his opinion, which was, that the remainder was good, and it was so decreed at the Rolls, and upon an appeal to the Lord Keeper, the decree was affirmed. See Lord Nottingham's reports, 1, 16, for the first devise being construed a trust. Sir Thomas Charges' case, anno 1691. Nelson, the old Duke of Albemarle, devised his jewels and plate to his wife for life, and afterwards to his son Christopher, which was a plain devise of a chattel personal with a remainder, and the Master of the Rolls held, this should be construed a devise of the use of the jewels, in order to support the will and intention of the testator. S. C. is reported, 2 Vern. 245, and the Lord Chancellor decreed accordingly, and the remainder to the young Duke was held good. In the case of Hide and Perret, 2 Vern. 331, the plaintiff's father devised to his wife all his household goods in his dwelling house at Hoddesden, during her natural life, and after her decease, to his son Joseph, and the question was, whether the devise over of these chattels, was good or not. The Lord Keeper held, that the devise over was good, for as to the personal chattels, the civil and common law is considered, and there the rule is, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not the devise of the thing itself, and therefore allowed the remainder over to be good. These cases were determined upon solemn arguments, and are conformable to the resolutions in several other cases cited in the reports. They come up expressly to the case at bar, and there can be no question, but according to them, Richard had a good right to the negroes now in question.

And it was adjudged for the defendant.

Reported by Sir John Randolph.

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5 *Tucker v. Sweny.

April, 1731.

Debts of Decedent*—Liability of Increase of Slaves.—Notwithstanding the act making slaves real estate,

*See monographic *note* on "Debts of Decedent" appended to Shores v. Wares, 1 Rob. 1.

such slaves and their increase are liable to satisfy a judgment obtained against the executors of the debtor.

The case. Mr. Richard Dandridge recovered judgment against the executors of Nicholas Curle for £507. Curle died possessed of several slaves, and of those slaves after his death, there was a considerable increase. Mr. Dandridge took out a fieri facias, which was served upon several of the slaves which Curle died possessed of, and likewise upon several of the negroes born after his death, and the question is, whether the increase of the negroes may be taken to satisfy this judgment; and it was held clearly they may. Negroes, notwithstanding the act making them real estate, remain in the hands of the executors by that act as chattels, and as such, do vest in them for payment of debts. So that in this case, they are considered no otherwise than as horses or cattle, and there is no doubt but the increase of any living creature, after the death of the testator, are looked upon as a part of his estate, and are liable to be taken for his debts.

The authority for this is Wentworth 83, and it was so adjudged by the Court.

Reported by Sir John Randolph.

Waddy v. Sturman & al.

April, 1731.

Wills—Construction.—A testator by his will gives to his son John certain legacies, and to his son Thomas certain other legacies, and then says: 'My will is, that if the said John or Thomas should die without issue, that then whatsoever is bequeathed to them the survivor shall have to him and his heirs and assigns.' HELD, that the remainder was good and vested in John when he survived Thomas, who died without issue.

Statutes—Construction.—The statute of Henry IV. was never intended to take away the jurisdiction of the court of chancery, and if it did, that statute cannot be carried further in equity than at law, and no judgment by that statute can bar any but those who were parties to the judgment.

Statute of Limitations—Application to Legacies.—The statute of limitations is likewise no bar in this case, because it is a suit for a legacy, and a legacy is not within that statute.

The case. John Jordan being possessed of a very considerable personal estate, sufficient to pay all his debts, with an overplus, by his last will and testament in writing, bearing date the 6th day of February 1693, gives several legacies to his sons-in-law, John Spence and Thomas Spence (who were brothers) in this manner. 'I give to my son, John Spence, twenty-five pounds sterling, to be laid out in negroes, to be delivered to him upon the day of his marriage, also four cows, &c. Item, I give to my son, Thomas Spence, two negroes Mingo and Peggy, to be delivered at the day of his marriage, and ten head of cattle, &c. But my will is, that if the said John or Thomas should die without issue, that then whatsoever is bequeathed to them, the survivor shall have to him and his heirs and assigns.' The two negroes were de-
6 livered to Thomas, *by Dorcas Jordan, the testator's wife and executrix, and he possessed them during his life, and died without issue in the life-time of John, who had the negroes in possession and died, leaving only one child (the complainant Waddy's wife). After John Spence's death, Dorcas Jordan brought an action of trespass in the General Court, against Lawrence Pope and his wife, who was the widow of John Spence, for recovering Mingo and Peggy and a child that was born of her; and obtained a judgment accordingly the 23rd of October 1700, against the defendants; the complainant Jane, being at that time about two years old. After the judgment, the negroes were taken by execution, and sold or disposed of by Dorcas Jordan, and are now with their increase in the possession of a person in Maryland; and the complainants have exhibited their bill against the defendants, executors of the last will and testament of John Sturman, who was the surviving executor of Dorcas Jordan, and the end of the bill is to recover the value of these negroes, with interest, out of the estate of Dorcas, which came to the hands of the defendant's testator. They severally pleaded the act of parliament, made in the fourth year of the reign of Henry IV., and the act of limitation made in Virginia, anno 1705 in bar to the bill, and have answered that John Sturman acted jointly with other executors, that they paid all the debts and legacies, that they do not know that any part of the estate came to his hands separately from the other executors. But they believe no part of it remained in his hands at the time of his death, the residue of the estate being divided and distributed according to the will, and as to the judgment, they believe there was no fraud or covin in the obtaining it, but that it was fairly given upon the justice and merits of the cause. And that several of the increase of these negroes, which were recovered by the judgment, were disposed of by the will of Dorcas and delivered accordingly: vide the answer as to this. The question is, whether the complainant (Waddy's wife) hath any right to demand those negroes, or the value of them, by the words of Jordan's will, and if she has, then whether the judgment, by the statute of Henry IV. or the act of limitation shall bar that right. As to the complainant's right to the legacy, given in remainder to her father after the death of Thomas, I think it is clear and the remainder good, for though the law doth not allow the remainder of a chattel (as negroes were then) to be limited after dying without issue, generally, yet in a will, if a man give a a chattel to one, and if he die without issue within a short time, as the compass of one life, remainder to another, that remainder is good. It is true in the construction of the words (dying without issue), a man is said to die without issue when his

7 posterity *fails, if it be a hundred years after his death, but in common parlance, or according to the vulgar acceptation, a man is said to die without issue when he leaves no issue at his death. And wherever, by the words of a will, the vulgar acceptation can take place, law and equity will construe it so as not to frustrate the testator's intent. So in this case, the testator plainly intended that if Thomas died without issue in the life-time of John, then, and not otherwise, his legacy should go to John; therefore the remainder was good and vested in John when he survived Thomas. So is the case of Pinbury and Elkin, 2 Vern. 766, 768, where chattels were devised to one, and if he died without issue after her decease, to another, it was held by the Lord Chancellor, that the words (after her decease) shewed the testator's intent to be, that if she left no issue living at her death, the remainder should take place, and therefore decreed accordingly; but if the remainder was not good, the whole property vested in Thomas, and then we claim as next of kin. Then consider the right Dorcas had to recover these negroes. It is admitted in the case, that she delivered them to Thomas, and after that she had no right to demand them again, not even for the payment of debts. But the property absolutely vested in Thomas upon the assent and delivery. So is the case of Noel and Robinson. 1 Vern. 90; 2 Vent. 358. Now as to the matter of the pleas, the statute of Henry IV. was never intended to take away the jurisdiction of the Court of Chancery, as appears upon the case stated upon that statute and the arguments upon it, at the end of the 1st Cha. Rep.; but if it did, that statute cannot be carried farther in equity than at law, and no judgment by that statute can bar any but those who were parties to the judgment. So is the case of Lock and Norborn, 3 Mod. 141. As to the statute of limitations, that is likewise no bar in this case, because it is a suit for a legacy, and a legacy is not within that statute: between Parker and Ash, 1 Vern. 256, by the Lord Chancellor. Now we have a right, and are not barred by either of these statutes. We can, by the rules of equity, pursue the estate of the testator, John Jordan, or his executrix Dorcas, into whose hands soever it shall come. So is the case of Nicholson and Sherman, Cha. Cas. 57. And if the executors of the surviving executor of Dorcas have nothing in their hands, and it be true that her estate was delivered to several legatees of her will, we must make them parties to the bill and bring them to answer.

And it was decreed accordingly by the Court.

Reported by Sir John Randolph.

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8 ***Reeves v. Waller.**

October, 1733.

Appeals*—Act for Recovering Small Debts.—The Act of 1 Geo. 2, for recovering small debts, does not exclude the plaintiff from an appeal, etc., but the defendant only.

The plaintiff brought an action upon the case in Essex County Court for forty shillings, won upon a horse race, and had a verdict in his favor. In arrest of judgment, it was objected, that the plaintiff ought to have sued by way of petition upon the act of 1 Geo. 2, for recovering of small debts, and for this reason judgment was stayed, and the plaintiff ordered to pay costs. And now I moved for a writ of error. The doubt was, whether it could be allowed, the principal debt being under five pounds, and no appeal or supersedeas ought to be granted by the act of 1 Geo. 2. I insisted that the act did not mention writs of error, and that the subject was entitled to them of common right. But the Court seemed to incline, that writs of error were within the act: however, a writ of error was allowed upon the authority of Spotswood and Harrison in this Court, in which the Court came to a solemn resolution, that the act did not intend to exclude the plaintiff from an appeal, &c. but the defendant only, see act C. 3, S. 44.

Reported by Edward Barradall, Esq.

The King v. Moore.

October, 1733.

Evidence—Witnesses—Competency.—Upon an information against the defendant upon the Act of 5 & 6 Geo. 2, laying a duty upon slaves, for not transmitting to the collector of duties, a list of the slaves imported and sold by him, the defendant offered as witnesses the master and steward of the ship, to which it was objected that they were incompetent as parties interested, since they had slaves of their own on board. HELD, this was no objection, since if two are concerned in a trespass and one indicted, the other may be a witness for or against him.

Statutes—Construction—Importation—What Constitutes.—The act was passed about four in the afternoon of July 1st, 1732. Defendant's ship came to anchor about two leagues from shore without the capes on the day of its passage, and came within the capes about noon of the same day, and anchored about eight in the evening. HELD, that there being no defined port limits as in England, this constituted an importation, and defendant was not within the statute.

An information was brought against the defendant upon the act 5 and 6 Geo. 2, laying a duty upon slaves, for not transmitting to the collector of the duties, a list of the slaves by him sold, imported in the ship A. The defendant offered as witnesses, the master and steward of the ship, to whom Mr. Attorney objected, as parties interested, having slaves of their own on board; but the Court seemed to think it no objection, and said at the bar, if two are concerned in a trespass and one is indicted, the other may be a witness for or against him. And by Sir John Randolph, if one is sued for any matter for which another is also chargeable, that other person may be a witness. The jury found a special verdict, that the act was passed July 1st, 1732,

*See monographic *note* on "Appeals."

about four in the afternoon, and the ship came to an anchor off Back river the said first of July, about two leagues from the shore, came into the capes about twelve, and came to an anchor between seven and eight, and could have got up to York if they had had a pilot. On the second of July got into the mouth of York, on the third
9 to Yorktown, *and entered the fifth.

Two questions were made upon the verdict. 1. Whether the day of passing the act was exclusive or inclusive. 2. Whether this was an information. The words of the act are, 'From and after the passing of this act, there shall be paid, &c. for all slaves imported or brought into this colony and dominion for sale, &c.' As to the first, for the King, it was insisted, there could be no fraction of a day, and the act being passed the first of July, that whole day must be included; and Clayton's case, 5 Rep. 1, was cited.*

Hopkins, for the defendant, agreed there was no fraction of a day, but insisted the day of passing the act was excluded, and consequently this importation was before the act, and cited Clayton's case supra, and the case in Dyer, 5 Eliz. 218, there cited, which seemed to be in point. As to the second, I insisted for the King, that the place where the ship anchored the 1st of July was not within any port, and so no importation. To which it was answered, there are no ports laid out here as in England, and that coming within the capes, with an intent to come straight to Virginia, is an importation.—Judgment for the defendant.

Vide Hopkins's argument, in Libro. Parso. 84, 2 H.

Reported by Edward Barradall, Esq.

The King v. McClanahan.

October, 1733.

Commissionating—What Constitutes.

The case was: The defendant was the first of three recommended by the county court; a blank commission was sent up to the clerk of the county court, under the seal, with directions from Mr. Robertson to offer the commission to the defendant, and if he refused, to put in the name of the next person recommended. Defendant refused before the county court, and the commission was filled up with the name of another; and whether the defendant was liable to the penalty of the act, was the question. The words of the act are, 'that every person hereafter commissionated to be sheriff, and refusing, shall forfeit,' &c. In this case the defendant never was commissionated; his name was never in the commission, and so not within the act.—Judgment for the defendant.†

Reported by Edward Barradall, Esq.

*Holt's opinion also cited. Rob. How's case, 2 Salk. 625: Lord Rockingham v. Oxendem, 2 Salk. 578.

†It was said, the practice of sending out blank commissions under the seal, was of dangerous consequence, and it was not safe for any man to fill them up.

10 *Isbell et ux. v. Butler et al.

April, 1735.

Slaves—Value of—At What Time Considered—Case at Bar.

In this case a question was made, whether a slave given by an intestate in his lifetime to a younger child, should be taken at the value he was when given, or the value at the testator's death. Et per tot cur. at the value when given, et recte opinor. Thomas Randolph and Hopkins contra.

Reported by Edward Barradall, Esq.

Darby v. Stringer.

April, 1735.

Evidence—Lapse of Lands.

Petition for land granted in 1669, as lapsed for want of seating upon; slight proof of a seating many years ago, though no appearance of it now. Adjudged the land was saved.

Reported by Edward Barradall, Esq.

Waddill v. Chamberlayne.

April, 1735.

Deceit—Sale of Slave—Incurable Disease.—An action of deceit will lie for the sale of a slave who has an incurable disease.

The plaintiff declares that the defendant clandestinely and deceitfully sold him a slave, for a great price, to wit, twenty-five pounds, knowing the said slave at the time, and for a long time before, labored under an incurable disease, not discovered by the plaintiff, and was of no value.

There is a verdict for the plaintiff, and I have moved an arrest of judgment that this action will not lie without warranty. This is an action upon the case in nature of deceit, and such actions I agree will lie in some cases, but not in this: the charge here is no more than selling a thing of small value for a great price, not discovering the defects; and however inconsistent this may be with natural justice, it is tolerated by the universal consent of mankind, where buying and selling is used. The principal advantage in the way of commerce is to sell dearer than you buy; and so as to the goodness or quality of a commodity, the law has left it at
11 large *pretty much to the conscience of the seller, who too often takes advantage of the buyer's ignorance. The law has provided a guard against those impositions, to those who are prudent enough to make use of it; that is, a warranty from the vendor of the goodness, value, &c. But without such warranty no action will lie for any little fraud or over-reaching, in the value or goodness of the thing sold. But in such case the rule is caveat emptor, and if the law was otherwise there would be no end to actions; but every contract, almost, in buying and selling, might produce one. There is no rule in law perhaps more universally known than this; it is

in every one's mouth, what frauds are practised every day in the sale of horses; yet I never heard of an action brought without warranty. No man thinks himself obliged to discover the defects of the thing he sells, and unless the buyer is prudent enough to exact a warranty, I take it he is without remedy. I will not deny but there are some instances* where an action will lie for deceit in a sale, without express warranty, as where it is a thing unlawful in itself, as the selling of bad victuals. 9 H. 6, 53; C. 11; E. 4, 6; C. Rol. 91; Cro. Ja. 197, 470. But the reason given in all these cases is, that it is prohibited by law to sell bad victuals, which proves the action would not lie but for that reason. So if I sell a thing, affirming it to be mine when it is another's; this affirmation amounts to a warranty, if I am in possession, otherwise not. Medina v. Stoughton, 1 Salk. 210. So are divers other cases† which prove there must be either an express warranty, or something that amounts to it in construction of law, and it is evident from the case of Medina and Stoughton, that if I sell a thing out of my possession, affirming it to be mine, (though this is an apparent fraud) no action will lie, for there caveat emptor says the book. There is a case I suppose will be quoted against me, and if that is law, then this action will lie; but I humbly conceive it is not. 9 H. 6, 53; C. in 1 Rol. Abr. 90, if a man sells a piece of cloth, knowing it not to be well fulled, an action of deceit lies, for this is a warranty in law, says Rolle, but the book says no such thing, nor indeed was the point adjudged in the case, but cited to be adjudged in another case; it is only a saying obiter of one of the Judges, and can carry no authority with it; especially as it is not supported by any subsequent resolutions, but the whole current of authorities since is contrary. There is the opinion of Frowick in Kel. 91, and of Popham in new Dyer, 75 margine; Chandler v. Lopus, in favor of this point. But the first is a single opinion, and as to the second, though
12 it was *adjudged in the King's Bench according to the opinion of Popham, yet the judgment was reversed in the Exchequer Chamber. Cro. Ja. 4. If a man sells a pipe of wine that is corrupted, and does not warrant it to be good, no action lies. F. N. B. C. 94; C. Bridgman, 127. And 1 Rol. Abr. cont. 90, is not warranted by the book, for it appears in the case there was a warranty. It is said, indeed, the warranty is not material; but what is the reason given? Why, because it is prohibited to sell bad victuals. Bridgman, 127. Southern v. How, was a case of a counterfeit jewel, which the defendant knew to be so; adjudged no action lay without a warranty. In the report of this case, Cro. Ja. 468, the counsel for the plaintiff labor this distinction, where the deceit is sciens or not; no judgment is given by the report there, but in Bridgman, judgment was given for the defendant, because the action would not lie without warranty, except in the case of bad victuals, which goes upon another reason as I have shewed. If a man sells a horse that is lame or diseased, without warranty, no action lies. F. N. B. 94; C. Bridgman, 127; 1 Rol. Abr. 90, 4. This is a common case, and what every body knows, and was never yet denied, nay, if there is an actual warranty, it extends only to secret infirmities, not such as are visible and apparent, as the want of an eye, or any other defect within the knowledge of the five senses. See the book of 11 E. 4, 6, C. Yet it is a fraud and deceit in the seller not to discover the defect to the buyer, but here caveat emptor. 1 Salk. 211; Butterfield and Burroughs is not contra, but rather warrants this opinion, for there the court say they would intend it a secret infirmity, being after a verdict. This case of a horse I take to be directly in point, for where is the difference between a horse and a slave, as to this matter? If an action will not lie in the one case, neither will it in the other, as I conceive. As to the difference taken where the deceit is sciens or not, it has its foundation from that opinion in 9 H. 5, 3, C. only cited, as I have observed, with no one adjudged case since to support it; but the whole current of authorities, as well as common experience, is against it. I will agree, the difference taken with respect to the property in several cases. 1 Dam. 178. If a man sells a thing, knowing it to be another's, an action will lie without warranty; but this case is settled in Medina v. Stoughton, cited before. In my little reading, I could never find a precedent of such a declaration as this; but the precedents are all upon warranties, and I believe no such precedent can be shewn, and if there cannot, it will go a great way to prove my argument. Sir E. Coke says an argument taken from the books of precedents and entries is very forcible. In short, Sir, if this action is maintainable, a great deal of learning
13 we meet with in the books upon *the subject of warranties, might have been spared; it must be useless and insignificant, and the rule caveat emptor may be thrown out of doors. I expect to be told this is arguing in favor of fraud, that this makes buying and selling a mere cheat, and learned lessons we shall hear, no doubt, concerning the immorality of the thing; but however such kind of reasoning may serve to gain popular applause, and raise a high idea of the orator's integrity, it will never, I am sure, prevail with discerning Judges. The laws of society and civil government are not founded upon the strict rules of natural justice. Public convenience oft requires they should be dispensed with; the punishment of theft bears no proportion to the crime, yet it is found necessary to make it so severe. I need not mention other instances, they are obvious enough; therefore to make specious ha-

*Rol. Rep. 5, 6.

†Cro. Eliz. 44; Cro. Jac. 4, 74; 1 Rol. Abr. 90; 3 Mod. 261; Shaw 68.

rangues concerning the morality or immorality of an action that is to be determined by the laws of a particular society, is arguing neither like a lawyer nor a politician. It is the rule of all governments, I believe, that the good of the majority is to be preferred; agreeably to this we have a maxim in the common law, 'Lex citius tolerabit privatum damnum quam publicum malum;' therefore the Judges in their determinations do not so much regard what the injury is to particular persons, but what the general convenience or inconvenience may be. An argument ab inconvenienti is very forcible in law, for the rule is 'quod est inconveniens est illicitum.' Now, Sir, I conceive the inconveniences will be manifold, if it be established for law, that an action will lie for selling a thing of small value for a great price, or for selling a commodity not discovering the defects; which are the charges in this declaration. It will tend to multiply suits without end; every man that is displeased with his bargain, will have it to say the thing is not so good or worth so much as he expected, and if this shall be a foundation for an action, a desire of revenge or proneness to be litigious may produce a law suit out of every bargain that is made. How much more reasonable is it that a particular person should sometimes suffer, than such a general inconvenience be introduced, especially since the law thus puts it in the power of every man to secure himself against impositions of this kind by requiring a warranty, and if he does not do it, he suffers through his own folly and negligence, and the law is not to be blamed. If this action will lie, every vendor of slaves will be subject to the same action. It frequently happens that there are distempers among the slaves, but the seller does not think himself obliged to publish this to the world, nor is it thought criminal to use arts to conceal it. Numbers of these distempered slaves have been sold, and the consequences sometimes very fatal. But I never
14 *yet heard of an action being brought; though we may expect to see them very frequent if this is established as a precedent. I will beg leave to mention a case adjudged here last court; Lewis v. Golston; it was in Chancery. Lewis brought a bill against Golston, suggesting the want of witnesses, to be relieved concerning the sale of two slaves, which he alleged the defendant warranted to be sound, but were in truth distempered. The defendant denied the warranty, and though it was proved the slaves had been distempered for some time, and till just before Lewis bought them, and that the defendant knew it, yet the Court denied any relief, because the warranty was not proved. If equity would not relieve in such a case, much less can an action at law be maintained. I remember very well Sir John Randolph, who was then of my side of the question, argued an action would not lie, without a warranty. He said these little arts that are used every day in the way of buying and selling, and in putting off bad commodities, were no ground for an action; nay, he went so far as to say, all trade was a kind of fraud. How right he is in his opinion I must submit, but I am apt to think his argument now, will not be very consistent with his doctrine then. There is one thing I have omitted, and that is the rule of the Civil law in buying and selling 'in pretio emptionis et venditionis naturaliter licet contrahentibus se circumvenire.' The civil law is universally allowed to be the most equitable perfect law in the world, and yet this kind of art of over-reaching in buying and selling is tolerated. There would be no such thing as buying and selling if it were not. I am persuaded, then, your honors will not be induced, from any plausible pretence of the immorality of the thing, to give judgment against the law. I take the law to be clear in favor of the defendant, and I pray that judgment may be stayed.—Judgment for the plaintiff.

Reported by Edward Barradall, Esq.

Morris v. Chamberlayne.

April, 1735.

Assumpsit*—Quit-Rents—Case at Bar.—The plaintiff was sheriff of New Kent in the year 1733 and had the collection of the quit-rents, levies and fees, and Burch was his under sheriff, and paid him five thousand pounds of tobacco for the profits of his office. There was due from the defendant £6. 12s. 4d. for quit-rents, and seven thousand seven hundred and thirty-seven pounds of tobacco for county levies and officers' fees of his own and other people's that he had received. Burch being indebted to the defendant more than that money and tobacco, before the year 1733, gave the defendant receipts for these quit-rents, levies, etc., and gave him credit in the defendant's books for the same, but no money or tobacco was paid except by that discount; neither the defendant nor Burch paid the plaintiff any of that money or tobacco. In an action of indebitatus assumpsit against the defendant for money and tobacco had and received to the use of the plaintiff, it was held that the defendant was liable.

The plaintiff declared upon an indebitatus assumpsit for money and tobacco had and received to his use. Upon non assumpsit pleaded, the jury find a special verdict, upon which the case appears to be, that the plaintiff was sheriff of New Kent, anno 1733, and had the collection of the quit-rents, levies and fees, and Burch was his under sheriff, and paid him five
15 thousand pounds of tobacco *for the profits of his office. There was due from the defendant £6. 12s. 4d. for quit-rents, and seventy-seven hundred and thirty-seven pounds of tobacco for county levies and officers' fees of his own, and other people's that he had received. Burch being indebted to the defendant more than that money and tobacco before the year

*See monographic *note* on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 183.

1733, gives the defendant receipts for those quit-rents, levies, &c. and gives himself credit in the defendant's books for the same, but no money or tobacco was paid except by that discount, and the defendant or Burch has not paid the plaintiff any of that money and tobacco. If the law be for the plaintiff the jury find £71. 1s. 10d. damages. The questions upon this case I take to be two: first, Whether the defendant is chargeable at all to the plaintiff for the quit-rents, &c. discounted with Burch, the under sheriff, and for which he has his receipt. Second, if he be, whether the plaintiff can maintain an indebitatus assumpsit for the quit-rents, &c. due from the defendant himself. There is a difference taken as to the money received for quit-rents, and the tobacco received for levies and fees; the quit-rents are said to be the King's treasure, and so coming to the defendant's hands, he is answerable, and so perhaps he would to the King, if we were in a dispute with the crown. For it must be owned, the law is particularly careful to secure the King's debts; his treasure is looked upon as the bellorum nervi, and therefore he has sundry prerogatives for obtaining them; he can have execution of body, lands and goods, at once. A subject can have no execution against the King's debtors without first securing the King's debt and (33 H. 8, c. 9,) if process for the King be commenced before judgment, the King shall have remedy against the debtor of his debtor cum multis aliis. If a man intermeddles with the King's treasure, pretending title, he shall be answerable for it to the King. 11 Rep. 89; E. of Devonshire; God. C. 291, 292. All this is true, but nothing to the purpose. The question here is not between the King and a subject, nor ought the money, as I conceive in this case, to be regarded as the King's debt; it seems, therefore, foreign and absurd to talk of his prerogative. The case as to this point is no more than this: an officer of the crown employs a person under him, who receives the King's money, and pays to a third person. The officer sues this third person for money received to his use: how is the King concerned in all this? Will his treasure be impaired if the plaintiff should not recover? How then can this be regarded as his debt? Is the plaintiff entitled to an execution against body, lands and goods? Will he be preferred to another subject in point of execution? Can the plaintiff have remedy against the debtor of the defendant? If I am answered in the negative, as sure I
16 must be, it *will be evident to demonstration that this is not the King's debt, nor can it be regarded as such; if it was, the plaintiff would have all those privileges. Therefore, without entering into the dispute whether the defendant would be answerable to the King or not, which I conceive is nothing at all to this case, I shall close this point with an observation of Sir M. Hale's; that to make the King's prerogative a state to recover other men's debts, is unreasonable, inconvenient and mischievous. Hard. 404. This plausible pretence of the King's debt being removed, the case is, in short, this: an under sheriff, who had farmed the profits of the sheriff's office, directs a person to whom he is indebted, to receive divers quit-rents, levies and fees, and discount them, together with what this person owed himself on the same account, out of his own private debt, and gives receipts. The under sheriff proves insolvent, the sheriff is forced to pay the King and publick officers, and whether the sheriff can recover against the person who received these quit-rents by the under sheriff's order, is the question? It is said if a master send his servant to receive money, and the servant pays it again to the person he received it of, in discharge of his own debt, this shall be taken as money received to the master's use, and I agree that it will be so, but I think that is nothing like the case at bar. The under sheriff here cannot be taken as a servant; he had farmed the office for a great premium, and so was not subject to the direction or control of the sheriff, who had delegated his whole power to him, and therefore had no right to intermeddle in the receipts and payments. But the under sheriff was surely to manage that, and every thing else relating to his office, as he thought most to his own advantage and benefit. It is inconsistent in the nature of the thing, that the sheriff should intermeddle, for by that means he might deprive the under sheriff of all the profits which he paid so largely for. If the sheriff then, had no power to direct the receipts and payments, or in any manner to control the under sheriff, how can the under sheriff be regarded as his servant? Or how can money received, by the order of the under sheriff, be money received for the sheriff's use? The case, therefore, is not like that of the master and servant, for there is an apparent fraud, and the person receiving the money knows very well it is the master's, and therefore it is reasonable he should be answerable to the master. But in the case at bar, I conceive the money and tobacco was in no sort the sheriff's, nor subject to his disposal: though it be true, he is answerable to the King and public creditors, he had fully authorized the under sheriff to receive and pay. The defendant transacted this matter with the person
17 so authorised, and who *alone had a right to transact it. If I employ a factor and he pays his debts with my effects, what remedy have I against his creditors? Suppose the under sheriff had actually received this money and tobacco, and paid the same to the defendant, could the sheriff then have demanded it as money received to his use? I believe not. I cannot then conceive any difference in the thing, between actually receiving and paying, and discounting, as in this case. This case is of a very general concern, almost every man pays his quit-rents, &c. to the under sheriff, and often, no doubt,

by way of discount, where a man has an account open with the under sheriff; and this, I believe, is the first time such a payment has been disputed. But hereafter it will be unsafe to transact any business with the under sheriff, if the defendant is chargeable in this case, and I must submit, whether such determination will not be introductive of a general inconvenience. But here it is pretended there is a m ghty fraud, because the money was never actually paid to the sheriff. I cannot conceive in what this fraud consists. A public collector being indebted to a man, appoints him to receive some public debts, and then allows him to apply them in discharge of his own private debt. Few men, I believe, would scruple to do this, or think it any point of dishonesty or fraud; and as to the money not being actually paid, that is answered before. The second question is, admitting the defendant is answerable, Whether the plaintiff can maintain an indebitatus assumpit for money, &c. received to his use, for the defendant's own quit-rents, &c. paid the under sheriff by way of discount, as appears in this case; and I conceive he cannot. This discount must be admitted to be a payment or not a payment. If it be a payment, the under sheriff was sufficiently authorised to receive them. His discharge we have, and there can be no foundation for this action as to them. If this discount be not a payment, as has been strongly urged, it must be owned they are still due; but then the remedy to recover them, is not by action, but distress. Nay, there is an express law that no action shall be brought, unless the party be returned insolvent. What pretence then has the sheriff to maintain this action, or indeed any action at all? Certainly, if these quit-rents, &c. are not paid, they must be recovered in the name of the King and the officers to whom they are due. I conceive the plaintiff has no right to recover any part of this money and tobacco of the defendant, much less can he maintain this action for the defendant's own quit-rents; and if the law be against the plaintiff upon either point, judgment must be given against him, the damages being entire.

Sir John Randolph, for the plain-
18 tiff, said it was not insisted that *this was to be regarded as the King's debt, but he insisted that the under sheriff was no more than a servant, and cited Dalt. Off. sheriff. That if a servant is sent to receive money, and gives a discharge without receiving it, that discharge shall not bind the master. That it was a general rule, a master was not bound by the act of his servant, if the servant did not pursue the authority given by the master; and he cited Dr. & Studt. dial. 2 C. 42, p. 258; 6 Mod.; Ward v. Evans, fo. 36. He says, this was a fraud and covin between the under sheriff and defendant, and a covinous payment was not good. 1 Keb. 300, a man was indicted for paying his poor's rate to an indigent overseer against the order of the justices, and 5 Co. 95. Goodall's case, where a pretended payment of money to satisfy a condition was not good; but neither of the cases seems to the purpose. That in Keb. does not say the payment was not good, but the man was indicted for disobeying the justice's order; and in Goodall's case, the reason given is, because an estate of inheritance, by the payment of the money, was to be divested, and, therefore, it ought to be a true payment and performance of the condition.

Judgment for the plaintiff, October, 1735.

Lee, Randolph, Grymes, Carter, Digges, and the Governor, for plaintiff.

Lightfoot, Custis, Tayloe, Robinson and Bird, for defendant.

BLAIR gave no opinion. For the plaintiff, of master and servant, see 3 Salk. 234.

Reported by Edward Barradall, Esq.

Legaw and Armistead v. Newton.

April, 1735.

Lapse of Lands—Case at Bar.—The lands were granted to Beheathland Gilson, by patent September 27, 1667, and again granted to Thomas Gilson October 20, 1670, as lapsed from Beheathland. She, at the time of the grant to her was one year old, died in October, 1693, being the widow of Stork, and by her will devised the land to her daughter Elizabeth, whose heir apparent is the defendant in this action. Elizabeth was born in 1687, married in 1702, to the defendant's father, who died in 1728. The land was first seated for Beheathland in 1692; the defendant has Beheathland's rights. In May, 1705, Augustine Smith obtained a grant of the aforesaid lands, as lapsed from Thomas Gilson, and the lessor of the plaintiff has his title. Smith seated it according to the condition of his grant. The defendant entered in 1729, and settled a plantation. Smith and the lessor paid the quit-rents from the time of the grant to Smith and ever since the entry. HELD, the plaintiff is entitled to the lan d.

The lands in question were granted to Beheathland Gilson, by patent, September 27, 1667, and again granted to Thomas Gilson, October 20, 1670, as lapsed from Beheathland. She, at the time of the grant to her was but a year old, died in October, 1693, being then the widow of one Stork, and by her will devised the premises to her daughter Elizabeth, whose heir apparent the defendant is. Elizabeth was born in 1687, married in 1702, to the defendant's father, who died 1728. The land was first seated for Beheathland in 1692, according to the law then, and no seating before; the defendant has Beheathland's right and is thirty-three years old. In May, 1705,

Augustine Smith obtained a grant of
19 *the aforesaid lands, as lapsed from Thomas Gilson, and the lessor of the plaintiff has his title. Smith seated it according to the condition of his grant, but except the seating by Beheathland and that by Smith, no person has ever lived upon the land till the defendant entered in 1729, and settled a plantation; only one Daniel,

after 1710, by permission of the lessor, tended part of the land several years. Smith and the lessor have paid the quit-rents from the time of the grant to Smith, and ever since the defendant's entry to this time; and whether the lessor or the defendant has title to these premises, is the question? For the clearer understanding of this case, I shall divide what I have to say into five points or questions. 1st. I shall consider, whether the infancy of Beheathland, the first grantee, did or could excuse the forfeiture for the breach of condition in not seating within three years? If not then, 2nd. Whether the second grant to Thomas Gilson was good? 3rd. Whether the seating in 1692, by Betheathland, did or could give her any right, or be taken as a performance of the condition, either of the first or second grant, so as to make the third grant to Smith void? 4th. If this seating be taken as a performance of the condition of the second grant, whether the defendant has any title under Thomas Gilson, the second grantee? 5th. Admitting the grant to Smith is void, whether the possession of the lessor of the plaintiff above twenty years before the defendant's entry, was not a bar to that entry, and is a good title in the lessor? 1st. I take it to be very clear that the infancy of the grantee will not excuse the breach of the condition. There are two sorts of conditions; in law, or implied; in deed, or express. The breach of conditions in law, in the case of infancy, will sometimes cause a forfeiture, and sometimes not. 1 Just. 233, C. 380; C. 8; Rep. 44, C. But infancy will never excuse a forfeiture in case of the breach of a condition in deed, as if land be given to an infant upon condition, or he purchase such estate, or even if an estate upon condition descend to him, he is bound by such condition and must take notice of it at his peril, for if the condition be broken during his minority, the land is lost. Bro. condition 114; coverture and infancy 71; Plowd. 375; Stowell 8; Rep. 44 C.; Whittingham; 1 Just. 380 C.; 1 Mod. 86, 300, and 2 Lev. 22; Porter v. Fry, a notable case. An estate was given to a grand daughter, an infant, upon condition she married with consent, and if she married without consent, then devise over. She married without consent, under age, and one point adjudged is, that her infancy would not excuse the breach of the condition, and even equity refused to relieve against it. And so in the case of Bertie and Lord Falkland, 2 Vern. 343. The
20 like point was resolved, *Lege. 8 Rep. 1 Mod. This is the law in the case of a subject, and it is stronger in the King's case, for there, conditions are always taken strictly, and as most for the King's benefit. If the act of 11 Ann. c. 4, for saving infant's rights in case of lapse, should be objected, I answer, an act made so long after and providing only for cases futurely happening, can never influence this case; besides, this case is not at all within the purview of that act, which only saves infant's rights in case of lapse, not where they are original grantees or purchasers. And now I have mentioned this act, I must take notice of it as a further proof, that infancy will not excuse the breach of a condition, for if it would, this act had been needless. I hope, then, it is clear that the infancy of Beheathland, the first grantee, did not excuse the forfeiture for the breach of condition, and it is next to be enquired, 2nd. Whether the second grant to Thomas Gilson be good? It is the nature of an estate upon a condition, that if the condition be broken, the grantor has a right of entry; if he cannot enter, as in some cases he cannot, he must make a claim, and in either case of entry or claim, the estate determines and not before. 1 Just. 218. It will be objected, perhaps, that the King cannot enter for a condition broken, till the breach is found by office. Pop. 26. And I agree, that regularly there ought to be an office; but then, I say, it was never practised in this country, I mean in a strict and formal sense, for something in the nature of it has been always used and practised, at least, from the year 1662. By an act made then, c. 69, no patent is to be granted for land as deserted for want of planting within three years, till proof be made before the Governor and Council, and an order from them for the patenting thereof. Thus the law stood here, till the 9 Ann. c. 13, when a new method was established for this purpose, which is too well known to need reciting. The old method as well as the new were substituted in the room, and are in the nature of an office. It is indeed notorious, that under the old act, lands were frequently granted upon a mere suggestion that they were lapsed, without any further inquiry, and therefore, this court upon proof made that the land was saved, has frequently adjudged such new grants to be void; and with good reason, because they were founded upon false suggestions, and the king was deceived. But there can be no pretence of that kind in this case, because it is found in the verdict, that this land was not seated till 1692. Above twenty years after this second grant, and at this distance of time, it must be presumed the grant was regularly obtained, according to the directions of the old act: sure nothing appears to the contrary, and in the grant itself, it is mentioned to be by order
21 of the General *Court. If then this grant was regularly obtained, there was an enquiry, in nature of an office, according to the course and practice of those times. And then the king might enter as he did, and grant the lands to Thomas Gilson, and such grant is undoubtedly as good as any other under the same circumstance, nor has the validity of such grants been ever disputed, except where it has been proved that the land was saved. Here then, is a period to Beheathland's right and title under the first grant; and

the legal estate in the premises vested in Thomas Gilson. How Beheathland ever gained any other right or title, will be incumbent on the defendant to show; for my part, I cannot so much as guess at it; for I cannot conceive, 3rd. That her seating in 1692 (which is the third point) could give her any right, or be taken as a performance of the condition of the first or second grant, which, if it should, would consequently make the third grant to Smith, void. I have before observed, that if the grant to Thomas Gilson was good, the legal estate of Beheathland determined when that grant was made. I cannot conceive then, how a tortious act of hers, twenty years after, could regain that estate she had forfeited so long before. I call this seating of hers in 1692, a tortious act, for if the grant to Thomas Gilson is good, and his estate continued, it was a dissiesin or trespass upon him. If his estate did not continue, but was become forfeited, it was an intrusion upon the King. I am really at a loss to determine what arguments can be made use of, to prove that such an act can give any legal right or title, and therefore I must be silent till I hear what they are. Sure, it will not be pretended that this was any performance of the condition of the first grant to Beheathland, twenty years after the condition broken and entry made for the breach, and thereby the estate determined. Neither can this seating be taken as a performance of the condition in the second grant, as I humbly conceive, being so long after the time limited in the grant for performance. I shall admit that a seating by one who has no title, shall enure to the benefit of those who have right. But then I think this seating ought to be within the time limited. Suppose we were in the case of a subject: an estate is granted upon condition to be performed within three years, which is not done, the grantor does not enter, but suffers the grantee to continue in possession, who many years afterwards performs the act required by the condition. I believe this would not be taken as a performance of the condition, or bar the grantor of his entry. And if not in the case of the subject, much less in the King's case, where conditions are always taken strictly, and as most for the King's benefit. And, though equity will sometimes interpose to save a
22 forfeiture, where *the design and intention of the grantor is fulfilled, though the condition be not strictly performed, that was never known in the King's case. Besides, the intention here was not fulfilled, which was to have the land seated and cultivated. I conceive then, this seating in 1692, was no performance of the condition of the second grant, and then the grant to Smith in 1705, is a good grant, and the lessor of the plaintiff has a clear title. 4th. But if this seating can be taken as a performance of the condition of the second grant, it must next be seen, if the defendant has any title under Thomas Gilson, the grantee, upon which head I shall not need to say much, because I am sure no title at all appears either in the defendant or Beheathland, under whom alone it is, the defendant pretends to claim. They were neither of them heir to Thomas Gilson, nor was any conveyance ever made by him of his right. So that there cannot be any pretence of any legal title under him. If they will set up an equitable title, as I do not know what they may pretend to, it will be unnecessary to give any answer. We are at common law, and I presume the determination will be upon the legal title, and not any imaginary equitable one, if any such is pretended. 5th. Admitting the grant to Smith is not good, then it is to be considered whether the possession of the lessor of the plaintiff, above twenty years before the defendant's entry, was not a bar to that entry, and gives the lessor a good title in this case. By the stat. 21 Jac. c. 16, s. 12, which are enacted here, totidem verbis, 9 Ann. c. 13, it is not. So, see the statute and the act, any person having a right of entry, must make that entry within twenty years after the title descended or accrued, or is barred from such entry; with the usual savings to infants, feme coverts, &c. who may enter within ten years after the disability removed. This act being express, that the party shall be barred if he does not make his entry within twenty years. A possession of twenty years is compared to a descent that tolls entry. And therefore, if a man has been so long in possession, and another enters upon him, and puts him to his ejectment, that possession shall be as good a title in him (though plaintiff) as if he was defendant and still in possession; because the defendant's entry was not lawful. 2 Salk. 421, Stokes v. Berry. There is another rule too, that if a man has a prior possession, and another enters upon him without title, the priority of possession is a good title against such an entry. Vaugh. 299; Crane v. Ramsey, 2 Saund. 1120. The lessor of the plaintiff, and those he claims under, were in possession from the time of Smith's grant in 1705, till the defendant's entry in 1729, which is twenty-four years, and this possession is a good title, unless some incapacity has intervened in the
23 *defendant, or those he claims under. Admitting any title does appear for him, and if no such does appear, then the priority of possession is a good title against the defendant's entry, without any title at all. Lege. Salk. Because I will not take up time unnecessarily, I will agree that if Beheathland had a good title in her at the time she devised to her daughter Elizabeth, our twenty years' possession will not avail. Because Elizabeth, in whose time our whole possession was, has been under the incapacity of infancy and coverture, during all that time. But I hope it is clear she had no title after the grant to Thomas Gilson, and then, though the seating in 1692 should be taken as a performance of the condition of the second

grant, and so the grant to Smith is void, yet the defendant having no title under Thomas Gilson, our priority of possession is a good title against this entry; at least the twenty years' possession is undoubtedly a good title against Thomas Gilson, and all claiming under him, there appearing no incapacity as to them.

Randolph for the defendant, said the question was, whether the second or third grant were good. That where an estate was granted upon condition, though the condition was broke, the estate continued until entry of the grantor. And where an entry was necessary in the case of a subject, an office was so in the case of the King. Therefore, that the breach of the condition of the first grant, must be found by office, before the estate of the first grantee was determined. That it did not appear in this case by any proof, that the condition of the first grant was broken before making of the second grant, nor even so much as that the party was summoned, which was certainly requisite, according to natural justice; but the second grant might be made without any enquiry into the truth, or hearing the party, as grants frequently were in old time, and then it is certainly void. He cited Pop. 53, to shew that an office in the King's case countervailed an entry in the case of a subject. (Quer. of this, for by Pop. 25, there must be an entry after the office.) He compared this to the case of Carter and Baylor, though there is really no kind of similitude between them. That case, which happened in was in short this: Edward Hill obtained a patent in 1683, for seventeen hundred and seventeen acres. In 1693, he gave the land to Edward Chilton, and Hannah his wife, (who was his daughter) and their heirs. In 1698, Edward Chilton alone sold to Baylor, who cleared enough to save the land, according to the law then, and afterwards in 1704, obtained a new grant of the same land, as lapsed from Hill. Hannah survived her husband, Edward Chilton, and Mrs. Carter was her heir, and so if the grant in 1704, to Baylor, was not good, had an undoubted title.

24 And it was adjudged that grant *was not good, the land being saved before; and though it was saved by a stranger, not the grantee, or those who claimed under him, it should enure to the benefit of those who had right.

Judgment for the plaintiff, October, 1735. By the opinion of Lee, Tayloe, Robinson, Byrd, Blair, and the Governor.

Randolph, Custis, and Digges, contra.

Reported by Edward Barradall, Esq.

Tutt v. Freeman.

October, 1736.

Jurisdiction*—Amount in Controversy.

Indebitatus assumpsit for goods sold, money lent, and paid, and services done. The jury found only nine pounds three shillings damages.

Randolph moved that no judgment ought to be given, the damages being under ten pounds sterling. So the action will not lie in this court.

Barradall, contra. Judgments are given here every day, where the damages found by the jury are under ten pounds, if the cause of action laid in the declaration, is for so much, and so the practice was agreed to be.

And the motion was overruled.

Reported by Edward Barradall, Esq.

Anderson v. Winston.

October, 1736.

Usury*—Case at Bar.

Debt on the act 3 and 4 Geo. 2, c. 12, against taking excessive usury. The plaintiff declares that the defendant, after the 29th of September, 1730, viz. ultimo July, 1731, at, &c. upon a certain contract made between the defendant and one John White, did receive of the said White, by way of corrupt bargain and loan, three pounds currency, for gain, use, interest and giving day of payment of twenty pounds currency by the defendant to the said White lent over, and beside the lawful interest of six per cent. against the form of the Act of Assembly, &c. and in another action, declares in like manner for taking thirty six shillings for interest, and giving day of payment of twelve pounds, in

25 which actions *the jury find specially; that White, some time in June, 1730, borrowed of the defendant ten pounds current, and in July, twelve pounds more, and gave separate bonds for payment of twenty pounds, and twelve pounds sterling at the end of a year. In April, 1732, White and the defendant made a settlement, and for the first year White was charged for principal money on both bonds, £36. 16s. current, and in October following White paid the said £36. 16s. and interest at six per cent. from the respective days of payment in the bonds, and the defendant received it. And if the Court adjudge the defendant guilty, they find him guilty of taking the said £4. 16s. above six per cent. upon the said bonds. And I take it upon the matter found, the defendant is not guilty of any breach of the said act; before the making of which, there was no law here that settled the rate of interest, nor were men subject to any penalty, though they took twenty or even fifty per cent. Now, this act provides that no person, after the 29th of September, 1730, upon any contract to be made after that time for loan of any monies, wares, &c. shall take above six per cent. per annum, for forbearance, and all bonds, &c. made after that time, where more is received, shall be void, and any person who, after the time aforesaid, upon

*See monographic *note* on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

*See monographic *note* on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

any contract to be made after the said 29th of September, shall receive above six per cent. shall forfeit double the value of the money, &c. lent, &c. It is plain this act was intended to refer only to contracts made after the 29th September, 1730. The penning of it is very strong to exclude all contracts made before the 29th September, 1730, and after the time aforesaid, is repeated no less than four times. Indeed, it would be very strange to subject them to such severe penalties, when they transgressed no law then in being. I suppose it will not be pretended that any bond taken before the 29th September, 1730, where more than six per cent. is received, is void. Then neither can the receiving the money upon such bonds, subject the obligee to the forfeiture of the double value for it. Receiving upon a contract made after the 29th September, is made penal by this act. This I take to be very clear upon the words of the act, as well as evident from the reason and justice of the thing, and therefore it may be needless to mention the authorities upon this head. But as there are cases directly in point adjudged upon the statutes of usury in England, I will beg leave to mention two or three. Hawk. 1, P. C. 244, is express that a contract made before the act, 12 Anne, which reduces interest to five per cent., is not within that statute, but that it is lawful to receive six per cent. (the legal interest before) upon such contract. See Dalt. 13; Raym. 195. But we go no further than to the last act
26 against usury, 8 Geo. 2, *5, to prove such contracts are not within the first act, upon which this action is founded. The title of it is to make void certain contracts for paying excessive usury. It recites that there were several contracts subsisting, made before passing of the first act, or between the passing and commencement, and though there was no law in being to punish such unreasonable lenders, yet such contracts, which were always unrighteous, ought not to be binding. It is therefore enacted, that all bonds, &c. made before 29th September, 1730, where any interest above six per cent. is agreed to be paid, shall be void as to all interest above six per cent. Here is the judgment of the legislature, that contracts made before the first act, or before the passing and commencement, are not punishable by any law, and all the punishment inflicted by this act, is only to make such contracts as were then subsisting void, as to all interest above six per cent.; but there is no penalty for receiving the money upon such contracts. If there was, the defendant would not be within it, the matter for which this prosecution is set on foot being transacted long before the making of this act, and was not a contract then subsisting? If then the defendant did not take above six per cent. upon a contract made after the 29th September, 1730, I conceive he is not guilty of the breach of any law; and that there is nothing found in this verdict to prove he did, is very clear. In June and July, 1730, he let White have twenty and twelve pounds, and took his bond for payment of the like sum sterling at the end of a year. This, I hope, was a contract before the 29th September, 1730. It was lawful then for the defendant to receive the money due upon these bonds, I mean without being subject to any penalty. In April, 1732, White and the defendant made a settlement. At this time the defendant might lawfully take the sterling money reserved on the bonds, as I said, and might also lawfully receive six per cent. interest upon the money from the time it ought to have been paid; and this is all he did do. The sterling money is paid in cash, at fifteen per cent. the lowest exchange, which makes £36. 16s. the money received upon the settlement, together with interest upon it, from the time it was payable by the bonds, at six per cent. If there is any pretence of a contract after the 29th September, 1730, in all this, it must be when this settlement was made; but upon that he took no more than six per cent. And however unreasonable it might be to take fifteen per cent. upon the first contract, which was before the law, it is plain he has not taken more than is allowed by the law on any contract since, and therefore he is not guilty of any breach of the Act of Assembly; unless it is construed that the receiving money after the 29th September, 1730, upon a con-
27 tract made before that time, *where more than six per cent. is received, is within the act. But I humbly conceive such a construction can never prevail, being against the express words as well as intention of the act, which, as I have observed, is penned in the strongest terms to exclude all contracts before. It is against the sense of the legislature here, since the making of it, as I have shewed from the second Act against usury; against the rule of construction in such cases, as appears from the cases I have read, adjudged upon this point in England; against the private sentiment, as we may suppose, of Sir John Randolph, who, we all know, had the penning of the second act, and was very active in promoting it; and also against natural justice to punish any man for an action, innocent in itself with respect to human laws, by a law made ex post facto, which kind of laws have been always condemned as unjust, and therefore to make such a construction of a law against the express words of it, I apprehend can never be thought right; and I hope the consequence of such a determination will be considered. It must affect a great number of people, who thought they might lawfully take more than six per cent. before the act, and perhaps in conscience might do so, for, with deference to the learned gentleman's opinion, I think some men, under some circumstances, may as lawfully take ten per cent. as others five. I mean foro conscientiæ, and abstracted from positive laws; and in this most of the writers upon the law of nature agree. I own that usury seems to have been always condemned by the antient

laws of England, though an usurer was only punishable by ecclesiastical censures in his lifetime. But if it was found by twelve men after his death, that he died an usurer, he was compared to a thief, his goods were forfeited to the King, and his lands escheated. 3 Just. 155. And as usury was an offence punishable by the law of the Church, we frequently find it said to be against the law of God. Not that it is prohibited by the Gospel, though it might be so by the canons and decrees of the Pope, which last, in the times of superstition, the artful priest taught the world to believe were as much the law of God, as the Gospel itself. But now mankind are more enlightened, and protestants, at least, allow nothing to be against the law of God, but what is prohibited in holy writ. 1 Hawk. 245. As to the prohibition in the Jewish law, that is not at all obligatory upon Christians. The law of Moses was promulged to a particular people, and was only binding upon them to whom it was promulged. It is not pretended, nor is it any where said to be an universal law to mankind; and that it is not binding upon Christians, that is, the actual and political part of it, we have the authority of the Church, viz. seven of the thirty-nine articles.

28 It is true the moral *part is there said to be binding, and so it would be if it was not in the law of Moses; the moral law being eternally and universally binding upon mankind. But in truth, this prohibition is not a general, but a partial prohibition, respecting the Jewish nation only, for they are permitted to take usury of strangers, though not of one another, which is plain proof that usury is not against the moral law, for if it was, the Jews, who were the sanctified and chosen people of God, would never have been permitted the practice of it at all. Indeed, it is impious to suppose that God would tolerate the practice of a thing simply and naturally unlawful. This prohibition then to the Jews was merely political. First, to obviate that avaricious disposition so observable in that people, and to prevent it from running out into oppression of one another; and second, thereby to cement them into a closer bond of amity to each other. Third, to secure and strengthen that democratical government Moses intended to institute, by preserving some kind of equality in property. Upon which principle, the laws of Jubilee, and against alienating land for ever, were also instituted. It must, however, be owned, the primitive Christians took no usury; probably out of a superstitious reverence to the Mosaic law, which might be the first occasion of its being condemned by the Church, though afterwards abused by the Clergy, who made a market of that, as well as other offences, by the practice of commuting for penance. Whoever has a mind to be further convinced, that usury is not against natural justice, let him read Puffendorf's law of nature, B. 5. c. 7. s. 8. ad finem, and Barbeyrac's notes thereupon; where he may see it proved to a demonstration, that it is neither against the law of God nor of nature, but even necessary in the present state of human affairs, and of great use in all trading countries. Grotius, who seems to condem the name, allows the thing. He says, Lib. 2. c. 12. there are some things that look like usury, but are parts of another nature, as the amends that ought to be made or credited for the loss he is at, in being out of his money, &c. which is the very thing contended for; viz. if I lend money, or money is owing to me, I ought to have something for the use of my money, and the loss I sustain for want of it. This is the very principle upon which usury is proved to be consistent with natural justice. It is no matter whether you call it usury or interest, amends or damages; the thing is the same; and certainly in the present state of human affairs, where many persons' estates consist all in money, and they cannot, nay, it would be inconvenient that they should employ it in trade and husbandry, no just reason can be given why they should not make a profit of their estate, as well as those who have lands, and rent them out; especially when their money is as

29 useful *to the Commonwealth; for no considerable trade could be carried on without it. Usury was allowed by the Roman law, Puff. 276, note 4, and is practised in almost all civilized nations, at least, in all Christendom. It is indeed prohibited by the Alcoran; but even the professors of that religion evade it, by lending money to have a share, as a fourth or fifth part of the gain made by it, which is the same thing, for in equity there is no difference whether I agree for a certain gain before hand, or run the risque of an uncertain one. Puff. 276. As to the quantum, that may be taken for usury according to natural justice, Grotius and Lucan 6. 35. (See Barbeyrac's note on Grotius, 2. 12. 20.) proportions it not by the gain of the borrower, but the loss that accrues to the lender, and that so much ought to be paid by the borrower, as the lender in the way of his calling, usually makes of his money, allowance being made for hazard. But because it would be difficult to prove and adjust this exactly, and such a latitude would give an opportunity to ill men to insist upon too great an interest, the policy of most nations has reduced it to a certain standard, which is more or less according to the different circumstances of each state. In trading countries, as in Holland, it is very low, two and a half or three per cent. In Venice where there is no trade, it is eight per cent., and interest is high in all the inland parts of Germany. The rate of interest in England has been reduced from time to time, as money has grown more plenty and its trade increased. By the —— H. 8. it is prohibited to take more than ten per cent. under a penalty. This is the first law that made usury cognizable in the King's court. Thus it continued till James I., when interest was reduced to

eight per cent.; after the restoration, it was reduced to six, and by the ——— Ann ———, to five. In most of the English plantations, I am told it is now at ten. Twelve was permitted by the Roman law till the time of Justinian, who reduced it to eight. Puff. 276, note 4. Thus it varies in different countries, and in the same country, according to the different circumstances of it. To conclude: where the rate of interest is settled by law in any country, no good man ought to take more though it was not prohibited under a penalty; but where there is no law, the rule laid down by Grotius, seems very equitable, viz. in proportion to the loss that accrues to the lender, and therefore, a trading person who usually makes a great profit of his money, may with good conscience require more than one, whose money lies dead upon his hands. From whence I would observe, that the taking more than six per cent. before there was any law, by some men, under some circumstances, was not criminal and unrighteous as is pretended; yet I should be sorry to be thought an advocate for 30 *excessive usury, as it is certainly introductory of great oppression, and I am heartily glad it is settled by law. All that I contend for, is, that a man may not be punished for any contract of this sort, before there was any law to make it penal, and I hope judgment will be given for the defendant.

This case was agreed by the parties, and so no judgment given.

Reported by Edward Barradall, Esq.

Legan, Lessee of Chew v. Stevens.

October, 1736.

Land Patents—When Junior Patentee Has Priority—Case at Bar.—In September 1729, Tayloe, a sworn surveyor pretended to survey for the lessor of the plaintiff one thousand acres of land, of which he returned a plat, and a patent was granted June 16, 1727. This land, except about sixty poles from the beginning was not marked or measured before issuing the patent and this the lessor of the plaintiff, knew. The defendant afterwards surveyed one thousand acres, and obtained a patent in September 1728, which takes in part of the land within the bounds of the plaintiff's patent. This was marked and measured and the surveyor told the defendant the land was free and not taken up before. The defendant seated his land in January 1728. Upon these facts and the fraud of the senior patentee, it was held that the junior patentee was entitled to the land.

There has been a survey with a jury in the country, and a special verdict found here upon which the case is: in September, 1726, Colonel Tayloe, a sworn surveyor, surveyed (or pretended to survey) for the lessor of the plaintiff, one thousand acres of land, of which he returned a plat, and a patent was granted, June 16, 1727. This land, except about sixty poles from the beginning, was not marked or measured before issuing of the patent, and this Chew, the lessor of the plaintiff, knew. The defendant afterwards surveys one thousand acres, and obtained a patent in September, 1728, which takes in part of the land within the bounds of Chew's patent. This was marked and measured, and the surveyor (the said Tayloe) told the defendant the land was free and not taken up before. It appearing by the jury's report in the country, that the surveyor told Chew, when he began his survey and run the sixty poles, that he could not then finish it, being then Saturday night, but would, when he came up to finish two other surveys he had begun the day before. It appears also, that in January, 1728, when the defendant first began to seat his land, Chew forewarned him from digging upon the land in controversy. The survey is of no other use than to shew how the grants interfere, and the sole question in the case is, whether the grant to Chew, the lessor, be good or not. The objection is, that the surveyor's returning a plat without marking and measuring the land, and that with Chew's privity, is a false suggestion, and so the King was deceived, and his grant void. This point has been once already labored very strongly, and once your honors have determined that the grant is good; but Sir John Randolph is now to convince you of your mistake. However, I hope this case will not be drawn into a precedent, that after judgment is passed, a cause shall be suffered to be argued again, because a lawyer 31 or his client happen *not to be satisfied. It must be my task to endeavor to shew that this grant is good; and although I shall not produce so many cases as I presume you will be entertained with on the other side, I hope to prove, first, That there is no such deceit in this case as will make void the King's grant; secondly, That to determine this grant void, will introduce a general mischief and inconvenience upon the subjects here. As to the first, the King is of that great eminence and consideration in the law, that many little defects and omissions will make his grant void, which, in the case of a common person have no effect. Such are mis-recitals, wrong suggestions, non-recitals, &c. But the reason is not, as I conceive, because the King's honor was concerned, as was argued last court, but because the King is supposed to intend the great affairs of government, and cannot take notice of matters of lesser moment, as a common person may and ought to do. Hob. 224. And the true reasons, why the law adjudges the King's grants void in case of deceit, are first, To punish the party for his fraud; secondly, To prevent damage and prejudice to the King's interest, which would often happen if such grants were allowed. Hob. 223. Yet it is not every circumstance that may be called deceit, nor every wrong suggestion that will make the King's grant void; and where the King is not deceived in the consideration, in his title, in the value of the land, or in the restrain he intended to make for his bene-

fit, or generally where it is not to the prejudice of himself or his subjects, the grant will be good. Even false considerations will not always defeat the King's grant; as where it is personal and executed, as for money paid or service done; though the money was not actually paid or the service done, the grant will be good. 10 Rep. 67. 68; St. Saviours 13. patents 4 Mod. 415; Saund. 37; 3 Leon. 248. pl. 455. a. The reason is, though this be a deceit, yet the law does not esteem it so weighty or material as to destroy the grant. Hob. 223. If there was any thing in the argument of the King's being injured in point of honor, this sort of deceit is as injurious to honor as any other; but as I never read or heard of that argument till last court, until I have some better authority for it than Sir John Randolph, he must excuse me if I look upon it as a mere refined speculation of his own. In other cases it has been thought to be for the honor of the King to make his grants valid, and not to destroy them: as in the point of construction, if two constructions can be made, and by one the grant will be void, and by the other good, for the honor of the King and benefit of the subject, such a construction shall be made as will support the grant. 10 Rep. 67; St. Saviours 6 Rep. 6; Sir John Molin. And certainly it is more for the honor of the King to 32 pass over small faults, where it *is not to the prejudice of himself or subjects, than to be too rigorous in taking advantage of them. In the case of a common person, I am sure we should think so. 2 Just. 496. 497; 1 Mod. 96. read Hob. 222, and St. Saviours' case, 2 Just.; 2 Mod. 1. If the King by office found, has a manor in ward, and grants the said manor by a certain name, which said manor was lately seized in our hands, &c. and in truth the said manor was not seized, this shall not avoid the grant, though false, for it was not material, and was only added for the greater certainty of that which was certain enough before. 10 H. 4; 2 Sir John Lestrange cited in Legat's case, 10 Rep. 113. &c. Queen Elizabeth granted to Thomas Markham the office of Keeper of parks or woods of B. which said office the Earl of Rutland lately held, whereas the said Earl never held the said office, and it was resolved by the Chancellor, Attorney, and Solicitor general, to whom it was referred, that the grant was good notwithstanding that false suggestion. So if the King demise a manor by special name, which manor was lately in the tenure of I. S. but in truth he never had it, yet the grant is good; for in these cases the King is not deceived in his title, nor in the value of that he intended to grant, nor in the restraint which he, for his profit, intended to make. Sir Thomas Markham's case, cited in Legat's case, supra. quod lege. H. 7. anno 1719, granted to G. B. the manor of B. in tail male, and anno 24. by letters patent reciting the former, and that they were surrendered and cancelled, by virtue whereof, the King was seized in fee, granted the said manor to the said G. B. and T. his wife, and the heirs of G. (without any grant of the reversion) and the question was, if the reversion would pass by this last grant? It was objected. 1. That the estate tail was not recited as continuing, whereof the reversion might be granted, but as determined, and therefore the King granted it as a thing in possession, when he had only the reversion expectant. 2. The King thought by the surrender of the first letters patent the estate tail was determined, and that he was seized in fee, in which he was deceived. 3. The King was deceived in the estate he granted, for he intended to grant an estate in fee, in possession, and not a reversion expectant, but it was adjudged that the grant was good to pass the reversion, for here was no wrong done to any one, and less passed by the grant (viz. the reversion) than the King intended, and so no prejudice to him. 6 Rep. 55. Lord Chandos. Lege. 2 Mod. 1. Where was the King's honor in this case, or those others I cited. Yet it is evident he was deceived, but the deceit was not material, no ways to his prejudice, and so not weighty enough to make void his grant. Many other instances of the 33 like kind might *be given, but these I hope may suffice to shew, that though the King be deceived, if it be not in the consideration that is really in his title, in the value of the lands, or in the restraint he intended to make for his benefit, the grant may be good. It will remain then, to consider whether the King was so deceived in the present case, whether the deceit alleged, be so weighty or material, as that it should make the grant void. The method established here for granting the King's lands, has been always the same. A survey is first to be made, and a plat returned before a patent issues. Not that there is any positive law for this, but that it has been the course and usage from the first settlement, and takes its rise, and continues its force, merely from the King's authority and institution, who, no doubt, may establish another method for granting his lands if he pleases. Now that many patents must have been granted formerly, without the ceremony of marking and measuring of the land, (the want of which is the great fraud and deceit here complained of) must be evident to any one who considers the state of things upon the first settlement of the English here. The Indians were then in great numbers all over the country, and it could not be done with any safety or security; and indeed the disputes we have concerning the bounds of the old grants, prove this point to a demonstration, since in many of them, there appear never to have been any marked lines or boundaries, and almost in all, a vast difference between the courses and distances of the patent, and the antient possession under them. But I never yet heard that any of these grants have been impeached, because the land was not marked, &c. Though we may expect they will, if it is

your honors' opinion that that defect is sufficient to avoid the King's grant. That being equally necessary then as now, there was no positive law then, nor is now, making it necessary or essential, and therefore, for the same reason, that if a grant made ten years ago is void for want of that circumstance, a grant made fifty or an hundred years ago, must be void for want of the like circumstance. The length of time will make no difference in the case of the King. It will be said, perhaps, there is an act of Assembly directing the surveyor to bound the land surveyed by him, by marking trees. And it is true there is such an act, and no doubt but what the surveyor ought to have done it, but then I must observe, that act is merely directing to the surveyor; the title is, 'An act directing the duty of surveyors,' 4. A. c. 22. and the whole scope of it plainly shews nothing more was intended. There is not a syllable of the King's grants, or that they shall be void if the surveyor does not do his duty; nor would the King, I presume, be pleased to be so prescribed to. This
34 act then, is nothing to the *purpose, only to shew the surveyor has not done his duty, which I allow. But it is no consequence I hope, that, therefore, the King's grant is void; I am sure the act says no such thing. But here Chew, the grantee, was privy to this neglect of duty in the surveyor, and this is made a mighty aggravating circumstance. It may be necessary to obviate the force of that objection. It was said last court, that the grant was a mere forgery, that there was a combination between Chew and the surveyor, though to what end, I know not, and shall be glad it may be pointed out. It is found, indeed, that Chew knew the land was not marked or measured, when he took out his patent; but then it appears in the depositions, that the surveyor, when he began the survey, made an excuse for not finishing it, that it was Saturday night; but promised to do it when he came up to finish some other surveys. This, Chew might reasonably suppose he would do in nine months, which passed before he sued out his patent. But, admitting he was somewhat too hasty in getting a plat, and obtaining a patent before this was done, I cannot see how this can be termed a fraud. It was rather a piece of ignorance, an error of the judgment, not any depraved or sinister intention; nor does there appear any advantage he could possibly propose by it to himself, nor any fraud upon the King; for the full composition was paid. No more lands within the bounds than mentioned in the grant, and the full quitrents honestly paid ever since. Neither could he intend or foresee any prejudice to another. He might well think the surveyor would finish his survey according to his promise; and if he did not do it, it is he alone is guilty of the fraud, and not Chew, and ought to answer for the injury done to the defendant; which he, or his representatives may undoubtedly be compelled to, notwithstanding the contrary was asserted last court. This mighty fraud, then, in Chew, of being privy to the surveyor's neglect, when stated and considered, appears to be no more than a piece of ignorance and folly, without any probability of a fraudulent sinister intention, either with respect to the King, or any one else. The surveyor is undoubtedly inexcusable. But then whether his neglect of duty ought to make void the King's grant, must be humbly submitted. I shall now speak a word to the second point, which was to shew the general mischief and inconvenience that will be introduced, if it is determined that any neglect of duty in a surveyor, or his omitting to mark and measure the land surveyed, shall make the King's grant void. I have had occasion already to speak of the old grants upon the first settlement of the English here, and it is evident, I hope, from what has been said, that the lands then could not be marked or measured. It is further notorious, that in later
35 *times, surveyors have been very remiss and negligent in their duty. Many plats upon which grants are founded, have been returned without stretching a chain, or marking a tree. Therefore, if it is determined that grants are void for these slips and frauds of the surveyor, it will introduce an universal confusion, and shake, for aught I know, half the titles in the country. No purchaser can be safe under a possession, though ever so long, if the crown thinks fit to repeal the grants; for no time will bar the King. In short, to determine that a grant is void because the surveyor did not mark or measure the land before he returned his plat, will be in effect to declare that half the patents in this country are void. Now the judges in their determinations, have regard to the generality of the subjects' cases, and the inconvenience that may ensue. 1 Rep. 52. Vaughan lays it down as a rule, that where the law is known and clear, though unequitable and inconvenient, the judges must determine as the law is. But where the law is doubtful and not clear, the judges ought to interpret it to be as least inconvenient. To apply this. As it is far from being clear, that the defect of the surveyor in not marking and measuring the land, is such a deceit or false suggestion, as will make the King's grant void, and as such a determination will be introductive of a general mischief and inconvenience, and tend to destroy many men's titles to their inheritance, I hope it will not be your honors' opinion. As to any hardship that may be pretended on the defendant's part, and I remember a great deal was said of that last court, I hope Chew is not to answer for that, it being altogether the surveyor's fault, of whom he must seek for his remedy. And as to losing his houses, which is part of the hardship complained of, that is owing to the defendant's own folly and absurdity; since it appears Chew forewarned him from building upon the land in controversy, alleging it was within

his bounds, and the defendant could not be ignorant that it was so, by offering to purchase of him. So his damage upon this account, is of his own seeking, and ought not at all to be considered. And I must submit whether the hardship will not be as great upon Chew, to lose his land merely for a neglect of duty in the surveyor, (for I can consider it in no other light,) when he has honestly paid the King his rights, which is in the nature of purchase money, has no more land than he ought to have, and has paid the full quit-rents ever since the time of his grant. But in truth, the hardship on either side should be thrown out of the question, and the general inconvenience is what ought to be considered. This, I hope, I have sufficiently shewn, and so humbly pray judgment for the plaintiff.

Randolph for the defendant. The
36 question is not whether the *plaintiff's grant be absolutely void; but whether it be good against the defendant, who has obtained a fair grant, and observed all the rules prescribed by the law. Whereas the plaintiff's grant is a mere forgery. Procuring a plat to be returned, and taking out a patent upon it, when he knew the land was not surveyed, was a very great fraud upon the King; a false suggestion of the party himself; and must make the grant void, at least so far as not to hurt an innocent person, as the defendant is. The rules for granting lands here, have been the same from the first settlement of the country. The first charter to the company empowered the Governor and Council to settle the privileges of adventurers, which was done by allowing fifty acres to each adventurer. The same course was allowed after the dissolution of the company, without any positive authority till the time of James II., when a new lause was added to the Governor's commission, to grant fifty acres for importation; but no land was granted for money till 1703. Surveying was always necessary, and required before any grant was made, and where an essential circumstance is wanting, the grant must be void. Vernon's case, 1 Vern. 370; Vernon and Benson, 1 Mod. Cha. cases 47. Much more here, where the party himself was privy to this neglect of duty in the surveyor, and so joined with him in the deceit upon the King. The partaker in a fraud is equally guilty with the contriver. The law abhors all kinds of fraud. A fine, though the most solemn conveyance, if levied by fraud and covin, is void. 3 Rep. 77. Fermers case, as to the inconvenience. This case must be distinguished from those where the surveyor alone is in fault, and the grantee no ways privy. In that case it might be heard that an innocent person should suffer for the neglect of duty in an officer. But here the party knew the officer had not done his duty; it was a contrivance and combination between them, and a great piece of presumption and a notorious deceit upon the King, for the plaintiff to take out a patent upon such a piece of forgery as the plat was. Surely no favor or countenance is due to such a practice, especially when an innocent man is to be oppressed and ruined by it. To prove the grant void, were cited Allen Wood's case, 1 Rep. 40. b.; Vores' case cited in Legats. 10 Rep. 110. b. In April, 1735, judgment was given for the plaintiff by the opinion of seven judges against four. But upon the great importunity of the defendant's counsel, the court was prevailed upon to hear another argument, which was made October, 1736, when Blair and Byrd having changed their opinions, judgment was given for the defendant by the opinion of these two and Randolph, Grymes, Carter and Digges; Lee, Tayloe, Curtis, Robin-
37 son and *the Governor, contra. Lightfoot, formerly for the defendant, now doubted. Carter did not hear the first argument.

Note. The court's opinion turned upon the fraud (as it was termed) in the plaintiff, viz. his knowing the land was not surveyed.

Reported by Edward Barradall, Esq.

Jones v. Langhorn.

October, 1736.

Slaves—Life Interest in Wife.—Slaves were devised to a woman during her life with remainder to another. She afterwards married and joined with her husband in a deed of mortgage of the slaves for ninety-nine years. The husband died, and an action of detinue was brought by the mortgagee against the wife for the recovery of the slaves. HELD, the action will not lie.

In detinue upon a special verdict. The case was: a woman possessed of slaves devised to her during life, and after her death to another, marries and joins with her husband in a deed of mortgage of these slaves for ninety-nine years. The husband dies: this action is brought by the mortgagee against the wife for the recovery of the slaves.

Barradall for the plaintiff. The deed is undoubtedly void, as to the wife, and so it is merely the act of the husband. The question then is solely this, whether the husband in this case could dispose so as to prevent any title or interest from surviving to the wife; and I conceive clearly that he might. It is agreed that slaves in this case are to be considered as chattels, the devise to the wife being before the act, making them real estate. I shall then consider the interest accruing to the husband in the wife's estate, which is different, according to the nature and quality of that estate. In her lands, &c. he acquires a freehold during the coverture; or an estate for life, if there is issue between them. In chattels real, he acquires a property and a power of disposing in his life-time, but not by will; if he dies first without disposing, they survive to her. If she dies first, they survive to him. 1 Danv. 705. 8; 1 Inst. 351. a. But as to chattels personal, marriage is an absolute gift of all such in

possession, whether the husband survive or not. Co. Lit. 311. b. And this I presume, whether the wife has an absolute, or temporary, or a qualified property: for all the right and interest of the wife, be it more or less, is transferred to the husband, and vests in him by way of gift. There is no case in law that makes any difference, nor is there any in the reason of the thing. If the husband has a right to the greater, by the argument a majori ad minus, he has also a right to the less, for that omne majus continet in se minus, is a rule of law as well as an axiom of philosophy. Certainly it must appear absurd that the law should give the husband chattels
38 in which the wife *has an absolute right, and not those in which she has a lesser interest. The husband's right as to chattels personal, was always the same, and as to chattels real, it has been carried further in later times than formerly; for he may now dispose of the trust of a term as was adjudged about Michl. 1680, in the house of Lords, in Sir Edward Turner's case, (1 Vern. 17,) which is the first case of that sort, the law being otherwise before; but since, has been always held according to that determination. 1 Vern. 18; 2 Vern. 270, Tudor v. Samyne. Now whether the interest of the wife be only for life or in the whole term, it will certainly make no difference. Whatever interest she has, the husband has a power of disposing; and if in chattels real, surely in chattels personal too, in which he acquires a more absolute right. If 1 Inst. 351, be objected, that the husband shall not charge his wife's chattels real, though he may dispose; but if she survive, she shall hold it discharged; that rule does not hold in chattels personal as this case is; besides, all that is meant by that is, that he shall not charge her term with a rent. 1 Rol. Abr. 344. 5. and 346. 2. But I question whether the law be so at this day, the husband's power over the wife's term being enlarged since Coke wrote, in the instance just now mentioned; and it is certainly absurd that a man should have a power of disposing and not of charging. Then our case is different too; here is a mortgage, and the estate and interest become absolute in the law for the term, by non-payment of the money, and only an equity of redemption left to the mortgagor.

Randolph for the defendant. Slaves here are to be considered as chattels. Now the property of a chattel must be divided, so as that part of the property shall vest in one and part in another. But when a chattel is given to one for life with remainder over, the devisee for life has only the use, and the property vests in the remainder man. It is upon this distinction alone that remainders of chattels are allowed; for if the property vested in the first devisee, the remainder over must be void, because the gift of a chattel for an hour, is a gift forever. That the wife here having only the use and no property, this use vested in the husband only during his life; but he had no power of disposing, so as to conclude the wife after his death, though the disposition might be good during his life, and he cited 1 Inst. 351. a. where a difference is taken between a property and a bare possession; as where a woman has goods as bailee or executrix, this bare possession is not given to the husband by the marriage. He also cited Mor. 521, Thomson v. Butler, where the husband's release of the wife's annuity was no bar after his death; and mentioned the case of Brown and
39 *Willis, April, 1731, in this court, which he said was in point. He said it would be a hard case upon women, especially widows marrying second husbands, if they happen to survive: that it would be inconvenient too, since the slaves might be taken in execution for the husband's debts, or sold by him to the prejudice of those in remainder. To which it was replied, that it was true in the language of our books, by the devise of a chattel for life with remainder over, that this distinction was kept up upon the ground of that old rule of law, the gift of a chattel for an hour is a gift forever. But in effect, the first devisee has a property during life, having all the marks of ownership, except that of selling absolutely. Whatever profits can be made are his. He may maintain trover and even dispose during life; and certainly this is something more than a bare possession, which is the case, 1 Inst. 351. and so nothing like this. The use here is coupled with the interest, and wherever there is an interest there must be some degree of property; for what is a property but a power of disposing and using, which a devisee of a chattel for life has during life? Certainly then as such devisee has a qualified property, no one will dispute but he may sell during life. Marriage is an alienation, a gift in law, equivalent to an alienation in fact.* It is agreed, the slaves here vested in the husband during life. If they vested at all, they must, for the whole interest the wife had in them, being all transferred by the marriage. It is absurd to talk of the hardships upon women, unless it be a hardship that any thing should vest in the husband by the marriage. Is it harder that a lesser interest should vest, than that a greater should? The argument from inconvenience is full as ridiculous, since chattels so taken, may as well be taken for the wife's debts as for the debts of the husband, or sold by her in prejudice of the remainder man. It may be an argument against allowing such devises at all, but is none against the husband's right in such a case.

Judgment for the defendant, per totam curiam præter Lightfoot and Tayloe.

A like case between Clemonts and Walker, was argued in April, 1739, and the same judgment given by Randolph, Grymes, Carter, Diggs and the Governor. Curtis and Robinson, contra.

Reported by Edward Barradall, Esq.

*The wife might give or sell during life by deed. Marriage is a gift and alienation in law.

40 *Tayloe v. Graves.

October, 1786.

Slaves—Detinue.—In 1712 the testator devised to his daughter Mary, the use, labor and services of certain slaves during her life and after her death the said slaves and their increase, to go to the heirs of her body forever. Mary had issue, a daughter, living at the time of the devise and the death of the testator, but died before her mother, who was also dead at the time of this action. HELD, that the plaintiff who claimed as heir of the testator could not maintain an action of detinue for the slaves.

In detinue. A case was agreed; viz. W. P. possessed of the slaves in question, by his will, dated 1712, devises to his daughter Mary, the use, labor and service of them during her life, and after her decease, the said slaves and their increase, to fall to the heirs of her body begotten forever. Mary had issue, a daughter, living at the time of the devise and the death of the testator, but died before her mother, who is also dead, and the plaintiff claims as heir to the testator.

Mr. Attorney General. By the act of 1705, slaves are made real estate, though the law is now altered by the act of 1727, with respect to gifts and devises of slaves, that they can only be given and devised as chattels personal. There is, however, a proviso in this last act, that where slaves have been before given for life, and the remainder thereupon limited to another, that such remainder shall be good in law to transfer the absolute property to the remainder man. The testator here has given only an estate for life to his daughter, with a contingent remainder to the heirs of her body, and there being no such when the contingency happened, viz. at her death, the remainder is void, and the plaintiff as heir at law to the testator, is entitled to these slaves.

Barradall, for the defendant. Slaves in this case are to be considered merely as chattels; but before I speak to that, I shall shew that taking them to be real estate, the plaintiff can have no title. If this was a devise of lands, Mary would take an estate tail by the words of this will, and not an estate for life with a contingent remainder to the heirs of her body. It is a rule laid down in Shelley's case, 1 Rep. 104. b.; 1 Inst. 22. b. that where the ancestor takes an estate of freehold, a limitation to his right heir or heirs of his body, are words of limitation and not of purchase, and so it was adjudged, 1 Vent. 214. 225; King and Melling and Fitzgib. 7. Shaw and Weigh. There is, however, some exceptions to this general rule, in the case of wills, where the testator's intention is apparent to lodge the inheritance in the issue, as Loddington and Kime, and Bachhouse and Wells, cited Fitzgib. 22; Shaw and Weigh. See Raymond's argument in that case. In Wild's case, 6 Co. 17, a difference is taken where the ancestor has issue living at the time of the devise, and where not. That in the first case, the issue shall take by way of remainder, and so Hale's opinion seems to be, 1 Vent. 229. upon the authourity of that case. But I take the law to be otherwise settled at this day, nor is there any authority to support that opinion, since Wild's case,
41 which too was *against the opinion of two Judges. I conceive then that by this devise, Mary had an estate tail, and then the absolute property vested in her; for slaves could never be entailed before the act of 1727, and under that act only when annexed to lands. The constant resolutions of this Court have been so. On the other side, if heirs of the body here are taken as words of purchase, and slaves are to be considered as real estate, then, the remainder being contingent and void in event, by Mary's leaving no issue, the plaintiff is certainly well entitled. But slaves in this case are no more than chattels. It is true the act of 1705 makes slaves real estate to some purposes, but not to all; they are to descend to the heir, if a man dies intestate, and a woman is to be endowed of them. But there is an express proviso, that sales and alienations of them may be made in the same manner, as before making the act. There was some difference of opinion in the construction of this act, which occasioned the act of 1727, not to alter the first act, but to explain and amend it; and where a subsequent act explains a former, it cannot be said to alter it, but only point out the true construction. The words of the last act respecting the present question, are worthy of observation. It recites the difference of opinion in construing the first act, and then enacts, 'That the said act shall hereafter be construed, and the true intent and meaning is hereby declared to be;' no other construction then can now be made than what is hereby declared to be the true construction. It is not at all material whether the case happened before or since the act of 1727. The law was always the same. This last act does not alter the first, as I said; it only explains and points out the true construction; and the words of the last act are mighty plain (and so indeed I think are the words of the first) that in sales, gifts and devises, slaves are to be regarded merely as chattels. A sale, gift, or devise, is to transfer the absolute property as if such slave were a chattel. Taking slaves then to be chattels, the plaintiff can have no kind of pretence. It will not be denied but that a chattel may be given for life, with remainder over; it is not material whether the chattel itself be given, or only the use for life. The law makes the same construction in both cases, viz. that the first devisee has only the use, and the absolute property vests in the remainder man. The use only is given by his will to Mary for life, and after her death the slaves are to fall to the heirs of her body. If heirs of the body here are taken as words of purchase, as descriptio vel designatio personæ, the daughter of

Mary took the remainder as a person well described, and then the absolute property vested in her, and the slaves must go to her heir and not to the testator's. If they are not words of purchase, but words
42 of limitation, then *Mary has an estate tail given to her, and such a devise will pass the absolute property of a chattel. But suppose the remainder void by Mary's leaving no issue at her death; in that case I conceive the absolute property vested in Mary, for I take the law to be very clear, that if a chattel is given to one for life, or the use for life, (for there is no difference) and no remainder is limited, or a remainder that is void either in its creation or in event, the absolute property vests in the devisee for life, and can never evert back again to the representative of the testator. Quære de hoc. It has been endeavored to compare slaves in this case to chattels real, and many cases there are of devises of this sort, some of which have been cited, to what purpose I am still to learn. Cotton and Heath, 1 Rol. Abr. 612, was a devise of a term for life, and after to the eldest issue male: adjudged the issue male shall have it as an executory devise, though none in being at the time of the devise, which is stronger than our case, there being here an heir of the body living at the time of the devise. Peacock v. Spooner, 2 Vern. 195, is exactly this case, only stronger, as it was in the case of a deed: a term was adjudged in trust to permit husband and wife, and the survivor, to receive the profits during their lives, and after their deaths to the use of the heirs of the body of the wife. Here the heirs of the body took by purchase, and as a person well described. Id. 362; Dalforn and Goodman. S. P. adjudged. But Webb and Webb, id. 688, the same point coming in question, it was adjudged the devisee for life had the whole term; and that case is the same with ours. It is not material to the plaintiff whether the devisee for life, or the heir of the body, has the right, for in either case he has none, and I cannot imagine upon what rule of law he can pretend to any. I shall only observe further, that in all the cases upon the subject, the question is between the heirs of the body and the executor of the first devisee, who shall have the remainder; but there is no instance that ever the executor or heir of the testator set up a title to such remainder.

Judgment for the defendant, per totam curiam; but upon what point, I could not learn.

Reported by Edward Barradall, Esq.

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43 *Spicer, Adm'r of Stone v. Pope et al.

October, 1736.

Executors*—Accounting.

John Stone, by his will, April 27, 1695, 'devised his plantation and the profits of his slaves and personal estate, to his wife during life, and declares his will to be, that his son Richard Metualf and Ann his wife live upon the said plantation after her death, during their lives, and also keep and employ the negroes upon the said plantation, making use, as they shall see cause, of all the profits of the said lands, and clear produce of his said negroes, stock and plantation, except the increase of the said negroes, hereafter given away.' Then he 'devises to Mary and Elizabeth, two daughters of Richard and Ann Metualf, a negro a piece, by name, and to John, their son, a negro child, the next that should be born.' Then follows this clause: 'I give unto my daughter Ann's children, that she shall bear hereafter, a negro child a piece, as it shall please God the negro women shall bear them. Further, it is my will that if any of the said children prove disobedient to them, that the said Richard Metualf and Ann his wife, do keep them until they shall submit themselves unto their parents.' Then he 'gives all his personal estate, to be divided among Richard and Ann Metualf's children, after their deaths, and makes Richard Metualf, Henry Fleet, and Edwin Conway, executors.' The testator's wife died before him, and Metualf, upon his death, got all the slaves and personal estate into his possession, without proving the will, which was not produced till after his death, in 1699, and was then proved in Richmond Court by the witnesses only. Ann Metualf, after her husband's death, got possession, and marrying one Barrow, he was thereby in possession. Ann survived Barrow, and died 1728. She had four children by Metualf, Mary, Elizabeth, John, aforesaid, and Sarah, born after the will was made, to whom, after their mother's death, Stone's estate belonged by the will. The plaintiff, one of these children, having never received any part except the slave devised to her, sues out administration, cum testamento annexo, (Metualf and Conway, two of the executors, being dead without proving the will, and Fleet, the other, refusing,) and brings this bill for the discovery of the personal estate and slaves of Stone, that they may be divided according to the will, and she have her fourth part. The defendant set up several titles to these slaves, some of them under the other children of Richard and Ann Metualf, and others under the children of Ann by her second husband, Barrow, who they say are entitled to a child a piece: and the defendant, Rust, has some plate and other things of Stone's estate. Before I speak to the merits of this case, I
44 must beg leave to clear *it of two objections, that have been very much insisted on at the trial at law. 1st. The staleness of the plaintiff's claim, after a division, as pretended, of the slaves, pursuant to Stone's will. 2nd. The irregularity pretended in the plaintiff's suing out administration. As to the first, it is true the testator has been dead a long time, but the plaintiff's title did not accrue upon his death, but upon the death of Ann Met-

*See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

ualf, the survivor of the devisees for life, which happened no longer ago than 1728. In 1729, the plaintiff sued out administration, and this suit has been depending ever since. So that we sued as soon as our title happened, and as to the division talked of, the plaintiff never had one slave or other part of the estate, except the slave devised to her. So that whatever division has been made among the rest, is nothing to her; she has never had her part, and surely there is no injustice in seeking to obtain it. Second, as to the irregularity in obtaining the administration. I apprehend that point cannot now be properly enquired into. In England, we know, the granting administration is the province of the spiritual courts, and the chancery cannot control them; but if they proceed irregularly, the course is to obtain prohibitions and mandamus's from the common law courts. And in the case of a probate of a will, though great fraud has appeared in making the will, equity has refused to set aside the will so long as the probate has remained in force. 2 Vern. 8; Archer and Moss, 76; Nelson v. Oldfield. Now this court has, it is true, a three fold jurisdiction, as a court of equity, a court of law, and it has also a jurisdiction of testamentary matters. But then these jurisdictions must not be confounded. The proper bounds between each ought to be kept up, and this court, as a court of equity, will no more intermeddle with testamentary matters, than, if they were sitting as a court of law, they would judge by the rules of equity. This administration then, must be supposed regular till it is repealed, which this, as a court of equity, cannot do. But to take away all objection of cavil, I will shew that this administration was regular, perfectly; the course of the spiritual court being where the executors refuse, or die before probate, to grant such an administration as this, viz. cum testamento annexo. 1 Salk. 304; Wankford v. do. and that was the case here. Two of the executors were dead, and the other refused. An administration de bonis non would have been improper, as none of the executors ever proved the will. I will only add, as the plaintiff has a right by the will, she might have brought this suit, without taking administration at all; but she was first advised to bring an action at law, and so administration was necessary.

The questions arising upon the
45 merits of this cause may be four. *1.
What estates Richard and Ann Metualf had in the slaves and personal estate, by the will. 2. Whether the devise of the personal estate to their children after their deaths be good, and what will pass by the devise of personal estate. 3. Whether the devise to John Metualf, and to the children said Ann should bear thereafter, of a negro child a piece, as the negro women should bear them, be a good devise. If it be, then 4. Whether Ann's children by her second husband, Barrow, are entitled to a negro a piece by that devise.

1. As to the interest Richard and Ann Metualf had: there is no express devise of the slaves and personal estate to them; the testator only directs that they shall keep and employ the slaves upon the land, making use of all the profits of his land, and clear produce of negroes, stock, &c. which can be construed no more than the use or occupation. But then by the devise to their children after their deaths, they have the use for life by implication, and surely it cannot be pretended they had any greater estate or interest. At least, for my own part, I cannot conceive the least color or pretence, to give them any thing more. And then, certainly,

2. The remainder limited to their children after their deaths, is good. There is only personal estate mentioned in the devise; however, it will hardly be disputed that slaves pass under the devise, because, at that time they were no more than personal estate. The question then is, whether the remainder of a chattel personal may be limited after the death of one or more persons. And surely it will not be denied that it may. It was, indeed, formerly a question; though it was always allowed that the use might be given to one for life with a remainder over, which seems to be our case. But no difference is made between a devise for life, and the devise of a use for life, as the testator's intention is the same in both cases. To serve that intent, the judges will construe the intent of a devise for life, to be only of the use, and then the remainder over is good. These sorts of devises were only introduced in terms for years, and settled in Matthew Manning's case, 8 Rep. 94. b. under the name of executory devises, and afterwards in Lampet's case, 10 Rep. 47. b.; and are now extended equally to chattels merely personal, provided the limitation be appointed to arise within the compass of a life, or lives in being; and it makes no difference be the lives ever so many, for there must be a survivor, and so it is only for the life of that survivor; as a learned judge used to say, the candles are all lighted at once. 1 Sid. 451; 1 Salk. 229. The cases upon this head are very numerous; I shall only mention a few.
46 Wood v. Sanders, *1 Ch. C. 131. and cited in Duke of Norfolk's case. 3 Ch. C. 35. was a devise to the father for sixty years, if he so long live; then to the mother sixty years, if she so long live; then to John and his executors, if he survive his mother and father; if he died in their life-time, having issue, then to his issue; but if he died without issue, living the father or mother, then to Edward. John died without issue, living the father and mother, and it was adjudged that the remainder over was good. Here the remainder was not to take effect till after the death of three persons, and the contingency of one dying without issue in the life of another, which is stronger than our case.

Smith v. Clever, 2 Vern. 38. 59. The testator directed the residue of his estate to be

put to interest, and half the interest paid to his sister during her life, and the other half to her daughter, and after the mother's death, the daughter to have all the interest during her life, and if she died without issue of her body, he devised the principal over. The daughter died without issue, and the remainder over was good.

So in Rachael's case cited in that supra. the devise was to the wife for life, and if she were with child, then to that child, and if that child died without issue, remainder over, which remainder was adjudged good. In both these cases the limitation is after two lives, and a contingency of dying without issue.

Charges v. Duchess of Albemarle. Devise of jewels for life, remainder over. 2 Vern. 245; Hyde and Parrot, 331. S. P. So Pinbury and Ellpin, 758. and 766. was a devise to wife, and if she died without issue by testator, eighty pounds to remain over; remainder good. And the like point was adjudged in this Court, April 1734, between Lightfoot and do. where the remainder was limited upon a double contingency of dying without issue, or if there should be any failure in the male line. For further authorities, see Fitzgibbons, 314. Goldsmith's company v. Hall. But this remainder is made good by the express provision of our act of Assembly of 1727, which is, that 'where any person before the act, had by will disposed of any slaves for life or lives, and thereupon limited any remainder, such remainder shall be good;' which is exactly our case.

3. Whether the devise to John Metualf, and the children that Ann Metualf should have, of a negro child a piece, as the negro women should bear them, be a good devise; and I conceive not. A devise may be to a person not in esse, but I never yet read that a thing not in esse, could be bequeathed. It may by the civil law. 2 Domat. 159. It is a known rule, that a bare possibility cannot be devised. So is the late case of Bishop and Fountain, 3 Lev.
47 *(see Jacob's Dict. tit. possibility) which was a remainder limited after an estate tail. I know nothing in our law so nearly resembling this case, as that I have mentioned of a possibility. Cases in point cannot be expected, there being no slaves in England. The case of villeins comes the nearest to slaves, but I find nothing concerning them as to this point. It is certainly no more than a possibility whether a woman shall have a child, and therefore, I think the devise of a child that shall be afterwards born, is not good. Slaves are to be considered in this respect as chattels, and were really nothing more at the time of this devise. Now I believe the devise of a calf or a colt that should be born, would not be good. Besides it would be very inconvenient to allow of such devises. The owner of the mother we may suppose, would not be very careful either of the mother in her pregnancy, or the child after it was born, and some time it must remain with its mother: this might occasion the loss of many an infant, which is certainly a most humane consideration. Besides, the owner of the mother must be put to charge and trouble, which seems unreasonable, where he is to receive no benefit. The children, therefore, ought to follow the property of the mother, especially in this case, where neither person or thing was in esse at the time of the devise. If it be said that the intention of the testator must be observed, I agree to it; that is, where his intention is consistent with the rules of law. No intention of a testator is sufficient to entail a chattel, because it is against a rule of law, and so here it is against a rule of law, that a possibility should be devised. And if this devise should be allowed, then there remains another question.

4. Whether the children of Ann Metualf by her second husband, Barrow, be entitled to a child a piece by this devise. The words of the will are these, 'I give unto my daughter Ann's children that she shall bear hereafter, one negro child a piece, as it shall please God that the negro women shall bear them.' If we went no further, and considered the case upon this part of the clause by itself, it would be clear the children by Barrow, would be entitled. But the intention of a testator, must be collected from the whole will, and therefore, when we consider the scope of this before us, and particularly what immediately follows the devise above in the very same clause, it will be evident that the testator intended only Ann's children by Metualf. What follows is 'Further, it is my will if any of the said children prove disobedient to them, that the said Richard and Ann his wife, do keep them until they submit themselves in obedience to their parents.' After reading the whole clause, there will need little comment to prove that the children here meant, are the children of
48 Richard and *Ann Metualf, and no other. The latter part of this clause is not strict grammar, but the meaning is obvious enough. 'If any of the children prove disobedient to them;' here 'them' must refer to two persons mentioned before, but Ann only is mentioned in the first part of the clause, which makes it more than probable, that it was the mistake of the writer in not naming Richard in the first part. Upon this supposition, which I am sure is not without foundation, the clause will be reconciled to grammar and good sense, and the point put beyond dispute. But further, 'them' here must be understood of the parents of the children, for who else can children be disobedient to, but their parents? Besides, it appears from the latter part of the clause, 'till they submit to their parents.' Now who these parents are, is immediately explained. 'If the said children prove disobedient to them, the said Richard and Ann Metualf shall keep, &c.' Here 'them' is sufficiently explained to be Richard and Ann Metualf; then the word 'said,' ('said Richard and Ann') proves they should have been both

named before. It is absurd to suppose the testator should direct Richard and Ann Metualf to keep slaves devised to the children of Ann by a second husband, because Richard must be first dead before she could have such children. So that of necessity, he must mean the children of Richard and Ann Metualf and no other. And upon consideration of the whole clause, I think nothing can be plainer. It is further evident from the whole scope of this will, the testator had in view the providing for Ann's children, by Richard Metualf only. It is more than probable he had not under consideration what happened after, that Richard Metualf would die first, and Ann marry a second husband, since there is not the least notice taken of that, or of the children of such second marriage, through the whole will. The remainder of the personal estate is limited to the children of Richard and Ann Metualf, and no other children named, or I dare say, intended by the testator. If it be objected that the children of the second marriage are as nearly related to the testator as those of the first, and it was as reasonable he should provide for them as the other: I answer, perhaps he would have done so, could he have foreseen there would have been such children; but as I have said, he had no such thing in view or under consideration, he never thought of such second marriage, and as to any equity that may be pretended in construing the will in favor of the children of the second marriage, there is no equity in construing a will against the plain intent and meaning of a testator. Such a latitude in construing a will, would subvert the right men naturally have of disposing of their own. A man is not bound to give his estate in the most 49 reasonable *and equitable manner, but his will is the law as to that. The question is not what the testator ought to have done, but what he has done. So that the question is not whether the children of the second marriage ought not, in equity, to have a part of their grandfather's estate, but whether the grandfather has given them any by his will. And that I conceive clearly, he has not: he never so much as thought of them.

Upon the whole, I hope it appears that Richard and Ann Metualf had only the use of the slaves and personal estate during life: that the remainder to their children, after their deaths, is good, and that the devise of the negro children not born, is void: or if it be not, that the children of Ann by her second husband, can claim nothing by that devise: and so we pray a decree that the slaves and personal estate of the testator now in being, may be delivered up to the plaintiff to be divided according to the will.

In this case it was agreed, that the remainder to the children of Ann and Richard Metualf was good, and that the devise of the negro children not in esse at the testators' death was void,* and so the court decreed an account of the slaves and personal estate, in order to have them divided pursuant to Stone's will. October, 1736.

Reported by Edward Barradall, Esq.

*Dandridge v. Lyon, 1791, contra.

Parsons v. Lee, Sheriff of Stafford.

April, 1737.

Breach of Prison—Liability of Sheriff.—Through the insufficiency of the prison, the prisoner escaped and it was six months before he was retaken: during which time an action of debt was instituted against the sheriff for the escape. HELD, the retaking of the prisoner will not excuse the liability of the sheriff.

Debt for escape. The defendant pleads nil debet, and the jury find a special verdict, that (Scale) the prisoner escaped through the insufficiency of the prison and not any neglect of the sheriff. This was in August; and in February the sheriff obtained an escape warrant and retook him, before the issue joined, and he was in prison at the finding of the verdict. And it is found the prisoner appeared publicly at King George Court House, where he lived two or three court days after the escape. And whether this retaking shall excuse the escape, is the question. It is said in some books, that the retaking must be before the action brought, or it shall not excuse. But other books, that a retaking before issue joined shall excuse. Win. 35, and seems not denied, Cro. Ja. 657. 50 *And this opinion seems most reasonable, for it would be hard upon the sheriff, especially in this country, where a man escapes through the insufficiency of the prison, as this case is, and against the will of the sheriff, that he must be liable if an action is immediately brought, as it may be the same day, though he afterwards retake the prisoner upon fresh suit. But it will be said, fresh suit was not made in this case; the sheriff did not take out an escape warrant till six months after. But what is the escape warrant to the purpose. The sheriff might make fresh suit without such warrant, and take him in any other county by the common law, and the escape warrant which is given here by the 11 Geo. 1. is only in aid of the sheriff and plaintiff, therefore, it is no proof that he did not make fresh suit, because he did not sue out an escape warrant sooner; neither is there any thing in that, that the prisoner appeared publicly at the court house of another county; the sheriff might be pursuing him elsewhere, and is not to be presumed, knowing of what passed in another county. As to the distance of time between the escape and retaking there is nothing in that; he might be taken a year after the escape. God. b. 117. As it does not appear then that the sheriff did not make fresh suit, it ought to be presumed that he did, for as escapes are so penal to sheriffs, the judges ought to make such

favorable construction as the law will permit in favor of the sheriffs, who are the officers and ministers of justice, and the judges will never judge one to make an escape by any strict construction. 3 Rep. 44; Beyton's case. And these are certainly very hard actions upon the sheriff; they have always been thought so in this country, and I am mistaken if sheriffs have not been excused where the escape was through the insufficiency of the prison, without the sheriff's fault, without any retaking, much more here then. The plaintiff not being injured, having the effect of her execution, viz. the body of the debtor, it is most reasonable every one should bear his own burthen.

In this case it was adjudged, the retaking would not excuse the sheriff, and the county courts' judgment was reversed.

Reported by Edward Barradall, Esq.

The King v. Harrison.

October, 1737.

Highways—Obstruction of—License.—The defendant was presented by the grand jury for erecting gates on the King's highway. He pleaded a license from the county court. HELD, the plea was good.

The defendant was presented by the grand jury for erecting gates on the King's highway. The defendant pleaded a
51 license *from the county court, to which Mr. Attorney demurred, and upon argument, insisted that all gates erected on the highway are nuisances at the common law, and that the county courts here had no power to give license to erect a nuisance. He cited Cro. Ca. 184. See also 1 Inst. 221; 1 Bulst. 203; 2 Rol. Abr. 137. and Hawk. P. C. 199. 9. 212. 50. For the defendant it was urged, there was a great difference between England and this country as to this matter; travellers here are not so numerous now or wheel carriages very common, so that the inconvenience would be but small; and on the other hand, considering the manner of fencing here, a small piece of land would be rendered useless if gates were not allowed. It was further urged, that the act of the 4. of Ann. c. 39. did seem to give the county courts a kind of absolute power with respect to roads.

The court were unanimously of opinion that the plea was good.

Reported by Edward Barradall, Esq.

Major v. Dudley.

October, 1737.

Executors—Settlement of Accounts—Lapse of Time *

A bill was brought against the defendant, who had married an executrix that was dead, for an account of the testator's estate come to his hands. The defendant about twenty years before had exhibited in the county court, an account of debts and disbursments paid out of the testator's estate, to which he made oath, and the same was received and recorded, without any examination into the truth of these payments. As the children of the testator came of age, they severally petitioned the county court, and some of them brought suit to have their shares of their father's estate. Upon which petitions and suits, several orders were made for persons to settle an account of the testator's estate, and in all these settlements the account first exhibited by the defendant, was allowed as a good discharge for so much. In the present case, it was referred to persons to settle an account of the estate, who having some doubt about allowing this account, they prayed the opinion and direction of the court.

The court was unanimously of opinion for allowing the account, in regard to the distance of time, though the defendant had not one voucher to produce. And as to the length of time, the transaction
52 *was of little more than twenty years standing, and the suit has been depending ten years.

Reported by Edward Barradall, Esq.

Hayward et al. v. Chisman et al.

April, 1738.

Slaves—In Lieu of Dower*—Division of Estate after Death of Widow.—The testator among other things left five slaves to work and maintain his wife and children. His eldest son Henry who died before his mother devised the slaves to the defendants who after the death of the widow recovered them in an action at law. Upon a suit brought by the younger children of the first testator for a share of the value of the said slaves, it was held that the slaves were intended by the testator in lieu of the widow's dower and therefore not to be divided among the younger children.

Henry Hayward, possessed of divers slaves and other estate, by his last will, inter alias, devised the guardianship of his children to his wife, and left five slaves to work, and maintain his wife and children, besides the profits of the estate he had left them; and died without making any other disposition of these five slaves; leaving Henry, his eldest son, who, dying before his mother, devised the slaves to the defendants, who after his mother's death recovered them in an action at law, and now a bill is brought by the younger children of the first testator, for a share of the value of the said slaves. For the plaintiff, it was insisted, that by the act of the 4 Ann. 23. they were entitled to a share of the value, their father being intestate as to these slaves. For the defendants, it was said, that there was an exception in the act of the widow's dower, the value of

*See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

*See monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

which was not to be devised among the younger children, and that these slaves were intended by the testator in lieu of the widow's dower, and therefore not to be divided.

And of that opinion was the whole Court.

Reported by Edward Barradall, Esq.

Giles et ux. & Mallecote v. Mallecote.

April, 1738.

Slaves—Detinue—Case at Bar.

In detinue upon a special verdict. The plaintiff's father, Thomas Mallecote, by his will, devises to his son John, Quashey, a negro man; to his son Thomas, the child his negro woman Betty then went with, and Tomboy, a negro man; and gives slaves to his other children, and declares his
53 will, that his wife should have *the work of his sons' negroes, till they come of age, and if either of them die without heirs of their body, lawfully begotten, then that their part should be equally divided among the survivors; and gives negro Betty to his wife during life, and after her death to be divided, with her increase, among the children. The testator's sons, John and Thomas, are dead, and would not be twenty-one if now living. The slaves in question are Quashey and Tomboy, specifically devised to John and Thomas, and Quashey, a boy, the child Betty went with at the making of the will, but not born till after the testator's death. The plaintiff, Mary, the wife of Giles, is the testator's wife, named in the will (though not so found in the verdict) and the plaintiff, Mallecote, is one of the testator's daughters. The defendant is the testator's eldest son and heir, and heir of his brothers John and Thomas, and is more than twenty-one years old. There are but two questions in the case upon the merits. 1st. Whether the testator's wife has a right to keep the slaves devised to John and Thomas till the time they would have been twenty-one, or whether her interest determined at their deaths? 2nd. Whether the devise to Thomas of the child Betty went with, be good, though the child was not born till after the testator's death? And let these points be determined either way, there will remain a necessity to make a third question, viz. Whether the plaintiffs can join in this action? The case as to the first point, is briefly this: a man devises slaves to his children, and wills that his wife should have the work of them till his children come of age. The children died before they came of age. The question is, whether the wife's interest determines by their deaths, or whether she shall keep the slaves till the time the children would have been twenty-one if they had lived? It will be granted, I presume, that the devise to the wife must be taken reddendo singula singulis, viz. that she is to have the work of the slaves till the children respectively come of age, and that each child, as it comes of age, is entitled to the slaves given to it. Cro. Ja. 259; Aylor and Chop. And it will be further granted, I believe, that in construction, the devise must be taken as if the limitation was to the wife first, till the children come of age, and afterwards to them. Indeed, otherwise, the devise to the wife cannot be supported. Now in devises of this sort, there is a very great difference whether they are made for payment of debts, to maintain children, or upon any other trust, and where they are merely for the benefit of the devisee. For if a man devises land to his executors, till his son comes of age, for payment of his debts, or performance of his will, and then to his son, there, though the son dies before he comes of age, the interest of the executors does not determine, but they shall hold
54 the *land till such time as he would have been of age if he had lived. Boraston's case, 3 Co. 19; Dyer, 210. a.; Cro. Eliz. 22; 1 Cha. Ca. 113. But if a man devises land to his wife till his son comes of age, and then to his son in fee, and the devise to his wife is not expressed to be for any other particular purpose, but is purely for her own benefit, in that case if the son die before twenty-one, the wife's interest is determined, and the land shall go to the heir of the son presently. Hill. 1713, between Mansfield and Dugard, decreed Cha. Cas. Abr. 195. 4. The reason of the difference in these two cases is plain. In strictness of law the estate determines in both cases: for if a man makes a lease, or grants land to another till his son comes of age, the lease or grant is subject to the contingency of his son's living till that time. If he dies before, the lease or grant determines. Boraston's case, 19. b. agreed, per totam curiam. 6 Co. 35. b.; Plow. 273. And this of necessity; for grants being taken strictly according to the words, unless the estate was to determine by the death of the son, it must continue forever, because the son will never be of age. Now the great difference between a devise and a grant is this; that in a devise a more liberal construction is allowed, and it is not so much the form of words as the intention of the testator, that governs the construction. But yet where there is no apparent intention to the contrary, a devise, as well as a grant, must be construed according to the legal sense and operation of the words. 1 Salk. 238; Amble and Jones. And in such a case no greater interest will pass by a devise, than will pass by the like words in a grant. The resolution in Boraston's case (supra) is founded upon the intention of the testator, collected from the nature and manner of the devise. The case was a devise to executors till H. B. should accomplish his full age of twenty-one years, and the mean profits to be employed by the executors towards performance of the will. It was said that it should be presumed that the testator had computed that the profits of his estate, by the time that his son would be of age, would pay the debts, and therefore,

though the son died before, the executors should hold the land, till such time as he would have been of age, because otherwise the testator's intention in providing for the payment of his debts must be frustrated, his debts unpaid, and his will unperformed, which are certainly very strong and cogent reasons to induce such a construction of the will. So where the devise is for any particular purpose, as the maintainance of children or the like, it may be reasonable to make such a construction. But where the devise is general, no trust to be discharged, but purely for the benefit of the devisee, there is no equitable ground or motive to induce a more ample and
55 liberal construction, than *according to the legal import and operation of the words, nor any intention of the testator appearing to carry the devise further than the words in their legal sense will carry it; and this I take to be the reason in Mansfield and Dugard's case (supra) and upon which distinction Boraston's case and that are reconciled. That case was thus: a man devised lands to his wife, till his son should attain his age of twenty-one years, and then to his son and his heirs. The son died at thirteen, and the wife was executrix, yet it not being devised for payment of debts, nor any creditor or want of assets appearing, the Lord Chancellor (Harcourt) held that the wife's estate determined by the death of the son, and upon a re-hearing, continued of the same opinion. I will beg leave to read Boraston's case and this. Now the devise before us, is exactly the same as th is last, only there the slaves are devised first to the children and then to the wife. But in construction, as I have already observed, the devise to the wife must be taken first. The devise in this case is generally to the wife, no debts to be paid or any other trust discharged, but merely for her benefit, and she is also made executrix. No two cases can be more parallel in all their circumstances, and I hope my Lord Chancellor's opinion will be taken for good law; especially when the reason of the difference between a devise of this sort, and a devise for payment of debts, as Boraston's case and the others above cited are, is so clearly accounted for. I shall now proceed to consider the second point, whether the devise of a negro in the mother's belly be good, though the child is not born till after the testator's death. The objection, I suppose, will be, that the thing given was not in esse rerum natura, at the time of the devise, and so being no more than a possibility, is not devisable. I shall agree that possibilities which are remote are not devisable, but I take a difference between a near and a remote possibility. (Jacobs's Dictionary tit. possibility.) It was never yet questioned but that the profits of land might be devised for a time, and in this very will, the work, that is, the profits of the work of the slaves, are devised to the wife for a time. Now the profits are not in esse; they are but a possibility. So the profits that shall be made of any commerce, may be devised, and I can see no difference between a devise of this sort and the devise of a negro child that shall be born, especially when the child is actually in ventre sa mere, for then it has a sort of existence. Antiently it was murder to procure the destruction of such, and the law takes notice of a child in ventre sa mere; for a devise to such is good. For though it be but a possibility, it must be allowed to be a very near possibility, and must happen in a short time. For my part I can see no good reason why
56 such a devise should *not be good. It clashes with no rule of law that I know of, nor is attended with any inconvenience. Why then should not the testator's will be performed? But I would not be understood as if I contended to carry devises of this sort any further, than where the child is actually in the mother's belly. It would be inconvenient to allow a devise of the second, third, or fourth child that shall be born, for reasons that are very obvious, though even such a devise as that is allowed by the civil law, for a man may devise quidquid illa ancilla perperisset. 2 Dom. 159. S. 18. And it is clear from the same author, that the civil law admits of devises of things that are not in esse, as the fruits of a term, the profits of a commerce, and the like. Now it may be worth consideration, that in England legacies are properly recoverable in the spiritual court, where the civil law is the rule of decision, though the chancery for many years has exercised a concurrent jurisdiction with them. But then the chancery has some regard to the determinations of the civil law in matters concerning legacies, as that noted distinction between a legacy given to one at the age of twenty one, and where the legacy is made payable at twenty one, which is allowed to be a very slender foundation in reason; but because the distinction is kept up in the civil law, the chancery observes it too, that the subject may have the same measure of justice in which court soever he sues. Cha. Cas. Abr. 295. 2. in notis. And I humbly hope that this court will pay the same regard to the decisions of the civil law in matters concerning legacies, at least, so far as it is not inconsistent with the spirit of our law, nor attended with any inconvenience; and then it is mighty clear that the devise of a child in ventre sa mere is good. But there, as I said, it will be necessary to stop, and not to suffer devises of this sort to be carried any further, because of the inconvenience that will follow. I shall now speak to the third point; whether the plaintiffs can join in this action, for this must of necessity be made a question, let the merits be determined either way; because the plaintiffs have several and distinct rights. If the merits are determined against the defendant, then the plaintiffs, Giles and his wife, have a right to the slaves in question, and the plaintiff, Mallecote, has no pretence of right: but if the merits are with the defendant, then the plaintiffs, Giles and his

wife, have no right, but the plaintiff Mallecote, does pretend some right in that case. Upon the very state of the question, the absurdity appears in joining the plaintiffs in this action, for they cannot have both a right to recover. But if one has a right, the other has not. This is really a new kind of policy, and the first time I believe, it was ever practised; it is having two stringa to the bow. If they cannot
57 *recover by one title, they will by the other; but I doubt the consequence will be that, they will recover by neither. There is no instance in the law that I know of, where two persons having distinct and several interests, can join in an action. But it is a common exception in arrest of judgment, where two join, to object that their interests are several. As Dy. 320. a.; Sty. 203; 2 Lev. 27; 3 Lev. 362. But if there was no authority, the reason of the thing speaks plain enough. If judgment be given for the plaintiffs, it cannot be that the plaintiffs recover; but will the court give such a judgment, when one of the plaintiffs hath no right to maintain the action. Who shall have the damages in this case? Not he I hope, that has no right to recover them. Yet if any judgment is given for the plaintiffs, they will both have an equal right to the damages. Besides, who can tell for whom the jury intended these damages? Perhaps they might have been intended for the person who has no right to maintain the action; and is there any reason, then, that the defendant should pay? The damages here were certainly designed for Giles and his wife, but if they have no right to maintain the action, ought they to have any damages? I need say no more in so plain a point; especially as it is not so new an objection in this court, even in the case of an ejectment, where one of the lessors had no title; upon such an objection, the court would give no judgment. It has been twice so adjudged, as I have been told, in the cases Meachen and al. v. Burwell and Dewberry, and Roberts v. Smith. But if the plaintiffs, Giles and his wife, have no right, as I hope it is clear they have not, the plaintiff Mallecote has really no right at all, or if she has, it is not such a right as will maintain an action of detinue. The action she sets up, is under the remainder limited by the testator's will to the surviving children, in case of the death of either without heir of their body. Now this remainder I conceive, is void; being limited upon so remote a contingency, viz. a dying without issue, which may not happen in a thousand years. And no limitation of a chattel can be upon a contingency, unless the contingency is to happen within the compass of a life, or lives in being, or within a reasonable term of years, as twenty or thirty. 1 Salk. 229. But this point was settled in the case of Slaughter and Whitlock, argued last court; where slaves were devised to one, and if he died without issue, remainder over. It was adjudged the remainder was void, and the absolute property vested in the first devisee. So that the defendant as heir at law to his brothers, is solely entitled to the slaves in question. Or admitting this plaintiff has a right, it is no more than as a tenant in common with her other brothers; the remainder is limited to be equally divided between the
58 survivors. *Now surely no lawyer will say, that one tenant in common of a chattel, can maintain an action of detinue against another tenant in common, where there are only two, much less where there are more than two; every one of them has the same right that the other has; and by the same rule that the plaintiff, Mallecote, can maintain this action against the defendant; if she recovers, another of the surviving brothers or sisters may recover of her, and the defendant again may recover of that brother or sister, or even of the plaintiff herself; and so there would be no end of suits and controversies. This sufficiently shews the reason of the law, why one tenant in common, shall not have an action at law against the other. 1 Inst. 200. a. The remedy must be in equity; indeed, that remedy is pointed out by the act of 1727. c. 11. s. 18. This case was compromised, and so no judgment given.

Reported by Edward Barradall, Esq.

Harrison v. Halley.

April, 1738.

Attachments—Against Lands.*

A judgment having passed against the defendant and plaintiff as sheriff, the plaintiff had an attachment upon the act of Assembly against the defendant's estate; and it was against his lands as well as goods: the coroner returned that the defendant had no goods, and that he had attached a parcel of land, upon which the plaintiff had judgment, and the land ordered to be sold as goods taken upon a fieri facias.

N. B. This is the first attachment that has been granted against lands since the statute 5 G. 2, for the more easy recovery of debts in the plantations, upon the equity of which this practice is founded.

Reported by Edward Barradall, Esq.

Rogers Adm'r of Rogers v. Spalden.

April, 1738.

Affidavit—When Allowed in Proof of Debts—Notice.—The plaintiff who lived in England took proofs of her debt by affidavit and upon the trial offered them in evidence. HELD, as no suit was pending at the time the affidavits were taken and the defendant did not have notice, the affidavits could not be given in evidence.

The plaintiff living in England had taken proofs of her debt by affidavit, before the

*See generally, monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

Lord Mayor, pursuant to the act of Parliament, (5 Geo. 2.) for recovery of
59 debts in the plantations; and *now upon the trial these affidavits were offered in evidence; but it was objected that when they were taken no suit was depending, and the act only extended to cases where suits were actually depending, and it was said the defendant ought to have notice, and of that opinion was the whole court, except Grymes and Digges; and so the affidavits were not allowed to be given in evidence.

Reported by Edward Barradall, Esq.

Webb v. Elligood.

April, 1739.

Escape—Liability of Sheriff.

This was an action against the (appellant) sheriff, for an escape, and upon a special verdict, the case was; the plaintiff (respondent) had judgment against one Gilmet in custody, and prayed him in execution. He had been in custody thirty two days before at another suit, and the defendant knowing him to be insolvent, demanded of the plaintiff's attorney, security for the prison fees, who refused to give him security, and thereupon the sheriff discharged him. The question in this case was, whether the sheriff was obliged to keep him twenty days before he discharged him; and the court was of opinion that he ought to have done so, and affirmed the county court's judgment.

Reported by Edward Barradall, Esq.

Goodloe v. Dudley, &c.

April, 1739.

Sheriff's Office—Whether It May Be Farmed.*—The office of sheriff may be farmed.

Bond from under sheriff and security to pay fifteen hundred pounds of tobacco, and save harmless and indemnify the high sheriff, &c. Defendant pleads stat. 5, 6 E. 6. against buying and selling of offices, and avers the fifteen hundred pounds of tobacco was for the deputation of the defendant. Plaintiff demurs.

I believe this is the first time the office of sheriff has been thought to be within this statute, for though it may seem
60 to come *within the general words viz. 'An office that concerns the administration and execution of justice,' yet, if we consider the whole law, it will appear it never could be intended of the sheriff's office. The penalty is, that the party selling shall forfeit all his right, interest, and estate in the office, and the party buying be disabled in law to hold the office, and the promises and bonds to be void. Now I would ask what estate, right and interest a sheriff has in his office? Every one knows it is an office of burthen and charge; men are subject to penalties if they refuse to execute it. The words right, estate and interest, plainly shew the act intended only offices of profit, for no man can be said to have an estate and interest in an office of burthen. Then he is to forfeit the office; it will be an easy expedient (though the notion, I believe, is somewhat new) for the sheriff to get rid of his office. If it is within this act, he has nothing to do but to make a bargain with an under-sheriff for a sum of money, and he is discharged. If this could be done, men would not pay such great fines as they do in London for not serving.

At this rate there would hardly ever be a sheriff: every one would be shifting the office off himself. But there was no occasion for this act to extend to the sheriff; there was one made an hundred years before. 23 H. 6. 10. prohibiting sheriffs to let their counties to farm.* This is the statute the defendant should have taken advantage of, and it is a plain mistake in his lawyer. No other statute was ever thought to extend to sheriffs as to this matter. The 23 H. 6. is a private act of which the judges cannot take notice, unless it be pleaded. 4 Co. 76; Hob. 13; 1 Vent. 85; 2 Lev. 151. But the question is now, whether the plea be good? And clearly it is not. The other statute is now out of the question. It does not appear in the condition that this tobacco was given for farming the office, and it might be for another cause. The demurrer only confesses it so far as that it might not be denied on the argument of this plea; but it is not such a confession as is any evidence of the fact. But if the 5 & 6 of Edw. 6. does not extend to sheriffs, it has been adjudged not to be in force in the plantations. 4 Mod. 222; 1 Salk. 411; Blankard v. Galdy. Farming of offices is not so unlawful as may be imagined. The statute only extends to cases where a sum in gross is agreed for. If the agreement is, to pay so much out of the fees and profits, and at all events, it is not within the statute. 2 Salk. 466; Culliford and D. Cardonell, 468; 6 Mod.
61 234; Godolphin v. *Tudor. So if there be a salary annexed and a lesser sum is received, it is not within the statute. Ibid. The statute intended only to prevent extortion in offices, which men would be tempted to, if they paid a large sum for a deputation at all events. But if they have not a certain profit, or chance for a profit out of the fees, they are not to be under the same temptation. I shall agree if this bond is void as to the payment of tobacco, it is so for the whole. There is a difference, where part of a condition is void by the common law, and where by statute. In the first case it may be void in part, and stand good for the other part. But where part of a condition is against the statute, it is wholly void. The reason

*But see § 166, Code 1887.

*There is an antienter statute than this of H. 6 viz. 4 H. 4. c. 5. in which there is no penalty. But there is in 23 H. 6. viz. £40.—Edition 1829.

is, because the statute says the bond shall be void, and therefore, it cannot be set up in part. Hob. 14; Norton v. Sims, 3 Co. 82. b. 83. a. 1 Vent. 273; 1 Mod. 37; Carter 229; Pearson v. Humes, 2 Danv. 21. 8. I hope it will be considered how hard a case it will be upon the plaintiff, if the plea be adjudged good; the whole bond will be void and he without any remedy against his under sheriff, though guilty of ever so many breaches; it will be his utter ruin and destruction. This suit is chiefly brought to recover quit-rents, for which the plaintiff himself is sued. There is no honesty in the plea, the practice is usual, and, under some circumstances, justifiable.

Judgment for the plaintiff; that the plea was not good, per totam curiam. N. B. in Brownlowe Latine Red. 216. 218. this statute is pleaded to a bond for payment of money, with an averment that the plaintiff sold the defendant the office of under-sheriff, for which money he gave the bond. There was an idle replication and demurrer. But the author observes, that the reason of such a replication was, because the date of the statute was mistaken, for otherwise the plea was good. Sed quære et nota. The case of Blankard and Galdy was a deputation of the office of Provost Marshall, of Jamaica, (which is the same office as sheriff with us) and no exception taken that it was not an office within the act. In the argument of this case, it was said that the 23 H. 6 had no penalty, and therefore, the 5 & 6 Ed. 6. was necessary to be extended to the office of sheriff. But that is a mistake—there is a penalty of forty pounds by 23 H. 6.

Reported by Edward Barradall, Esq.

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62 ***Jones, &c. v. Porters.**

April, 1740.

Married Women—Deeds—Privy Acknowledgment.*—Where a deed of conveyance by husband and wife does not show on its face the privy acknowledgment of the wife, equity will not supply such defect.

Bill sets forth: That William Porter and Jane his wife, in right of Jane, was seized in fee of ninety-nine acres of land, and four hundred acres in Middlesex; and agreed to sell the ninety-nine acres to Thomas Jones, plaintiff, John's father, and the four hundred acres to plaintiff Roger. And, accordingly, by deed dated in 1703, between Porter et ux. and said Thomas Jones, conveyed the said ninety-nine acres to Thomas Jones, in consideration of three thousand nine hundred and sixty pounds of tobacco; and by another deed in 1704, between Porter et ux. and plaintiff Roger, conveyed the four hundred acres to plaintiff Roger, in consideration of one hundred and sixty pounds sterling. And in both deeds Porter and his wife covenant for further assurance; and they also gave a bond to plaintiff Roger for performance of covenants. That Porter et ux. came to court to acknowledge these deeds, but by the mistake or ignorance of the clerk, the acknowledgment is, that the wife relinquished her right of dower, and no notice is taken of the privy examination. That Porter died in 1705, and Jane his wife survived him and died in 1709; leaving issue Francis Porter, her eldest son. And Thomas Jones died many years ago, leaving issue plaintiff, John, his eldest son. And the plaintiff continued in quiet possession till 1732; when Francis Porter, son and heir of Jane, brought an ejectment for recovery, under pretence that his mother was not privately examined, and upon a special verdict had judgment to recover, and threatens to sue out hab. fac. poss. though it is plain upon the face of the deeds, the defendant's mother intended to convey, and she always acquiesced under it; never pretended she was not privately examined; but on the contrary, in her widowhood, declared she had joined freely and voluntarily in the sale, and was satisfied with it. Francis Porter died pending the ejectment, and the defendants are his heirs at law, and the end of the bill is to have the defect of the private examination supplied, and the defendants to make a perfect and absolute conveyance; the plaintiffs being purchasers for a valuable consideration. The defendants being infants, by their guardian put in their plea and answer. They plead the act of 1734, which enacts, that where the clerk has not taken notice of the private examination, it shall be taken the feme, was not examined; and for answer say, they were infants at the time of the transactions charged in the bill, and know nothing of them, and hope
63 the court *will not compel them to part with their inheritance legally decended to them, and pray to have the benefit of the judgment at law. The proofs in the cause are very short: only one William Hammet, who says he was in company with Jane Porter in her widowhood, and asked her for what reason she agreed to sell the land to the Jones's? She answered, that she nor her family could not have their healths on it, nor make corn for support of their family. That though Mr. Jones thought he had a good bargain, she wished it might prove so, and was glad the land was sold. There needs be little said to the plea, which seems quite unnecessary. We do not pray that this court should decree that the woman was privately examined, but to have the defect or want of that circumstance supplied. I shall never pretend to say that a court of equity can control an act of parliament or act of assembly, however severe it may be upon particular persons; and we cannot help thinking this act somewhat severe upon us, being made when the suit at law was depending. We allow then that the woman was not privately examined; the law has declared so, and we must submit. The question properly before your honors, and the only ques-

*See monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 157.

tion is, whether a court of equity will supply a defect of this kind when it appears, as I think it must be allowed to do in this case, that she had agreed to part with her inheritance and was consenting and willing without the coercion of her husband. The consent and agreement appear from the wife's executing the deeds; the grant and all the covenants are in her name as well as the husband's; she enters into the bond for performance of covenants, and she comes to court in order to acknowledge she acquiesced under the deed; and declares in her widowhood that she had agreed, and was glad the land was sold. These circumstances and proof must be convincing, that the woman was actually consenting and willing to part with her inheritance. Then I say, Whether the want of a private examination may be supplied by a court of equity? Or whether the heirs of the woman shall not be compelled to make a good and legal conveyance, is the question before the court? And I hope I shall have no great difficulty to persuade your honors, that we ought to have such a decree, and that the same is consistent with the constant course of equity in cases of the like nature. This method of the private examination of femes covert, is peculiar to the laws of England, renowned for its great favor and regard to women. It was introduced to preserve and protect the inheritance of the wife from the arbitrary will and disposal of the husband; that she might not be compelled by his threats or cruelty to part with it against her will. It is nothing more than a particular mode or ceremony instituted
64 for a *particular purpose, and I humbly conceive that if the end for which this ceremony was introduced can appear to have been answered, that is, if it appear that the wife was not compelled against her will, it is the same thing in natural equity and justice, as if the ceremony had been ever so formally complied with. The law has appropriated particular forms and ceremonies almost to every transfer. Livery is essential to a feoffment, and a surrender to pass a copyhold; and the courts of common law that are tied up by strict and rigid rules, will never dispense with the want of these ceremonies; but it is the peculiar province of equity to supply these defects, especially in favour of a purchaser for a valuable consideration, as we are. It is even a kind of maxim, that equity regards the substance, and not the circumstance of every act. To examine this case by that maxim, does it not appear here that the woman was willing and intended to part with her inheritance? And is not that the substance of the act? The defect is only in circumstance, the want of private examination. The cases in the books are numerous, where equity has supplied the want of livery in a feoffment, and want of a surrender in passing a copyhold, in favor of purchasers, and sometimes even in favor of younger children. I will beg leave to read two short cases for the court's satisfaction. Thompson v. Atfield, 2 Cha. Rep. 216; Hardham v. Roberts, 1 Vern. 132. These cases may suffice to shew the constant course of equity to be as I have said, viz. to supply defects in conveyances in favor of purchasers. Now if equity will supply the want of livery in a feoffment, and the want of a surrender in passing a copyhold, which ceremonies must be allowed to be as essential, in point of law, to the respective conveyances, as the examination of the wife can be where her inheritance is to pass, I shall beg leave to know what good reason can be given, why a court of equity should not interpose and assist an honest purchaser, as well in the one case as in the other, when it is manifest it was the voluntary intent of the wife to pass her estate? If the motive and reason of the determination be considered, it will appear they have as great weight in the present case as these cited. The true reason, as I conceive, is, because when there appears a fair contract between two parties, and one has paid his money, the vendor has become a kind of trustee in equity for the vendee, and so compellable in equity to make a conveyance as the case may require, that the vendee may have the legal as well as equitable title in him. Now I will beg leave to suppose that Porter and his wife were now alive, and this suit was brought against them instead of the heirs of the wife, upon the proof that there is in this case,
65 that the wife was consenting *and that the purchase money was paid. I presume there would be no manner of question, but that we should have the decree we now seek for against them, to perfect the conveyance; or that we should enjoy against them and their heirs, nay, though the woman should deny her consent, if it was made evident by proof; and that the purchaser, in confidence of it, had paid the money. Equity would without doubt consider such a proceeding as a fraud, and relieve against it. Now I would fain know what greater equity the heir can have, than the ancestor. The title they derive is under the ancestor, and the same equity that would run against the ancestor must run against the heir. If then it be allowed that we could be relieved against the ancestor, as I think cannot fairly be denied, I do humbly insist that we are entitled to the same relief against the now defendants, her heirs. Objected. No instance of equity relieving in such a case in England. Answered. That it is not strange, because it is a case that never could happen in England. I mean there never could be such a question. The only way for a feme covert to pass her inheritance in England, is by fine and recovery, and though she ought to be privately examined, yet if a fine is levied by the husband, and wife and is not examined, it shall bind her and her heirs. Coke's reading, s. 7. So that when the fine is once levied the purchaser is secure, and has no occasion to apply to a court of equity, though the feme was not examined; hence, it is plain, this is a

question that never could be made in England, and therefore it is no wonder we meet with no cases in point. But I think there are cases where a court of equity has done as much, or more, and instances that must be allowed to be as strong as this; because the ceremony of private examination must have been dispensed with. Baker and Child, 2 Vern. 61. It seems to be mentioned by the court as an established rule, that where a feme covert agreed to join with her husband in making a surrender, or levying a fine, though the husband die before it be done, equity will compel her to perform the agreement. If, where there is only a bare agreement of the wife, equity will compel her to perform it, I must submit if there be not a much stronger reason in this case, where an agreement does not only appear, but the wife actually executes a conveyance, which happens to be defective only in circumstance. I rely upon our being an honest purchaser for a valuable consideration. Purchasers are ever favored in equity, and the court will often stretch in their favor. Indeed, nothing can be more consistent with natural justice than this, that where a man has paid his money, he should have all the assistance of the law to protect and secure him in the possession of the thing purchased. If this case be considered only under the notion of
66 *an agreement, (and surely the agreement of the wife in this case cannot be controverted,) I humbly conceive this court ought to interpose upon the authority of the case just cited. It is, indeed, the peculiar province of equity to compel the specific performance of an agreement, even where the party may have remedy to recover damages at law; and in this case we can have no effectual remedy at law; the husband is indeed insolvent, and we must entirely lose our purchase money and improvements unless this court will assist us. Fraud, accident and trust, are said to be the three principal things about which a court of equity is conversant. In this case there is fraud on the defendant's part, that they would take advantage of the defect in their ancestor's conveyance. There is accident in two instances, viz. the mis-entry of the clerk and the death of the woman; and there is trust, by the payment of the money and wife's agreement. This is undoubtedly a case of great compassion. Here is an honest purchaser before the court, and the only objection to his title is a defect in the conveyance, and that only in point of circumstance or ceremony. This defect not attempted to be taken advantage of by the grantor; but the heir, after a quiet possession of thirty years, contests the act of the ancestor acquiesced under by her. The purchaser is without any remedy unless assisted by this court. The relief sought for is against no rule of equity, attended with no inconvenience, against no act of parliament, equitable and reasonable in itself, and agreeable to the courses of equity in similar cases. And if it be so; if the thing desired be no more than natural justice; if it will neither interfere with, nor violate any one established rule of equity, there can neither want argument nor precedent to induce a court of equity to decree for us.

*Francis for the defendant. The end of this bill is to repeal an act of Assembly. Equity cannot decree against an act of Parliament; there is no instance where a statute requires a particular act for transferring an inheritance, that a court of equity will dispense with that act. If tenant in tail agree to levy a fine, and die before it is done, equity will not compel the issue in tail to convey. Nothing but the actual levying the fine can take the inheritance from the issue. If a bargain and sale be made without enrollment, equity will not supply it, nor any circumstance that is required by the statute of frauds. As to wills; it is not the province of equity to relieve against blunders, and to decree in this case for the plaintiff, will be annulling a law made for securing women's inheritances. The rule of
67 the civil law is, where equity *would annul a law, that law must prevail. To which it was answered, what is desired by the bill, will neither annul the act of Assembly nor be contrary to it. The end of the bill is not to establish the woman's conveyance, which is allowed to be defective, but to compel a better conveyance to a purchaser for a valuable consideration. This sufficiently obviates all that has been said about decreeing against an act of Parliament. As to the cases put, they are by no means parallel, the issue in tail shall not be compelled to convey, where the fine is not perfected, because he does not come in under the tenant in tail, but by force of the gift in tail. The tenant in tail in his life time, would be compelled to levy a fine if he so agreed, and so here the woman would be compelled to make a better conveyance if she were alive, and the same equity must run against her heirs. As to the case of enrollment, though equity would not decree the deed good if not enrolled, yet it would decree a better conveyance to a purchaser, which is all we ask. As to the statute of frauds the same answer may be given, as to the life of tenant in tail. We do not attempt to set this conveyance up as good; but desire a better because it is not good: besides surely there is a difference between a purchaser and a devisee. And, though it is said it is not the province of equity to relieve against blunders, yet we see nothing is more common than for equity to relieve against mistakes and defects in conveyances, and especially in favor of honest purchasers.

In this case the bill was dismissed by a great majority of the court.

Reported by Edward Barradall, Esq.

Coleman et ux. v. Dickinson.

October, 1740.

Trust for Benefit of Husband and Wife—Limitation to Survivor—Slaves—Increase.—James Alderson and

*Author of Maxims of Equity.—Edition 1829.

Ann his wife by deed sold three slaves to Hunter for sixty years; if the said James and negroes should so long live, in trust and to the use of the said James and Ann for their lives, and to the survivor, if the negroes shall so long live. After the death of her husband the wife made a will disposing of the three negroes and their increase. HELD, that the limitations of the trust being for the use of the husband and wife for life, and for the use of the survivor, the wife upon her surviving her husband was entitled to the slaves mentioned in the deed, and the property of the increase must follow that of the parents.

James Alderson, and Ann his wife, by deed dated the 10th of July, 1712, reciting that Ann, at her marriage, was possessed of three slaves, and that by law they were real estate, bargained and sold the slaves to one Hunter for sixty years, if the said James and the negroes should so long live, in trust and to the use of the said James and Ann for their lives, and to the use of the survivor, if the negroes should so long live; with this proviso, that if Ann should die before James it should be lawful 68 for her by will to dispose *of the negroes after his death; and with this further proviso, that if the negroes had any increase during the term, that they should be taken care of till they were fit to be removed from their parents. The husband died first; the wife, who had made a will before his death, republished it afterwards, and by the will she has taken upon her, not only to dispose of these three negroes mentioned in the deed, but also their increase, to the plaintiff Elizabeth. The question is, whether as the husband died first, the wife had a power by this deed or otherwise, to dispose of these negroes or their increase? When this deed was made, it was the general opinion that a woman's slaves did not vest in the husband by the marriage. This was the construction of the act of 1705, by which slaves were first made real estate. It will, however, be allowed that this was a mistaken opinion and a wrong construction of the act; the explanatory act of 1727, having declared that where any slaves have been, or shall be conveyed, given or bequeathed, or have, or shall descend to any feme covert, the absolute property is thereby vested in the husband. After repeating these words, I may venture to take it for granted, that the slaves of Ann Alderson vested in her husband by the marriage, and it will scarce be pretended, I presume, that the husband's mistake as to his right, which appears in the recital of the deed, did at all lessen or destroy that title. From these premises these two conclusions follow. 1. That the wife can have no pretence of right, but what she can derive from the gift or disposition of the husband: and 2. That, as the husband had the absolute property in these slaves, so much of that property in them and their increase, as was not disposed of by the deed now before us, remains in the husband, and upon his death must go to his representatives. The business then is to see how far the property of these slaves, or their increase, is disposed of by this deed. It is scarce worth observing, that this deed is to be considered merely as the act of the husband, and it is well known that a feme covert cannot make a deed in any case, except where she is empowered by some particular law or agreement so to do. But as the wife here had really no interest in the thing conveyed, her joining or not joining in the deed cannot differ the case. The deed then, I conceive, ought to be considered thus. A husband conveys his slaves to trustees for sixty years, if he should so long live, to the use of himself and wife, and the survivor for life, with power to the wife if she died first, to dispose of them by will after his death. I say nothing here of the second proviso, which regards the increase: that I shall consider by and by. What is there more in this deed, than a limitation to the husband and wife for life, with a 69 power to the *wife to dispose upon the contingency of her dying in her husband's life-time. If this contingency never happened, can she have a right to dispose by virtue of this power? Certainly not; and that is truly all the question in the case. There is certainly some difference between an absolute power and a limited one, or a power that is to arise upon some future contingency. If a man gives his executor power to receive a sum of money out of his estate, in case he leaves a daughter, this power cannot be executed if he leaves no daughter, because it is to arise upon that contingency and not otherwise. So here the power given to the wife is not a power of disposing at all events, but only upon the contingency of her dying in her husband's life-time. The words of the deed are not only plain to this purpose, but it was apparently the intention of the parties, for under the mistaken notion they were, that the slaves did not vest in the husband, they concluded that if the wife survived, she would by law have a power to dispose, and there could be no necessity to provide for that, but only that she might dispose during the coverture, if she died first. Thus neither from the words of the deed, nor the intention of the parties, is there the least ground to infer, that an absolute power of disposing was designed to the wife; but only a power upon a contingency, which not happening, she has no power of disposing by virtue of this deed; and if she had none by the deed, she had none at all, as I hope I have demonstrated. Let us consider a little further the nature of this deed. It is a conveyance to a trustee for sixty years, if the husband so long lived. This trust and term then, were to continue no longer than the life of the husband; and so upon his death they both expired and determined, and consequently the power which was to be executed during the term, must cease and be void. Neither the trust nor the term, nor the power given the wife from the frame of this deed, could possibly subsist after the husband's death. As to

the mistaken notion of the parties, with respect to the right of these negroes, as this mistake could not alter or destroy the husband's right, so neither can it be any argument to give this deed a different construction or operation from what it would have had, if the husband had known it; perhaps if he had, he never would have executed this deed at all. If, therefore, we regard the operation of this deed in point of law, or if we regard the intention of the parties in making it, it is plain the wife had no power of disposing but upon the contingency of her dying in the husband's life-time, and therefore, her disposition to the plaintiff is void. Equity will often supply a defective execution of powers, but I never yet read or heard that a court of equity would create new or different powers from those created by the 70 *parties, or extend or enlarge them beyond what the words of the deed, or the intention of the parties would carry them; yet this is what must be contended for, to support the wife's disposition in this case. The power created by his deed is upon a certain contingency which never happened, and yet they will have it that the wife may dispose by virtue of that power. What is this but setting up a different power in the wife from that given her by the deed? As to the increase of the three slaves, mentioned in the deed we have been speaking of, which are the other six slaves claimed by the plaintiff under the will of Ann Alderson, I really cannot conjecture what may be said in support of the plaintiff's title to them. The bill (whether designedly or not I cannot tell) does not mention those six slaves as the increase of the three, though I dare say they will be granted to be such, but only sets forth that Ann Alderson devised the three slaves in the deed, and six others, without shewing her title to them. This is one of the causes of demurrer, that it is not suggested she had a right to the increase, or to dispose of them. I have already observed, and I hope it will be granted, that so much of the property of the three slaves and their increase, as is not disposed of by the deed, remained in the husband, the whole property vesting in him by the marriage. Now it is plain from the tenor of the deed, as well as a particular proviso in it, that the increase were never intended to be within the trust thereby created. The term is limited for sixty years, if James Alderson and the three negroes should so long live. So that if the three negroes had died, the whole trust had determined. The proviso which gives the wife a power of disposing upon the contingency mentioned, takes notice only of the three slaves, without saying any thing of the increase, all which is sufficient to shew that they were never intended to be comprised within the trust at all. But there is a second proviso which puts the matter beyond all doubt; by this, there is an express provision concerning the increase, that they shall be allowed to remain with their parents till they were fit to be removed. So that whatever the determination may be, with respect to the wife's right of disposing of the three negroes, I conceive the matter, as to the increase, will admit of no doubt or question. On the other side, it was urged, that the limitation of the trust being to the use of the husband and wife for life, and to the use of the survivor, that the wife surviving was well entitled to the slaves mentioned in the deed, and that the property of the increase must follow that of the parents.

And so it was decreed by the court.

Reported by Edward Barradall, Esq.

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71 *Knight v. Triplet.

October, 1740.

Sale of Land—Unrecorded Lease—Effect as to Purchaser.*—The defendant purchased lands on a part of which the plaintiff had a lease for years which was not recorded, of which the defendant had notice. Defendant brought an action of ejectment and obtained judgment; the plaintiff filed a bill for relief against the judgment and to establish his lease. HELD, under the act of 8 Geo. 2, ch. 6, which provides that all deeds etc., whether passing the freehold or lease for years not recorded shall be void, as to all creditors and subsequent purchaser, the lease not being recorded, was void as to the purchaser.

The defendant made a purchase of certain lands, of part whereof the plaintiff had a lease for years, which was not recorded. The defendant had notice of this lease before his purchase; yet he brought an ejectment and had judgment at law, and this bill was brought to be relieved against that judgment, and to establish the lease against the defendant; in regard he had notice of it, and so he was not deceived, but with respect to him it was the same as if it had been recorded. To this bill the defendant demurred; and to support the demurrer, it was argued that, by the act of Assembly, 8 Geo. 2. c. 6, this lease not being recorded, was void as to a purchaser. The words of the act are to this purpose, 'All deeds, &c. whether for passing freehold or lease for years not recorded, shall be void as to all creditors and subsequent purchasers.' It is a rule that equity never decrees against an act of Parliament, which indeed would be transferring the legislative power. It is true this act was made to prevent purchasers being deceived, and here the purchaser had notice, and so could not be deceived. But I answer, the act has made all deeds not recorded void, and there is no exception where the purchaser has notice; and as the act makes no exception, neither can a court of equity. This notice can never make that good which the act has declared void; besides the defendant might think he might safely purchase notwithstanding the lease, as the act had declared it void, and that is the truth. In

*But see § 2465, Code 1887.—Edition 1829.

this view it must bring a strange hardship upon the purchaser; he is informed of an encumbrance, takes advice of a lawyer who tells him the encumbrance cannot affect him because the act had declared it void, and yet afterwards this encumbrance shall be set up under pretence of notice. There is no instance of this in law, but there are cases exactly parallel against it. By the stat. 27 of Eliz. 4. against fraudulent conveyances, it is enacted that all deeds made to defraud or deceive purchasers shall be void. This is very like our act. All deeds not recorded shall be void. A man makes a purchase, and has notice before, of a deed that was fraudulent within this statute, and it was adjudged that he should avoid the fraudulent deed, notwithstanding the notice, for this reason, because the act had by express words made it void, and this notice could not make that good which the act had declared void. Sanden's case, cited in Gooches. 5. Co. 6. b. 72 The *case of Porter* and Jones was much harder than this, for there was a purchaser for valuable consideration without any kind of remedy; whereas the plaintiff may have remedy for damages against Thompson. But there the court would not relieve, because this very act had declared the deed was not binding. The hardship can never induce the court to decree against a positive law. Besides the hardship is not so great, as there is a remedy against Thompson; and the hardship may be greater upon the purchaser, who has paid the full value of the land upon a supposition that the plaintiff's lease was void, and who purchased under the sanction of the act.

The demurrer was allowed, and the bill dismissed with costs.

Reported by Edward Barradall, Esq.

Custis et al. v. Fitzhugh.

October, 1768.

Slaves—Conveyance under Statute of Uses—Validity.

In this case it was adjudged, that slaves as well as lands might be conveyed to uses, and were within the statute of uses. 27 H. 8; 2. Hop. 3.†

Reported by Mr. Hopkins.

Brent v. Porter.

October, 1768.

Slaves—Coparceners—Right of Survivor to Possession.—A right to slaves descended to two unmarried sisters, coparceners, possession of which was in another. One married and died, but the slaves were not reduced to possession. The surviving coparcener brought an action to recover her moiety. HELD, she was entitled to recover.

A right to slaves descended to two sisters, coparceners, and femes sole; but they were in the possession of another who claimed a right to them. One coparcener marries and dies, the slaves having never been reduced into possession. The surviving coparcener brings this action for her moiety. Two causes were assigned by the defendants, why she should not recover. 1. That by the express words of the act of Assembly, this difference is made, viz. where a right descends to a feme covert, that right vests in the husband; but a feme sole by 73 her marriage gives no right to *her husband, except to the slaves of which she is possessed. 2. That the husband of the deceased coparcener should have joined with the surviving coparcener in this action for the slaves. The court adjudged for the plaintiffs. But quære, on which point, or if on both? Cases cited were Bronaugh v. Cock, Wyld v. his children, Southal v. Lucas, Elliot v. Washington, Harrison v. Valentine. All determined in the General court. It was said at the bar in this case, and not denied, that wherever the femes is entitled to slaves not in possession, if the wife dies before reducing them into possession, the right survives to the husband. But if the feme survives it shall be hers: and that the act of Assembly only intended to give the husband such a right as he would have to the chattels of the wife, that is, a right to reduce them into possession; and that this reconciles the cases. In this case also, Pendleton observed, that the husband surviving might recover, whether he took administration or not; and that if he were to take administration and recover in that right, he would be accountable to no one, the statute of distribution having given the surplus to him as next of kin. But Wythe, said it was the second statute of distribution which did this, and that being made after 4 Ja. 1. was not in force here. Therefore, if he recovered, as administrator, he would by our act of distribution, be accountable to the next of kin.

Blackwell v. Wilkinson.

October, 1768.

Slaves—Entail—Not Annexed to Lands.—Slaves could not be entailed between the years 1705 and 1727, unless annexed to lands.

Slaves had been entailed between the years 1705 and 1727, without being annexed to lands, and the question was, whether the entail was good? At a former hearing before twelve judges, the court had been divided, and it came on now to be reargued.

John Randolph, Attorney General, pro quer. I shall consider, 1. Whether slaves were entailable under the act of 1705, c. 23. alone, without being annexed to lands? 2. If they were so, whether the act of 1727. c. 11. can by retrospection affect this case? 1. The legislature, considering the intimacy of connection between slaves and lands, and that the latter in this country could be of but little profit without the

*Ante, 62.—Edition 1829.

†This reference is probably to Hopkins's own notes.—Edition 1829.

former, thought it expedient to declare them real estate. The natural property of land is, that it is fixed and permanent: its legal properties, that it shall descend to heirs in various manners; shall be
74 subject to widows' dowers; *shall not be liable to execution; cannot be aliened but by writing; shall give its proprietor a right of voting at elections; cannot be demanded but by action real, &c. Again the natural properties of personal estate are, that it is moveable and perishable: its legal properties that it shall be distributed among the next of kin equally; shall be liable to execution; may be aliened without writing; shall not give a right to vote; must be demanded by action personal, &c. Slaves, having the natural properties of personal estate, that is, being moveable and perishable, were formerly considered as personal estate; but the legislature thinking it better that they should be considered as real estate, could not indeed give them their natural properties of immobility and permanence, but might give its legal qualities of descent in its various modes, dower, &c. Nor is this transmutation of properties uncommon in the law, it being every day's practice to consider lands as money, and money as lands. The legislature has declared then, in terms the most general, that slaves shall be held real estate; by which their intention is manifested to transfer to them every quality of that estate which it was in their power to transfer, to wit, the legal qualities of descent, dower, &c. To state a similar instance, the properties of a chose in action are, that it cannot be assigned, cannot be devised, nor released but to parties or privies, &c. Had the legislature then enacted, that slaves should be considered as choses in action, would they not without more, have had their capital qualities of being unalienable, indevisable, &c.? Suppose it enacted that slaves should be taken as heir looms: this alone would make them descendible to the heir and unalienable by will, which are the properties of an heir loom. In like manner, had the law declared they should be held as bonds, they would then have been assignable, have gone to executors, and had the other properties of a bond. When an act of parliament declares, that an alien shall be deemed and considered as a native of England, this cannot give him the natural accidents of a birth within England; but it can give him all the legal accidents of a capacity to sue and be sued, to inherit and be inherited, &c. In like manner, an act declaring slaves to be real estate, cannot give them the immobility and permanence of lands; but it can, and does give them, the other adventitious or legal properties which belong to lands. Now these are, that they may be aliened in fee, in tail, for life, years, &c. But it is objected, that the act declaring they shall be held real estate, and shall descend to heirs and widows, &c. particularizing the two properties of descent and dower, has shewn its intention of giving them no others; more especially, as it has afterwards expressly withheld from them
75 almost every other real quality. *Answer. Suppose I should say, every man present is honest, except A. and B.; and that C. and D. (who are present also) are honest. Should I be understood to mean, that nobody present is honest, but C. and D.? No; the naming them particularly might be construed to mean, that they were conspicuously honest, but by no means to contradict the general affirmation which went before. The rule in interpreting statutes is, that 'where the words of an enacting clause are general, and exceptions added, the regulation shall extend to every case not included within the exceptions.' It is commonly said, 'exceptio probat regulam.' Again, where the words are general, and some particulars happen to be specified, it is always supposed they are but exempli gratia. Thus the statute of circumspecte agatis, mentions only the Bishop of Norwich, yet it is held that the statute extends to all the clergy. So the statute de donis takes notice only of a gift to a man and the heirs of his body, to a man and his wife and the heirs of their bodies, and to a man in frank marriage; yet it was never doubted but that this statute extends to every entail. The statute of limitation bars actions not brought within such a time, but adds a saving for infants, femes covert &c. It is always allowed that, without this saving, they also would have been barred. The conclusion then, is parallel, that the words of the act of 1705, being general, that slaves shall be real estate, and the consequence of their being entailable not being prevented by any of the exceptions, they must be entailable: and also the two properties of descent and dower, must be supposed to have been mentioned exempli gratia only. To say that a person is seized of an inheritance, over which he has absolute power, can dispose of it totally, and yet not sub modo, is to say that the whole does not include a part. The fourth clause provides, that slaves shall still be liable to execution; the sixth, that the alienation of them need not be recorded; the seventh, that they shall not give a right to vote at an election; the eighth, that they may be recovered by action personal. Now, if under the general clause they were to have no other real properties but descent and dower, if they were to remain personal estate in every other respect, where the necessity of adding these provisos? Without these, they would, as personal estate, have been liable to executions, alienable without writing, insufficient to qualify a voter, and recoverable by personal action. The truth is apparent. The legislature were sensible, that by making them real estate, these properties of being not subject to execution, not alienable but of record, qualifying a voter, and demandable by action real only, would be necessary consequences, and therefore have carefully guarded against them.
76 And this, not by altering *the nature

of the estate, and making it personal in these particulars, but by admitting it still to be real estate; but real estate liable to executions, alienable without writing, and recoverable by action personal. These provisos shew plainly, that the legislature intended that slaves should have every quality of a real estate in their power to give them, except those particularly provided against. But I shall, secondly, urge that had the act of 1705, never been made, slaves might have been entailed under the statute de donis. Here I shall enquire what may be entailed. Tenements incorporeal may be entailed if they concern lands, as offices, dignities, &c. A dukedom, for instance, may be entailed, because, though not really connected with lands, yet it is demandable in a præcipe. If the Lord Fairfax should appoint a receiver of his rents, this office might be entailed. An equity of redemption may be entailed; so may charters. There is no estate in England resembling that of slaves, except villeins. Of those there were two kinds, villeins in gross, and villeins regardant. The latter, being connected with land, can throw no light on the present question; but villeins in gross may. These were unconnected with lands, as much as slaves, and were deemed purely personal, as slaves were before 1705. And yet, that a villein in gross might have been entailed, I infer from Co. Lit. 124. a. 'If an executor hath a villein for years, and the villein purchases lands in fee, the executor entereth, he shall have the whole fee simple.' Now it is clear, Lord Coke is speaking of a villein in gross; since a villein regardant can never come under the power of an executor. And if a villein in gross may be possessed in fee, he may in fee tail, which is only a conditional fee. The inconveniences attending entails of slaves are much insisted on: but they are magnified. The estate is as permanent as its proprietor; slaves may possibly last as long as lands; which, though not subject to so many accidents, yet may be destroyed. This argument, it will be said, proves too much, since it would equally support an entail of horses, hogs, &c. Answer. I annex this restriction to it, that the subject should be of distinguished value. It is objected, that the statute de donis uses only the word 'tenementa,' and that slaves not being a tenement, are not within that statute. It must be presumed that the legislature intended, by the act of 1705, to make them tenable, by making them real estate. But, thirdly, suppose them not a tenement, and so not included within the statute de donis. Yet I say, being capable of a disposition in fee, our title is good by the common law. Under that, were three kinds of fees, to wit, simple, conditional and base. The conditional fee, was what we now call a fee tail, and was only perpetuated, not erected by the statute de donis.

77 *That statute was the nurse, not the mother, of entails; it leaves them as they were at common law, only taking from the tenant in favor of the issue, that power of alienation which he had formerly possessed after issue born, before the statute de donis. Then, a gift in the terms of ours, would have conveyed a conditional fee, which indeed our ancestor might have aliened, but, not having done it, we succeed to the right; from which I conclude slaves were entailable under the act of 1705. If not, yet they were under the statute de donis; and if this is against us also, they might be conveyed in conditional fee by the common law. 2. If our title was good in either of these ways, then we say it is not affected by the act of 1727. It is a general observation, that laws are unjust and unreasonable, when by retrospection they attempt to direct those which were prior. They fall heavy on purchasers who understood the former law in the common sense, and who saw not that hidden meaning which the legislature have thought it necessary to unfold by a subsequent law. In criminal cases they have been branded with an infamy well merited; and why should the safety of our property stand on a basis less firm than that of our persons? The civilians say, that a law founded on a law of nature, may be retrospective, because it always existed, and a breach of it was criminal, though not forbidden by any human law: but that an institution, merely arbitrary and political, if retrospective, is injurious, since, before it existed, it could not be broken, nor could any person foresee that such an action would, at a future day, be made criminal. Lord Coke has made the same observation on the act of Gloucester, 'nova constitutio futuris formam imponere debet, et non præteritis.' 2 Inst. 95. 292. Now the law of 1727, regulating dispositions of slaves, is an arbitrary law, and cannot therefore be retrospective. The act of 1727, is an acknowledgment of the legislature, that that of 1705, is deficient: now what was the deficiency? Why, that too great power of entailing was given by that act; therefore it is declared that slaves shall not be entailed unless annexed to lands. But where the necessity of this, if, under the act of 1705, they were only personal estate and could not be entailed? The 2nd clause says, 'the meaning of the said act is declared to be,' &c. The 3rd clause says, when any person 'shall sell,' &c. The 5th, 'infants may dispose.' 6th, 'no slaves shall be forfeited,' &c. 7th, 'no administrator hath or shall have power, &c. 8th, 'when a mother shall die intestate,' &c. All these expressions shew it was intended to be future: only the 4th clause indeed is retrospective; but we know the history of that clause, and it concerns not the present case. An inconvenience is to be objected, that great numbers of slaves in this colony are now held

78 *under titles similar to that in dispute, and that, if a judgment should be in favor of the plaintiff, many suits will be immediately brought. Answer. These slaves being in possession, part of the issue

in tail, part of alienees, whatever judgment be now given it will be equally productive of suits. The objection founded on this fact, that great numbers of slaves were entailed between 1705 and 1727, without being annexed to lands, proves it was the general sense of the people who lived nearest the time of making the act, that slaves might be entailed separately; and 'contemporanea expositio est fortissima in lege,' says my Lord Coke. 2 Inst. 11. They take their opinion probably from knowing the sentiments of the legislature. In Burwell's case in G. C. the circumstance of the slaves being annexed to lands was, as I can say, from good authority, never taken into consideration in England; they were considered as if they had been entailed separately; and it was expressly declared, that the act of 1727, should not be retrospective. On the whole, I conclude that our title is good, either under the common law, the statute de donis, or the act of 1705. And that it could not be injured by the act of 1727, since from the expressions in that act, the intention appears to have been that it should be only future; and, being an arbitrary law, it cannot be retrospective.

Mason, for the plaintiff, argued nearly to the same effect; but such observations only, as were new shall be taken notice of. The slaves in dispute were given to our ancestor in tail, without being annexed to lands, by will dated 1718. The donee in tail devised them, in 1755, to the defendant; against whom we bring this action as issue in tail: this is shortly the case. I insist that our title is good; 1st, under the common law; 2nd, under the statute de donis; 3rd, under the act of 1705; and 4th, that it was not impeached by the act of 1727. First, it is a rule that, whensoever any new species of property is introduced, which resembles a property formerly known in the law, the principles of the older are applied to the new. Finch. b. 1. c. 3. max. 24. Thus copyholds are not generally descendible, and so cannot be entailed; but when, by particular customs, they are descendible, all the qualities of other descendible estates are transferred to them: that is, they become entailable, &c. So slaves, though formerly not descendible, yet, when made so by law, immediately assumed the other qualities of descendible estates, that is, they became entailable, &c. Lord Coke, 1 Inst. 20. a. shews what things were not within the statute de donis; to wit, an annuity, office of keeper of the hounds, &c. because they do not savor of the realty; but in all these cases, says he, the donee has a fee conditional, as 79 before *the statute, and by grant, or release, may bar his heir. If then the devise in our case, was of a conditional fee, our ancestor not having aliened, the estate has descended on us: but, say they, he has aliened by will. Answer. This is not such an alienation as will bar the issue; for the rule is, that 'an accruing right is preferred to a last will.' Our claim is per formam doni, which is paramount that of the defendant by the will; the law therefore here splits an instant as in 1 Inst. 185. between a devisee and one who claims by survivor. A devise of an heir loom is void, for the same reason, so of an heriot. This is not such an alienation then as will bar the issue. Second, our title is good under the statute de donis. The word 'tenementum' there, has been construed to extend to every thing savoring of the realty. An office is said to savor of the realty; much rather then shall a slave, who is exercised in tilling the ground. But, third, the act of 1705, has made them a realty itself; surely then, if an estate, which only savors of the realty, may be entailed; a realty itself may. They object, that the 6th clause, having given a power of alienating by word of mouth only, if it is adjudged that they were entailable, they will be entailable by parol. I answer, that before 22 Car. lands might be aliened by parol; and so might, in like manner, be aliened in tail. But it will be said, in the case of lands, livery of seisin was necessary, which was an act of such notoriety as to publish the alienation sufficiently. I answer, that to transfer the property of slaves, whether in fee or in tail, a delivery is also necessary, as appears in Smith v. Smith, 2 Str. 955, where it was ruled that a parole gift without some act of delivery, would not alter the property of chattels. And this delivery of the slaves would have been equally notorious with a livery of seisin of lands. It appears to have been the general opinion, between 1705 and 1727, that slaves might be entailed without lands; and by Finch. b. 1. c. 3. max. 61. 'communis error facit jus?' Fourth, whether the act of 1727, affects this case? If the intention of the legislature was, that this act should be retrospective; yet being iniquitous, it shall not have that effect. The second section says, 'the design of the act of 1705, was and is,' &c. It is absurd to say what was the design; that must be collected from the words. The legislature might establish a new meaning for the future, but not for cases past. When they have enacted a law, their power ceases, they have done their part, and then the judges are to take it up, and say what was the meaning. There have been two cases determined in the general court resembling this, though not accurately. That of Sheeles v. Jones, 1727, in which the act of 1727, was declared not to be retrospective; and Burwell v. Johnson, which was the case of an entail of slaves by 80 *will, before 1727, in which the slaves were entailed separately, though there were lands given in another part of the will, with similar limitations.

Wythe, for the defendant. The question is, 1st. Whether before 1727, a slave could be entailed, without being annexed to lands? 2nd. If he could not, whether he might be conveyed in conditional fee? 1st. The doctrine laid down by the counsel for the plaintiff, is, that every inheritable real

estate was, by the statute de donis, made entailable. If this assertion be true, it follows of consequence that the act of 1705, making slaves a real inheritable estate, did thereby make them entailable; but, if this assertion be not true, and if slaves, though real estate, are yet very different from those estates, which have been adjudged entailable, then that consequence does not follow. And here this previous question becomes necessary, to wit, what estates were entailable under the statute de donis. Estates are divided into, 1st. Inheritances; 2nd. Freeholds; and 3rd. Chattels. The first alone are within the statute de donis. These were either, of lands, or other things. In the 2 Jac. c. 1. it was adjudged, that the dignity of Count of Westmoreland was entailable, within the statute; because it concerned lands. Nevils case, 7 Co. 61. The office of a steward, bailiff, marshall, a sergeantry, or custody of a church, the Earldom of Shrewsbury, entailable; as appears from the same authority. The reason given was, that they concerned lands: from which I infer, that, had they not concerned lands, they could not have been entailed, nor was it necessary the place should be in England, or even in existence. Albemarle, was not in England. There was no such place as Rivers in those days. Part of the dignity consisted in possession. Lord Holt says that they consisted in dignity, office, and possession. If a baronet was named of a particular place, it was entailable. But it may be observed that the statute de donis, having no other effect than to prevent alienations, it was immaterial, as to a dignity, whether it was entailable or not; since, by the common law, it could not be aliened. It appears then, that dignities were not entailable, unless they concerned lands. A warranty might be entailed; so might charters. Copyholds were sometimes held at will only; sometimes were descendible, and were entailable, where the custom had made them so. An advowson might be entailed, so might prædial tithes, which issued out of lands. Seigniories, rents and services were entailable; because by these, the title to the lands was remembered and preserved; and they were to the owner instead of the lands. A common might be entailed, as proceeding from the soil. So might estovers. An use likewise, because, 81 before the statute of uses, it *was an equitable right, and since it is a legal right. An equity of redemption may be entailed, because equity considers the right to the lands to be in the mortgagor, and that the mortgagee has no other title to it than as a pledge for money. A villein in gross was not entailable, nor can any case be produced to prove he was. A villein regardant indeed might, for a reason hereafter to be given. I have here enumerated all the estates capable of being entailed, and they do, I believe, include every inheritable estate, except one, which I shall mention presently. I shall here make three observations. 1st. That the statute de donis describes the things which may be entailed by the words, 'lands, manors, and tenements.' 2nd. That whatever may be entailed under the statute besides lands, concerns lands, is annexed to, exerciseable in, or issuing from lands; or in other words nothing can be entailed but what has its foundation in lands. 3rd. In every case of an entail the præcipe is the proper remedy. The tenant in tail is to have an assise. The issue or remainder man is to have a formedon, in both of which, 'manors, lands, or tenements' must be mentioned. A copyholder, tenant in tail, must have a writ of assise in nature of a formedon. Co. Lit. 60. a. A quare impedit was the remedy for the patron of a church; in which it is alleged he was seised as of freehold: for tithes the same remedy as for lands or tenements. For rents or services an assise lay, alleging he was seised of freehold. So for a common. There are three instances in which the remedies were of a different nature. 1st. A dignity; the reason was, because the person who bore it, could not be deprived of it, as he might of his lands, &c., and consequently, no remedy was necessary to be given, for it could only come before the court incidentally, or by a petition to the King to call him up to the House of Lords, who thereupon became judges, whether he had a right to be so called. The 2nd. is an action for breach of a covenant annexed to, and running with lands entailed, as of warranty, for instance. The 3rd. An action of detinue for charters. The reason of this is, that not the right to the subject entailed, but only appendages to it, to wit, damages, are recovered. A slave cannot be entailed under the express words of the statute de donis. For, 1st. He is not a manor. 2nd. He is not lands. 3rd. He is not a tenement; for this must either be a corporate inheritance, which may be holden of some superior, or it must concern, be annexed to, or exerciseable within some corporate inheritance; this being my Lord Coke's definition of a tenement. Co. Lit. 19. b. Now in the present case, they were not annexed to lands, nor to any corporate inheritance; neither do they, in their nature, concern, or are they exerciseable 82 (for these two expressions *are synonymous) within lands, in the sense intended by my Lord Coke. It has been said indeed, that they labor in the ground, and therefore are exercised and exerciseable in it; but this exposition of the word exerciseable is superficial indeed! Lord Coke applies it to offices annexed or confined to a certain spot of land. Now what analogy is there between an office exercised in a certain territory, and a slave exercised in tilling the earth? Not so much as there is between such an office and a spade. The office of the keeper of the hounds is exerciseable in lands; yet not being confined to any particular spot of lands, it is not entailable. So a slave may be exercised in any lands, or no lands: he may be employed in ploughing the earth, or in ploughing the

ocean; or set to work in manufactures of various kinds. Lord Coke, further says, things are not entailable, because they do not 'savor' of the realty. But this he explains, ubi supra, to mean 'exerciseable.' But, say they, if a thing savoring of the realty is entailable, much rather shall a realty itself. This I shall answer by two observations 1st. That the act of 1705, gives them expressly but two qualities of lands, to wit, descent and dower. 2d. That that act, by making them descendible, according to the manner of lands held in fee simple, did not give them the adventitious or collateral qualities of land. This I shall prove by producing a case of an inheritable realty in England, which is not entailable, viz. a copyhold. The similitude between a copyhold and a slave, is very striking; the former is made real and descendible by custom; the latter by an act of Assembly. Nor does it destroy the resemblance that the one is by law, and the other by custom, for consuetudo est altera lex, and the whole common law is founded on custom. Again, of copyholds there can be no dower; neither would there have been of slaves, had not the act expressly mentioned it, this being a collateral quality of lands. Of copyholds there can be no tenancy by the courtesy of England; no more can there of slaves; this being omitted by the act. Copyholds are not assets to charge the heir on the bond of his ancestor; nor would slaves have been, had not the act particularly provided for it. For this see Brown's case. 4 Co. 24. In Heydon's case, 3 Co. 8. it is expressly declared that the statute de donis does not extend to copyholds, though real and descendible. The same similitude should be preserved here also, that is, neither should that statute extend to slaves. This instance of a real inheritable estate not entailable, proves the falsity of the general position laid down by the adverse counsel. The rule exceptio probat regulam has been much relied on; but it is answered by this observation, that generally the pro-
83 visos in the act *of 1705, either take from slaves such inherent qualities of a real estate, as would have been the consequence of their being made real estate, or give them such collateral qualities as they would not otherwise have had. By a proviso in this act, an heir inheriting slaves from his father, shall account to his brothers and sisters for a proportion of the value. If the legislature intended to make them entailable, then the heir in tail is bound by this proviso, the words of which are general. But, that they could not intend this, is evident. The ruin of the heir would be its certain consequence, since he could not alien the slaves, to enable him to pay the money, and he might perhaps have no other estate. This act was intended to favor the heir, not to ruin him, by making him a purchaser. The argumentum ab inconvenienti can in no case be stronger than in the entailing of slaves. And the inconveniences are so obvious, that the legislature could not but have seen them, and, seeing them, they most surely would have guarded against them, by a proviso, as they have done against others, much less considerable. But the truth is, they did not intend to make them entailable, and therefore no such proviso was thought to be necessary. The inconveniences attending the entailing of lands, have been loudly complained of; but how much greater are those attending entails of slaves! Slaves are transitory and changeable both in the time and place of their existence, and difficult to be traced to the root from which they sprang; and the more so, since having no surname by which different families may be distinguished, no register is sufficient to remove the difficulty. But lands on the other hand are fixed and unalterable. Again, lands cannot be conveyed but by record; but slaves may without record, and even without a deed. The entail of lands, of any value whatever, may be docked in England; and so they may here, if under the value of two hundred pounds sterling: whereas the entail of slaves can never by any method be docked, and these inconveniences will multiply daily, as slaves will be daily multiplying. The case of Burwell and Johnson, is cited against us, because slaves were there adjudged to be entailable under the act of 1705. But in that case lands were devised in the same clause, and by the same words with the slaves, and it was always held, that things annexed to lands might be entailed, as charters, covenants to warrant, &c. But moreover, the thirteenth clause of the act of 1727, confirms the annexations of slaves to lands before that act. 2nd. If it should be adjudged, that they were a fee simple conditional, the inconveniences before complained of will be much increased, because some slaves will then be held in tail, and some in conditional fee.

Slaves held under these two different
84 titles will intermix *beyond a possibility of investigation. This old doctrine, which has lain neglected since the statute de donis, is now, after an interval of five nundred years, brought again into court. It has hitherto been the policy of judges to discourage perpetuities of every kind; but here is an attempt to introduce one in a form, to us, new. 3rd. There is another point in this case on which we rely for success, though the principal question should be determined against us. The act of 1727, says, that where a slave hath been, or shall be conveyed to a feme covert, the property shall vest in the husband. This clause is most clearly retrospective. Now the person under whom Wilkinson claims, and his wife, both survived 1727. In the cases of Jones v. Sheeles and Bruer v. Smith, it was determined, that the property did not vest in the husband, because in each of those cases the wife was dead before the act of 1727.

Pendleton pro defendant, argued to the same effect. He argued, moreover, that the case of the villein cited by Mr. Attorney, from Co. Lit. must have been of a villein

regardant; because he went to the heir; that, if slaves were entailable at all, they were entailable by parol. The consequence of which would be very bad; since a purchaser, could by no industry of his own, be secure in his purchase. That exceptio probat sed non extendit regulam; and that the word 'hereafter' in the act of 1727, respects future constructions, not future gifts.

Attorney General, in reply, observed; that the gentlemen on the other side, by an enumeration of what things were capable of being entailed, had endeavored to draw this conclusion; that nothing was so, unless exerciseable in lands. But a dignity may be entailed, though there be no such place in existence as the one named for its support. There is no such place as Rivers; and there might as well be no Albemarle; since that is in Holland, where an English dignity cannot be exercised. The truth is, dignities are entailable, because of their great honor and importance in the state. An office too, they say, is entailable, because confined to a particular spot of ground; but there was no locality in the office of marshal of England. An equity of redemption is a mere equitable title to redeem something forfeited. But admit their position. Slaves are exerciseable in lands, and therefore may be entailed. The case I mentioned of a villein, must have been of a villein in gross; and Lord Coke says, that a tenant in tail, for life, or at will, is entitled to the possessions of a villein. And if the villein in the hands of an executor, was intended a villein in gross, the villein held in tail, for life, or at will, would be so intended also; as we cannot suppose Lord Coke, would have made
85 a transition so *sudden, from a villein in gross, to a villein regardant. But that a villein in gross might be held in fee, appears clearly from Lit. sect. 182. (So likewise from Co. Lit. 124. b. wherein it is said, there may be a tenant by the courtesy of a villein.) An argument has been drawn from the resemblance between a copyhold and slaves, to prove that, though descendible, they are not entailable. But a copyhold is, in the eye of the law, but an estate at will, and cannot, for that reason, be entailed. They were originally the estates given to villeins, who would have been enfranchised by the gift of a larger estate than at will. In process of time they were allowed to be enlarged. If the act of 1705, intended to give slaves only the two properties of descent and dower, it would only have said they shall 'descend to heirs and widows,' and would not have added, that they shall be real estate. Dower was a collateral right, and therefore did not take place in copyholds. But the act of 1705, declares that the proprietor of slaves shall have every right; which must include collateral rights, as well as others. But a right to entail, is not collateral; every right in the proprietor himself, is lineal; but dower, courtesy and rights in other persons, are collateral. It is objected, that if slaves were entailable alone under the act of 1705, the heir must be accountable for a proportion of the value. But this proves too much; since it equally proves that slaves annexed to entailed lands, must be accounted for by the heir; a position which can never be maintained. Besides the act of 1705, says the 'slaves of an intestate;' which shews they were speaking of such persons only as could make a will and dispose of the slaves thereby: for it would be absurd to say that the value of entailed slaves is not divisible, if the last tenant in tail made a will, and is devisible if he made none; when that will could have no kind of affect on the slaves. In Burwell v. Johnson, say they, the slaves were annexed to lands: but what was that to the purpose? since, in the act of 1705, not a word of entailing by annexation, is mentioned. It is objected that Blackwell, gave some of the entailed slaves from the heir, but gave him others not entailed, which should be taken as a compensation. If so, go into equity and ask such a decree. The last objection was, that the act of 1727, vested the slaves in the husband, because he survived 1727. Answer. That clause speaks not of entailed slaves, but of those only in which the wife had an absolute right. Blair, W. Nelson, T. Nelson, Corbin, Lee, Tayloe, Fairfax and Page, were of opinion for the defendant, that slaves could never be entailed unless annexed to lands. Byrd, Carter and Burwell were of a different opinion.

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86 *Allen, et al. v. Allen, et al.

April, 1769.

Slaves—Reversion In—Right of Younger Children to Share.—A father entitled to a reversion in slaves dies, and afterwards the particular estate, which was for life, falls in. HELD, the heir at law must account to the younger children for a proportion of the value.

Slaves—Hotchpot.—Hotchpot does not take place in dividing the value of slaves.

In this case, one question among others was, whether, where a father entitled to a reversion in slaves dies, and afterwards the particular estate (which here was for life) falls in, the heir at law shall be obliged to account to his brothers and sisters for a proportion of their value? And the court determined he should. It was also insisted that some children by a second wife, (whose mother had by a marriage contract reserved a right of appointing her own slaves at her death as she pleased,) should bring into hotchpot whatever they should get under such appointment, or not be entitled to take with the children of the first marriage, a proportionable part of the value of the father's proper slaves. But the court determined that the right of hotchpot, does not take place in dividing the value of slaves.

Bradford v. Bradford.

April, 1769.

Conterminous Landowner—Procession of Land—How Far Binding.—A procession of land of two conter-

minous landowners is not binding unless they are present or have notice of the proceedings.

This was a dispute between two conterminous land holders, with respect to their boundary. The jury found specially, that the line in truth was as the plaintiff below suggested, but that it had been six times processioned according to the line which the defendant below would establish. They recite the proceedings, before the processioners in hæc verba, which proceedings mentioned that the plaintiff himself was present at the first processioning, but do not say who was present at those subsequent; and they referred it to the court, whether these processionings were binding on the plaintiff? The court below had adjudged that they were not binding; from which judgment the defendant there appealed.

Wythe, for appellant, admitted the hardship of the case on the side of the appellee, but relied on the words of the act of 1710. c. 13. which comprehend this case; on the importance of the method of processioning towards preserving boundaries in quiet; and on the maxim, that institutions tending to promote public utility, must prevail, though injurious in particular instances. He cited a similar institution among the Romans, by them called Terminalia.

Pendleton for the appellee, cited
87 the words of the act, 'that the *processioners should report who were present at the processioning.' He urged that the intention of the act was, that the parties should be present, or at least have notice, and that this should appear in the proceedings: whereas in the present case, it does not appear that the appellee was present or had notice, except at one of the processionings. And the law being hard, and this case particularly so, the judges would not conclude the appellee, unless it appeared that the act was strictly complied with.

Wythe, in reply observed, that the law does not require the parties' presence, only that the church-wardens should publish at church, the persons and times appointed for processioning in every precinct, which was intended to amount to actual notice, and that we should presume this was done.

The judgment below was affirmed.

Gwinn v. Bugg.

October, 1769.

Mulattos—Binding Out by Church Wardens.

The case was this. A Christian white woman between the years 1723 and 1765, had a daughter, Betty Bugg, by a negro man. This daughter was by deed indented, bound by the churchwardens to serve till thirty-one. Before the expiration of her servitude, she was delivered of the defendant Bugg, who never was bound by the churchwardens, and was sold by his master to the plaintiff. Being now twenty-six years of age, and having cause of complaint against the plaintiff, as being illy provided with clothes and diet, he brought an action in the court below to recover his liberty, founding his claim on three points. 1st. That himself having never been bound by the churchwardens, the master of his mother had no right to his service. 2nd. That if he had, yet he had forfeited it by selling him to the plaintiff. 3rd. That if both these points were against him, yet the plaintiff had forfeited his right by his failure to provide him with necessaries. The fact of ill treatment was, I suppose, proved in the court below, for this as well as the defendant not having been bound, was set forth in the record as the grounds of the judgment; from this judgment Gwinn appealed, and it now came on to be argued before the General court.

Pendleton, for the plaintiff. That
88 the defendant is obliged to serve *till thirty-one years of age, a bare state of the several acts of Assembly will evince. The act of 1705, c. 49. s. 18. enacts, that where a white woman shall have a bastard by a negro or mulatto, that bastard shall, by the churchwardens, be bound to serve till thirty-one. It says nothing of the issue of that bastard, who, therefore, by that law were left in freedom. Then comes the act of 1723, c. 4. s. 22, enacting, that where such mulatto bastard, as by law was obliged to serve till thirty-one, shall have a child during her servitude, such child shall serve to the age of thirty-one. This extended the servitude, then, to the second as well as the first generation, and here a binding was not made requisite: the binding of the mother and a birth during her servitude, being sufficient to bring a mulatto of the second generation under the operation of that act. The act of 1753, c. 2. only re-enacts these two acts as far as concerns the present case. To apply this doctrine, then; a Christian white woman has a daughter Betty Bugg, by a negro. Betty Bugg, is thereupon bound according to the act of 1705. Betty Bugg, during her servitude, is delivered of the defendant. On him, therefore, the act of 1723, operates, by declaring that 'where a female mulatto (Betty Bugg) by law obliged to serve till thirty-one, shall, during servitude, have a child (the defendant) such child shall serve till the age of thirty-one.' But some objection will be made, perhaps, from the act of 1764, c. 7. There are only two clauses in that act, which can be cited for this purpose. The first is section 3rd, 'where a white woman has a child by a negro or mulatto, those (that is, the children of the white woman, not the children of a mulatto as the defendant is) hereafter born, or already born and not yet bound, shall be bound to serve, the males till twenty-one, the females till eighteen.' This clause then is of no avail to the defendant. The second is in section 4th. 'The children hereafter to be born (not those already born like the defendant,) of mulatto women during servitude, shall

serve, the males till twenty-one, the females till eighteen.' The defendant's mother then was properly reduced to servitude by an actual binding under the act of 1705; himself is put into that condition without a binding by the act of 1723. Nor is he relieved by the act of 1764, because he is not the child of a white woman, and because he is not the son of a mulatto born after the passing of that act. Then he urged that the appellant's right is not forfeited by ill treatment of the defendant. It might well be questioned whether the clauses in the act of 1705, which were reenacted in 1753, c. 2. s. 5. 6. ordaining that servants, by act of Parliament, indenture or custom, shall be comfortably provided with necessaries and humanely treated; 89 and on default herein *giving the court a power to sell the servant and deliver the money to the master; it might be questioned, I say, whether this act was intended to extend to the children of mulattoes, who are bound neither by act of Parliament, indenture or custom, but by act of Assembly. The humanity of courts, however, has extended this act to their relief, and I shall not draw it now into question. It suffices for my purpose that emancipation is not the remedy provided by the act of Assembly in case of ill treatment. The legislature, paying a just regard to the right of the master, while they extended their care on behalf of the servant, have directed, that on the first complaint, the court shall prescribe to the master what treatment is proper for the condition of his servant. If this admonition is disregarded, a second remedy is provided against the said complaint, which is a sale of the servant, and payment of the money to the master. Here the servant is relieved, by a sale to a kinder master, and the master's property little violated by its commutation into the form of money, and both of these are the purposes of substantial justice. But how far have they been regarded by the judgment of the court below? For the first, to be sure, for the comfortable state of the servant, that judgment has most liberally provided, by taking him from his master and subjecting him to no other. But how are the rights of the master preserved? Not at all. His servant is taken from him, and no equivalent returned. This judgment then, disregarding the rights of the master, is substantially different from that prescribed by the act of Assembly, and is therefore erroneous.

Mason, for the defendant, relied principally on the second point; that the former master of the defendant could not transfer him; and so the plaintiff had no right. He insisted there was a trust in the master coupled with his interest, that, though he was entitled to service, he was also bound to maintain comfortably. That where ever there was a trust it could not be transferred, and instanced the case of an apprentice, and one of the court remembered a case of ——— ——— where this very point was so adjudged. Yet judgment reversed, and quære, if the great clearness of the first and third points, which alone were assigned in the record as the grounds of the judgment, might not prevent the court from attending minutely to the second, which seems to be in favor of the pauper.

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90 *Howell v. Netherland.

April, 1770.

Mulattoes—Binding Out by Church Wardens.

This case was referred to the determination of the court, on facts stated by the counsel for both parties, which were, That the plaintiff's grandmother was a mulatto, begotten on a white woman by a negro man, after the year 1705, and bound by the churchwardens, under the law of that date, to serve to the age of thirty-one. That after the year 1723, but during her servitude, she was delivered of the plaintiff's mother, who, during her servitude, to wit, in 1742, was delivered of the plaintiff, and he again was sold by the person to whom his grandmother was bound, to the defendant, who now claims his service till he shall be thirty-one years of age. On behalf of the plaintiff it was insisted, 1st. that if he could be detained in servitude by his first master, he yet could not be aliened. But, 2nd. that he could not be detained in servitude.

I. It was observed that the purpose of the act was to punish and deter women from that confusion of species, which the legislature seems to have considered as an evil, and not to oppress their innocent offspring. That accordingly it had made cautious provision for the welfare of the child, by leaving it to the discretion of the churchwardens to choose out a proper master; and by directing, that that master should provide for it sufficient food, clothing, and lodging, and should not give immoderate correction. For these purposes the master enters into covenants with the churchwardens; and to admit he had a power after this to sell his ward, would be to admit him a power of discharging himself of his covenants. Nor is this objection answered by saying that the covenants of the first master are transferred to the alienee, because he may be insolvent of the damages which should be recovered against him, and indeed they might be of such a nature as could not be atoned for, either to the servant or to society; such, for instance, would be a corruption of morals either by the wicked precept or example of the master, or of his family. The truth is, the master is bound to the servant for food, raiment and protection, and is not at liberty, by aliening his charge, to put it out of his own power to afford them when wanting. The servant may as well set up a right of withdrawing from his master those personal services which he, in return, is bound to yield him. Again, the same trust which is created by express compact in favor of the first mulatto, is extended by

the law to her issue. The legislature confiding that the choice of a master for the first mulatto, by the churchwardens, would be prudent, vest the issue in him also without further act to be done: and the
91 master, at the time he takes *the mother, knowing that her issue also is to be under his servitude on the same conditions, does by accepting her, tacitly undertake to comply with those conditions raised by the law in their favor. These servants bear greater resemblance to apprentices than to slaves. Thus, on the death of the first master, they go to his executor as an apprentice would, and not to his heir as a slave. The master is chosen, in both cases, from an opinion of his peculiar propriety for that charge, and the performance of his duty in both cases is secured by mutual covenants. Now it is well known that an apprentice cannot be aliened; and that, not from any particular provision of the legislature, but from the general nature of the connection and engagements between them: there being, as was before observed, a trust reposed in the diligence and discretion of the master; and a trust by our law cannot be assigned. It adheres to the person as closely as does his integrity, and he can no more transfer the one than the other to a purchaser. But,

2nd. It was insisted, that the plaintiff, being a mulatto of the third generation, could not be detained in servitude under any law whatever: the grand position now to be proved being that one law had reduced to servitude the first mulatto only, the immediate offspring of a white woman by a negro or mulatto man; that a second law had extended it to the 'children' of that mulatto; but that no law had yet extended it to her grand children, or other issue more remote than this. To prove this, a general statement of these laws was premised. Act of 1705, c. 49. s. 18. 'If any woman servant shall have a bastard child, by a negro or mulatto, or if a free Christian white woman shall have such bastard child by a negro or mulatto; in both the said cases the churchwardens shall bind the said child to be a servant until it shall be of thirty-one years of age.' In other parts of the act, it is declared who shall be slaves, and what a manumission of them; from sect. 34. to 39. are regulations solely relative to slaves, among which is sect. 36. 'Baptism of slaves doth not exempt them from bondage; and all children shall be bond or free according to the condition of their mothers and the particular directions of this act.'

Act 1723. c. 4. s. 22. 'where any female mulatto, or Indian, by law obliged to serve till the age of thirty or thirty one years, shall, during the time of her servitude, have any child born of her body, every such child shall serve the master or mistress of such mulatto or Indian, until it shall attain the same age, the mother of such child was obliged, by law, to serve unto.'

In 1748, the Assembly revising and digesting the whole body of our acts of Assembly, in act 14. s. 4. incorporate the clauses before cited, without any addition or alteration. And in 1753, c.
92 *2. s. 4. 13, the law of 1748, is re-enacted with some new matter which does not affect the present question.

Now it is plain the plaintiff does not come within the description of the act of 1705, s. 18; that only reducing to servitude 'the child of a white woman by a negro or mulatto man.' This was the predicament of the plaintiff's grandmother. I suppose it will not be pretended that the mother being a servant, the child would be a servant also under the law of nature, without any particular provision in the act. Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called personal liberty, and is given him by the author of nature, because necessary for his own sustenance. The reducing the mother to servitude was a violation of the law of nature: surely then the same law cannot prescribe a continuance of the violation to her issue, and that too without end, for if it extends to any, it must to every degree of descendants. Puff. b. 6. c. 3. s. 4. 9. supports this doctrine. For having proved that servitude to be rightful, must be founded on either compact, or capture in war, he proceeds to shew that the children of the latter only follow the condition of the mother: for which he gives this reason, that the person and labor of the mother in a condition of perfect slavery, (as he supposes to be that of the captive in war) being the property of the master, it is impossible she should maintain it but with her master's goods; buy which he supposes a debt contracted from the infant to the master. But he says in cases of servitude founded on contract, 'The food of the future issue is contained or implied in their own maintenance, which their master owes them as a just debt; and consequently their children are not involved in a necessity of slavery.' This is the nature of the servitude introduced by the act of 1705, the master deriving his title to the service of the mother, entirely from the contract entered into with the churchwardens. That the bondage of the mother does not under the law of nature, infer that of her issue, as included in her, is further obvious from this consideration, that by the same reason, the bondage of the father would infer that of his issue; for he may with equal, and some anatomists say with greater reason, be said to include all his posterity. But this very law admits there is no such descent of condition from father to child, when it imposes servitude on the child of a slave, which would have been unnecessary, if the condition had descended of course. Again, if it be a law of nature that the child shall follow the condition of the parent, it would introduce a very perplexing dilemma; as where the one parent is free and the other a slave. Here

93 the *child is to be a slave says this law by inheritance of the father's bondage: but it is also to be free, says the same law by inheritance of its mother's freedom. This contradiction proves it to be no law of nature.

But the 36th section of the act will perhaps be cited as entailing the condition of the mother on the child, where it says, that 'children shall be bond or free according to the condition of the mother, and the particular direction of this act.' Now that the word 'bond' in this clause relates to 'slaves' only, I am justified in asserting, not only from common parlance, but also from its sense in other parts of this very act. And that on the other hand it considers those who were to be free after a temporary servitude, as described under the word 'free.' In this very section, 36, it says, 'baptism of slaves does not exempt them from bondage.' Here then in the very sentence now under consideration, the word bondage is used to express perpetual slavery; and we cannot conceive they meant to use it in two different senses in the same sentence. So in clause nineteen of the same act, it says, 'to prevent that abominable mixture of white men or women with negroes or mulattoes, whatever white man or woman being free, shall intermarry with a negro or mulatto, &c. shall be committed to prison, &c.'' Now unless the act means to include white servants and apprentices under the denomination of 'freemen,' then a white servant or apprentice may intermarry with a negro or mulatto. But this is making the act miss of its purpose, which was 'to prevent the abominable mixture of white men or women with negroes or mulattoes.' But to put it out of dispute, the next clause (twenty) says that 'if any minister shall, notwithstanding, presume to marry a white man or woman with a negro or mulatto,' he shall incur such a penalty. Here then the prohibition is extended to whites in general, without saying 'free whites,' as the former clause did. But these two clauses are plainly co-extensive; and consequently the word 'free' in the nineteenth, was intended to include the temporary white servants taken in by the twentieth clause, under the general appellation of 'white men or women.' So that this act where it speaks of bondmen, means those who are 'perpetual slaves,' and where of 'freemen,' those who are to be free after a temporary servitude, as well as those who are so now. Indeed to suppose, where the act says, 'the children of a bondwoman shall be bond,' that it means 'the children of a temporary servant shall be temporary servants,' would infer too much: for it would make temporary servants of the children of white servant women, or of white apprentice women, which yet was never pretended. The conclusion I draw from this, is, that since the tempo-
94 rary *service of a white woman does not take from her the appellation of a freewoman, in the sense of this act, and her children under this very clause are free, as being the children of a free woman, neither does the temporary servitude of a mulatto exclude her from the same appellation, and her children also shall be free under this clause, as the children of a free woman. So that the meaning of this clause is, that children shall be slaves, where slavery was the condition of the mother; and free, where freedom either immediate or remote, was her condition: excepting only the instance of the mulatto bastard, which this act makes a servant, though the mother was free. This is the case alluded to by the last words of the clause, 'according to the particular direction of this act.' Because in this case, the act had made a temporary servant of the child, though the mother was not so.

Then comes the act of 1723, directing that where any female mulatto or Indian, by law obliged to serve till* thirty or thirty one, shall have a child during her servitude, such child shall serve the same master to the same age. This act does itself prove that the child was not obliged to serve under the former law of 1705, which had imposed servitude on the mother; and consequently that the clause 'children shall be bond or free, according to the condition of the mother,' affected the children of slaves only. For wherefore else was this law made? If the children of a mulatto held in temporary servitude were to follow the condition of the mother, and be temporary servants under the law of 1705, that of 1723, was wholly unnecessary. But on the contrary, when we find an Assembly within eighteen years after the law of 1705, had been passed, the one half of whom would probably be the same members who had passed that law, when we see these people I say, enacting expressly that the children should be temporary servants, it is a strong proof the makers of the first law had not intended they should be so. Expositio contemporanea est optima, is a maxim in our law, because such exposition is supposed to be taken from the makers of the law themselves, who best knew their own intention; and it is doubly exclusive, where the makers themselves passed a new act to testify their intention. So that I hold it certain, the act of 1705, did not extend to the children of the first mulatto, or that of 1723, would not have been made.

That the act of 1723, did not extend
95 to the plaintiff, is apparent *from its words. 'Where any female mulatto by law obliged to serve till thirty one (that is, the plaintiff's grandmother) shall during the time of her servitude, have a child born of her body (that is, the plaintiff's mother) such child shall serve till thirty one.' This act describes the plaintiff's mother then as

*This refers to an act of Ass. 1670, c. 12. which had enacted 'that all servants not being christians, imported into this country by shipping, shall be slaves for their life-time, but what shall come by land shall serve, if boys and girls, till thirty years of age, if men and women, twelve years and no longer.'—Edition 1829.

the subject on which it meant to operate. The common sense of mankind would surely spare me the trouble of proving the word 'child' does not include the grandchild, great-grandchild, great-great-grandchild, &c. in infiniatum. Or if that would not, the act itself precludes me, by declaring it means only a 'child born of her body.' So that as the law of 1705, has made a servant of the first mulatto, that of 1723, extends it to her children.

The act of 1748, is the next in course. At this time all our acts were revised and digested, and sent in one volume to receive his Majesty's approbation. These two laws being found to be on the same subject, were then incorporated without any alteration. This however, could not affect their meaning, which is still to be sought after by considering the component acts in their separate state. At any rate it cannot affect the condition of the plaintiff, who was born in 1742, which was six years before it was made. The same may be said of the law of 1753, which is copied from 1748, with only the addition of some new matter, foreign to the present question. So that on the laws of 1705, and 1723, alone, it is to be determined; with respect to which I have endeavored to shew;

That the first of them subjected to servitude, the first mulatto only.

That this did not, under the law of nature, affect the liberty of the children,

Because, under that law we are all born free.

Because, the servitude of the mother was founded on compact, which implies maintenance of her children, so as to have them under no obligation to the master.

And because, this descent of condition from parent to child, would introduce a contradiction where the one parent is free, and the other in servitude.

That as little are they affected by the words of the act, 'children shall be bond or free, according to the condition of the mother.'

Because that act uses the word 'bond,' so as to shew it means thereby those only who are perpetual slaves, and by the word 'free,' those who are entitled to freedom in præsenti or in futuro; and consequently calling the mother 'free,' says her children shall be 'free.'

96 *Because it would make servants of the children of white servants or apprentices, which nobody will say is right.

And because the passing the act of 1723, to subject the child to servitude, shews it was not subject to that state under the old law.

And lastly, that the act of 1723, affects only 'children of such mulattoes,' as when that law was made were obliged to serve till thirty-one; which takes in the plaintiff's mother who was of the second generation, but does not extend to himself who is of the third.

So that the position at first laid down is now proven, that the act of 1705, makes servants of the first mulatto, that of 1723, extends it to her children, but that it remains for some future legislature, if any shall be found wicked enough, to extend it to the grand-children and other issue more remote, to the 'nati natorum et qui nascentur ab illis!'

Wythe, for the defendant, was about to answer, but the court interrupted him and gave judgment in favor of his client.

Godwin et al. v. Lunan.

October, 1771.

General Court*—Jurisdiction of Ecclesiastical Matters.—The General Court has ecclesiastical Jurisdiction, and may censure, or deprive a minister of the gospel of his office if sufficient cause be shown.

The plaintiffs were churchwardens and vestrymen of the upper parish, in the county of Nansemond, and filed a libel in the General court, as a court of ecclesiastical jurisdiction, against the defendant, charging that he was minister of the gospel of Christ, regularly ordained, according to the rites of the church of England; that he was received to the care of the said parish; that he was of evil fame and profligate manners; that he was much addicted to drunkenness, in so much, as to be often drunk at church, and unable to go through divine service, or to baptize or marry those who attended for those purposes; that he officiated in ridiculous apparel unbecoming a priest; that he was a common disturber of the peace, and often quarrelling and fighting; that he was a common and profane swearer; that on the 10th of July 1767, and at other times, he exposed his private parts to view in public companies, and solicited negro and other women to fornication and adultery with him; that he neglected the parochial duties of performing divine service, preaching and administering the sacrament of the Lord's supper; that he had declared he did not believe in the revealed religion of Christ, and

97 cared not of what religion he *was so he got the tobacco, nor what became of the flock so that he could get the fleece. Wherefore the libellants prayed that the said Patrick Lunan might be corrected, punished and deprived, or otherwise, that right and justice might be administered. The defendant pleaded to the jurisdiction of the court, and on that plea it came to be argued in October 1771.

Wythe, for the libellants, and in support of the jurisdiction, read the fourth section of the act of Assembly, 1748, c. 6. copied from the act of 1705, c. 19. s. 5. declaring the jurisdiction of the General court in these words, 'That the said General court shall take cognisance of, and are hereby declared to have power and jurisdiction to hear and determine, all causes, matters and things whatsoever, relating to or concerning any person or persons, ecclesiastical or civil, or to any persons or things of what

*See monographic *note* on "Jurisdiction" appended to Phippen v. Durham, 18 Gratt. 457.

nature soever the same shall be, whether brought before them by original process, appeal from any inferior court, or by any other ways or means whatsoever.' And that the intention of the legislature was as general as their words, he produced every proof of which a matter so plain could admit. These arguments were not taken down, but their whole scope was to prove the General court possessed ecclesiastical jurisdiction, which, as he took it for granted, proved that it had a power of depriving ecclesiastics.

I was of* counsel for the libellant also, and though I thought the ecclesiastical jurisdiction of the court established beyond a doubt, yet I conceived it did not follow thence that they might deprive the defendant of his parish, because visitation and deprivation are no parts of the office of an ecclesiastical judge. To prove this it was proposed,

To enquire into the first establishment of Christian churches in Great Britain;

To develope their several kinds and constitutions;

To see who is entrusted with their care and visitation; and to apply the principles which this enquiry would revolve to the parochial churches of our own country.

On the first introduction of Christianity into Great Britain, it is certain there were in parochial divisions. The bishops and their clergy lived in common, and occasionally sent out itinerant preachers, to those places where the people seemed disposed to receive them. But when the number of converts became considerable, and the tract of country they occupied ex-
98 tensive, this occasional *mission was found inconvenient, and a division into districts or parishes took place. This is supposed by some to have been in the time of Archbishop Honorius, anno, 636. But Mr. Selden and others think it of later origin. It is not pretended that this division was then made, as it now remains, into small parishes: it is probable that at first they were few and large, till time and the progress of conversion, made it necessary to divide and subdivide them. 3 Burn's Eccles. Law, 58.

The King, his great lords and thanes, for the accommodation of their tenants, having built churches on their manors, obliged their tenants to pay tythes to these churches: for though a law of Ethelwolf, so early as the year 1854, (Hume's History of England) had given tythes to the clergy, yet it left the people at liberty to pay them where and to whom they pleased; a grievance to the drones among the ecclesiastics, not entirely rectified till a law of King Edgar. c. 1. obliged them to pay them to the mother church of the parish. 'Dentur omnes decimæ primariæ, ecclesiæ ad quam parochia pertinet.' 1 Bel. 112. The church being situated then on the soil of the lord, being built by himself, and the tythes paid from his tenements and tenants, gave him a natural right to employ any clerk for the celebration of divine service, whom he should choose. 1 Inst. 119. b. The same circumstances would give him a right to remove the clerk, whenever he should become deficient in duty. Hence arose the rights of donation, or the disposition of church livings, by laymen. 1 Bl. 111; Gibs. 819; Watson. c. 15.

In process of time, however, an encroachment was made by the bishops, on some of the lay patrons who possessed churches of the donative kind. They insisted, and in some instances prevailed on the patron, to give the bishop a right of previously examining the person to whom the church was to be given. For this purpose the patron was to present him to the bishop, who on examination admitted him able, and instituted him into the cure, or refused him altogether; and a maxim was soon established of 'once presentative and always presentative.' 1 Inst. 344. a. This innovation is said by Selden, to have been introduced by that pious saint and martyr Thomas a'Becket, in the time of Henry II. Seld. tyth. c. 12. But Lord Coke, seems to think it was not done till the time of Pope Innocent III., which was in the reign of our John. 3 Inst. 201. And thus was introduced a second class of churches distinguished by the name of presentatives.

Of the residue of the parishes, after the donatives and presentatives were taken off, the bishops and clergy still retained the care, and appointed persons to officiate at the several churches. These
99 *churches, they doubtless, sometimes built themselves, and sometimes procured leave to convert the old British temples into Christian churches, and so may, in some degree be considered as the founders of them. 3 Bum. E. L. 59. Light as this foundation was, it gave them some color for collating the clerk, and this having been exercised by them from the infancy of Christianity, has acquired the force of immemorial custom, and given reality to the right now known by the name of collation. So that at present, churches are comprehended as Dr. Blackstone rightly says, under the classes of donatives, presentatives and collatives. 2 Bl. 22. Donatives are those churches originally founded and endowed by the crown or a lay subject, or perhaps by both, which lie merely in the gift of the lay patron, whose deed of donation is an absolute investiture of the clerk, without presentation to the bishop or any other ceremony. Presentatives are churches originally founded in the same manner by a lay patron, and which, though at first donatives, were by encroachment of the bishops subjected to presentation to them for their examination, admission, or refusal. The reasons of refusal, are, however, examinable by the temporal courts on an action of

*This circumstance is the apology for the little justice done to the arguments of the other counsel in this case; being prevented taking them down minutely by the necessity of considering in the instance, how they might be answered.—Edition 1829.

Juare impedit, if brought by the patron. 2 Inst. 631. Collatives are those remnants of the old parishes, left after the King and great men had taken off their manors, the right of collating to which, is by immemorial custom, vested in the bishop. Of the donative and presentative church, the lay founder is patron; a right acquired by the acts of foundation (fundi-datio) and endowment (donatio). Of the collative church the bishop is patron, because he is quasi the founder of that, having built it himself, or been principally instrumental in procuring it to be built, or applied to the purpose of religion. See 1 Bl. 111. 112. 113; 2 Bl. 21. 22. 23. 24; 3 Inst. 201.

Having investigated the nature of the several kinds of churches, and shewn the origin of the rights of patronage, it remains to enquire what these rights are. 1st. Nomination, or the right of naming the clerk. 2nd. Donation or induction, which is the investing with actual possession. 3rd. Visitation, which is the superintending his conduct after he is in possession. The latter is the object of the present enquiry; as it includes deprivation; which is only one of the higher degrees of punishment exerciseable by the visitor. So said my Lord Holt, in the case of the Bishop of St. Davids v. Lucy, Salk. 134. 'By allowing his power to visit, all is admitted; for he that may visit, may deprive as well as censure, these being but several degrees of ecclesiastical punishment; and by the 26 Henry VIII., and the 1 El. c. 1. the only power given to the ecclesiastical commissioners was to
100 visit, *without a word of deprivation, yet they were always allowed a power to deprive.' So that the visitor of the church, whoever he be, is the person empowered to deprive the incumbent. With respect therefore to the right of visitation, as it is one of the rights of patronage arising from foundation and endowment, so it will, in general, be found coupled with them. Thus in collative churches, the bishop alone visits, he having, in some degree, been the founder of the church. In a donative church, the patron is visitor, because he originally founded the church, and so its constitution is the work of his hands; a point which I shall presently incontestibly prove. In presentative churches indeed, the right of continuing to superintend, or in other words to visit, seems to have been encroached on, when the right of approving the nominee was first acquired to the bishop. 1 Mod. 12. It might, perhaps, be thought that if the bishop was the proper person to judge of the fitness of the clerk, he would be the proper person to judge also how long that fitness continued. But whatever may be the cause why the presentative church varies, in this instance, from the general rule, 'that the right of visitation follows the foundation,' is immaterial, because it will be shewn that our churches are donatives, to the visitation of which, therefore, I shall confine my future enquiries. Lord Holt, in his argument in the case of Philips v. Bury, Holt's Rep. 724, expresses himself in these words: 'But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and therefore, if there be no visitor appointed by the founder, I am of opinion that the law doth appoint the founder and his heirs to be visitors. The founder and his heirs are patrons, and not to be guided by the common known laws of the kingdom. But such corporations are, as to their own affairs, to be governed by the particular laws and constitutions assigned by the founder. It was said, the common law doth not appoint a visitation at all; I am of another opinion; the law doth, in defect of a particular appointment, make the founder visitor; if he is silent during his own time, the right will descend to his heirs. Yelv. 65. and 2 Cro. 60. So 8 Edward III., 70. and 8 Ass. 29. So that patronage and visitation are necessary consequences, one upon another. For this visitatorial power was not introduced by any canons or constitutions ecclesiastical; it is an appointment of law; it arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect their actions, and regulate their behavior, as he pleaseth.

Indeed, where the poor are not incor-
101 porated, according to the case *in 10 Co. there is no visitatorial power; because the interest of the revenue is not vested in them: but where they are incorporated, there, to prevent all perverting of the charity, there is by law a visitatorial power: and it being a creature of the founder's own, it is reason he and his heirs should have that power, unless they please to devolve it elsewhere.

'In our old books, deprived by patron, and deprived by visitor, are all one. For it is a benefit that naturally springs out of foundation; and it is in his power to transfer it to another.' And so in 2 Jur. Eccles. 473. by Twisden. 'Whenever there is a cure of souls, the church is visitable, either by the bishop if it belong to him; if to a layman he must make delegates, if to the King, my Lord Keeper does it.' And he cites 1 Mod. 12. And the author adds, 'I presume the Judge, in this case, is to be understood, as to the man's making delegates, to mean if he finds himself unequal to his duty, then he is bound in conscience to delegate commissioners qualified for it; but not that he may not do it himself, though he be really able; for it is to be observed, if his commissioners do otherwise than he is convinced in his conscience they ought, he may still undertake and determine it himself, according to conscience, and as he may so take it up. I conceive, no reason can be shewn, why he cannot do it in the first instance; for his commissioners are but in aid of him, and I conceive, in this case, his power, though

more absolute, may be compared to the Ordinary's authority, who, though ordinarily he judges by his Chancellor, or other official; yet he may sit himself and determine matters within his limited jurisdiction, if he pleases, and have, as is to be presumed, abilities.' Moore, 765; Fayrechild v. Garye. 'Pasch. 3 Jac. En bank le roy, surun special verdict fuit adjudge que l'incumbent dun benefice donative poit resigner a son patron, et que il esteant del foundacon le Patron est auxi de son Visitation et correction, et l' ordinary n' ada faire ove luy. Ass. 29. and 32.' S. C. Cro. Jac. 63; S. P. 1 Mod. 90; Dean of Ferne's case, Dav. 44. a. 46. b. 47. a. And by Co. Lit. 344. a. 'A church parochial may be Donative and exempt from all ordinary jurisdiction, and the incumbent may resign to the Patron, and not to the Ordinary; neither can the Ordinary visit, but the Patron by commissioners to be appointed by him.' So that this much is certain, that in donative churches the right of visitation is in the Patron. And here we must note that in the case of the King's donatives, he does not visit in person, but may make commissioners for that purchase; and if he does not make them, his Chancellor visits ex officio for him. Thus by F. N. B. 42. a. 'The King may have a prohibition directed to the Ordinary, that he shall not visit the hospitals,
102 *which are of the King's foundation, or of the foundation of his predecessors; because that the Chancellor of England ought to visit them and no other. And so is it of the King's or his progenitors free chapels, no Ordinary shall visit them, but the Chancellor of England.' S. P. Dav. 46. b. 'If the King doth found a church, hospital, or free chapel, donative, he may exempt the same from ordinary jurisdiction, and then his Chancellor shall visit the same. Nay, if the King do found the same without any special exemption, the Ordinary is not, but the King's Chancellor, to visit the same.' Co. Lit. 344. a. But 'the King may, if he pleases, make a special commission.' 6 H. 4. 14; Dy. 273. As in the case of Waldron v. Pollard, Dyer, 273, the King gave a commission to visit his donative. So in the case of the college of William and Mary in this country, which is of royal foundation, the King did by his charter appoint commissioners for the purpose of visitation, and prescribed the rules for keeping up a perpetual succession of them. So that it appears that the patron of a donative is visitor of right, and where the King is patron, he may appoint commissioners, but if he does not, his Chancellor visits ex officio for him. And indeed, it is worthy the attention of this court, that if as an ecclesiastical court they should take on them to visit our clergy, and it should appear they are not visitable by any ecclesiastical court, the error is not excused by the law in this as in other cases, where a judge happens to be mistaken in his opinion, but he incurs the penalties of a premunire, which are a forfeiture of property, outlawry, and perpetual imprisonment of the person. These were first introduced by the stat. 16. R. 2. for drawing causes of temporal cognisance (and all cases of advowsons are tryable by the temporal courts only) 'in curiam Romanam vel alibi.' The word 'alibi' has been construed to extend to any ecclesiastical court. Thus in 12 Co. 38. 'For as it was resolved by all the Justices, Pasch. 4 Jac. reg. est contra caronam et dignitatem regiam, when any ecclesiastical Judge doth usurp upon the temporal law, because, as in all those writs it appareth, the interest or cause of the subject is drawn ad aliud examen, that is, when the subject ought to have his cause ended by the common law, whereunto by birthright he is inheritable, he is drawn in aliud examen (viz.) to be decided and determined by the ecclesiastical law; and this is truly said contra coronam et dignitatem regiam. And this appears by all the prohibitions (which are infinite) which have been directed to the high commissioners and others, after the said act. By 1 Eliz. a fortiori, he who offends in a premunire shall be said to offend contra coronam et dignitatem regiam. And this in effect answers to all the aforesaid objections; but yet other particular answers shall be given to every of them.
103 *'As to the third, although the court by force of high commission is the court of the King, yet their proceedings are ecclesiastical: and for this, if they usurp upon the temporal law, this is the same offence which was before the said act of 10 Eliz. For this was the end of all the antient acts, that the temporal law shall not in any manner be emblemished by any ecclesiastical proceedings.

'As to the fourth, although it be a new court, yet the antient statutes extend to it within this word alibi, and divers new Bishopricks were erected in the time of Henry VIII., and yet there was never any question, but that the antient acts of premunire, extended to them.' And in Bro. Abr. I find it expressly determined to be a premunire to call the incumbent of a donative before an ecclesiastical visitation. 'Per aliquos benefice donative per le patron tantum est lay chose et levesque ne visitera, et ideo ne deprivera, et donque sil mella in ce il est in le case de premunire, et in ce case fuit Barloo evesque de Bathe tempore. E. 6. Et fuit arct de obteiner un pardon, eo que il avoit deprive le deane de Welles que fuit un donative per letters patents le roy per acte de parlament ent fait, tamen 8 E. 3. supra ne adjudge. (8 Ass. p. 29.)' Bro. Abr. Permunire 21. So that my conclusions from the premises, so far as necessary in the present question are, That donative churches, being originally founded by a lay-patron, and being still subject to his donation, are likewise subject to his sole visitation, the ecclesiastical judge having no right to intermeddle: and again, That if the patron be a subject, he may visit either in person or by commissioners; if he be the King, he may also

appoint commissioners, but if he make no appointment, the Chancellor visits ex officio.

Our last enquiry is, To what class belongs the churches of our government? are they collatives? are they presentatives? or are they donatives? Collatives they are not: because these were described as having existed immemorially, and been all that time disposed of by the bishop, which immemorial usages had confirmed the right in law. But our parishes pretend to no immemorial existence, for that would make them older than our government itself: they have been erected by acts of Assembly long within memory, to be found by any one who will recur to our records. Nor was there ever an instance of collation to one of them by a bishop. 'If an act of Parliament make a particular district a particular separate and distinct parish, the jurisdiction of the ecclesiastical court does not attach upon it, for this clear reason, that it was not such immemorially. Parish St. John, Clerkenwell, 9 Geo. 2 B. R.' 2 Jur. Eccl. 348. Neither are our churches of the presentative kind; because of these the distinguishing characteristic
104 *is that, though of lay foundation, yet the bishop has acquired a right of having the clerk presented for his examination, admission, or refusal. But no such right was ever pretended in our churches, nor was there ever an instance in them of presentation to a bishop. But they are of the donative kind. These were said, 1st. to have been founded by lay-men; 2nd. not to be subject to presentation to a bishop; 3rd. to lie purely in the gift of the patron. Now let us see if these characters are not applicable to our churches. The act of Assembly, 1661, c. 1. directs that a church shall be built in every parish, and c. 2. that the expenses of building and keeping it in repair, provision for the poor, and maintenance of the minister, be levied on the people of the parish; c. 3. that there be a glebe laid out in every parish, and a convenient house built for the abode of the minister; and that a maintenance be provided for him, which shall be worth eighty pounds per annum, besides his perquisites and glebe. The act of 1696, c. 11. instead of the £80 given the minister by that of 1661, c. 3. gives him sixteen thousand pounds of tobacco, besides his perquisites, to be levied 'by the vestries in their respective parishes;' and lastly the act of 1748, c. 34. (old ed'ns.) sect. 1. confirms this salary to them, to be levied by the vestry 'upon the titheable persons in their respective parishes;' and sect. 5. directs that the glebe shall contain two hundred acres of good land at the least, and that there shall be built on it a convenient mansion house, kitchen, barn, stable, dairy, meat house, corn house, and garden, the expenses of which are to be levied on the titheable persons in the parish. Here it might be thought prima facie perhaps, that as the parishoners pay the money they are the founders and endowers. But a little attention will, I think, discover this to be a fallacy. The parishoners are indeed the persons ordered to furnish the money; but the erection of the parishes and gift of the salary, or in other words, the foundation and endowment of the church, is the act of the legislature. They direct an officer to levy sixteen thousand pounds of tobacco on the titheable persons of the parish. As soon as it is in his hands it is the money of the public, and then they order him to pay it to the minister of the parish, just as if the founder of a church should endow it with an annuity which, by his charter of donation, should be payable out of his manor of Blackacre: his tenants of that manor, though they furnished the money, would hardly be considered as the founders and endowers. Suppose the legislature, instead of directing the payment of these expenses to be levied on the particular parishoners, had ordered the payment out of the public purse; the foundation and endowment would surely then have been their acts: but what difference
105 can it produce, *if instead of ordering the parish collector to pay the money to the treasurer, and him again to the minister, they adopt the shorter method of making the collector pay it immediately to the minister. Our own country furnishes a decisive refutation of this notion. The college of William and Mary is endowed with duties on skins, furs, liquors, tobaccos, paid by the exporters and importers, though given by the legislature. Yet was it never supposed, that that college was founded or endowed by the exporters or importers of these commodities. As little then can the parishoners, though the parochial taxes be assessed on them, be called the founders and endowers of our churches. The truth is, the parish is erected, the church and its soil given, and also the endowment, by the legislature, or in other words by the community whom they represent. Now that is a civil, not an ecclesiastical body. The churches are therefore of lay foundation. Again, if we consider the community, as made up of King and People, the King will then be the patron of our churches, it being a known branch of the royal prerogative, that where the King and his subjects are joint founders, the rights of patronage vest in the King. 1 Bl. 481. Or if we consider it in a constitutional point of view, the same consequence will be evolved. For whereever an act of Parliament or of Assembly erects a new office, without prescribing the particular mode of appointing the officer, it belongs to the King to make the appointment. And for this reason; that possessing the executive power of the laws, it is his peculiar duty to see such act carried into execution, which cannot be unless an officer is appointed. 1 Bl. 272. On this principle, is almost every officer in Great Britain, as well as in Virginia, appointed by the crown; the acts erecting the offices, never prescribing the mode of appointment unless where they mean to give it from the

crown. If then our acts of Assembly, erecting cures of souls, and declaring that they shall be given to ecclesiastics of a certain sect, have not said by whom the nomination shall be, it will follow that the King, who is to see the law executed, must nominate persons for that purpose. We have but two acts relative to this matter. The act of 1661, c. 4. says that a minister, producing to the Governor letters of ordination from some bishop in England, and subscribing, &c. the Governor is to induct him into 'any parish that shall make presentation of him.' This law, without doubt, gave the nomination to the parishoners collectively, though it preserved to the crown the right of donation or actual investiture. But the impropriety and inconvenience of popular elections of priests, and the unfitness of the people to judge of their qualifications, had soon caused the vestries to usurp this right, and even their unreadiness to choose where the choice was to be followed
106 *by immediate assessments for maintenance, together with the doubt at what time the King might interpose to supply the vacancy, induced the necessity of altering the constitution of the churches in this respect. In 1748, therefore, the right of nomination was restored to the crown, except for the first twelve months after an avoidance, during which it was given to the vestrymen of the parish. Act 1748, c. 34. (old ed'ns) s. 7. 'And whereas it is doubted how long the right of presentation of a minister to a parish, remains in the vestries in this colony: for settling that matter be it enacted, that the sole right of presentation shall be, and remain, in the several vestries, for and during the term of twelve months next after a vacancy shall happen in their respective parishes.' But perhaps it may be thought that the right of choosing, given by this act to the vestries in the first instance, is another mark of foundership; and if they are founders, of course they are visitors. This must be answered by distinguishing between the act of nomination, which is given them for a twelve month, and of donation or induction, which is reserved to the crown, and is better expressed by the word investiture. Nomination is defined by Cowell to be 'a power to appoint a clerk to a patron of a benefice.' And he says the word 'invest, signifies to give possession. Others,' says he, 'define it thus, investitura est in suum jus alicujus introductio, a giving livery of seisin or possession.' This, in donative churches, is effected by the single deed of donation, without other ceremony. Donatives are given and fully possessed by the single donation of the patron in writing, without presentation, institution, or induction.' Gibs. 819; 1 Burn. Eccl. L. 154, And in collatives and presentatives it is affected by induction. 'Induction is, by the canon law, called corporal possession, and is compared in the books of common law to livery and seisin, by which possession is given to temporal estates.' Gibs. 814; 1 Burn. Eccl. L. 157. So that the right given the vestry is barely to name for one twelve month, whereas the crown is, on that nomination, to make the deed of donation, or give corporal possession. The act indeed for nomination, uses the word presentation; the sense of which, as used in the ecclesiastical law, is to present to a bishop, and is in its nature and effect very different from nomination; and for donation, it uses the word induction, which has indeed the same meaning of delivering actual possession, only that it is usually applied to the delivery of a different kind of church. However our legislators of 1661, were not critics in the language of the law; and it matters not, since they have plainly enough signified what they meant. These rights of nomination and investiture are generally indeed in the same person, and are both exercised by one
107 *and the same act. Thus when in a donative, a patron makes a deed of donation, it is a nomination as well as an investiture. But they may be separated; as happens when the patron grants away the next avoidance. There the grantee has only the right of nominating; but the grantor or patron is to invest. For says Gibs. 794, 'the right of nomination may be in one person, and the right of presentation in another. And this is where he who was seized of the advowson doth grant unto another and his heirs, that as often as the church becomes void, the grantee and his heirs shall nominate to the grantor and his heirs; who shall be bound to present accordingly. In such case it was agreed by the whole court in the case of Shirley and Underhill, Mod. 894, that the nomination is the substance of the advowson, and the presentation no more than a ministerial interest.' 1 Burn. Eccl. L. 122. Now this is precisely the case between our vestries and the crown under the act of Assembly. The King being considered as the founder and patron of the church, if nothing had been said, would have possessed both rights of nomination and investiture. But the acts give the vestries, for one twelve month, the right of nominating to the Governor, the person whom he is to induct or invest with possession. It is similar to the case of sheriffs and inspectors, who are nominated by the court, but commissioned or invested with their office by the Governor. So in the case of a clerk, it is not the nomination by the vestry, but the Governor's investiture which puts him into possession, and entitles him to the temporalities of his cure. So that while the act takes from the King, pro tempore, and transfers to the vestry, the right of nomination, which was one of the rights incident to his patronage, it leaves him the ensigns of that right, to wit, investiture. And still the estate in law which was in the King, is made to pass from him by his act of investiture, and not from the vestry by their nomination. So that like the case before cited of the grant of a next avoidance, though the nomination be in the

grantee, yet the presentation to the bishop, if it be presentative, or the deed of donation, if it be donative, must be by the patron. He still continues the patron, and he, not the grantee, possesses the right of visitation. Thus then it may be stated in fewer words. The King is the patron of all our churches. The rights of patronage are 1st. Nomination. 2nd. Investiture. 3rd. Visitation. Only one of these rights, viz. nomination, was taken away, and that but for a limited time. The other two, of investiture and visitation, were not touched, and consequently still remain in him.

We may safely, therefore, conclude that our churches are donatives, because they wear the three characteristics of dona-
108 tives. *1. They are of lay foundation. 2. They are not subject to presentation to a bishop. 3. They lie in the gift of the patron. That patron is the King, and though one right of patronage, viz. nomination, is taken away pro tempore, yet the others, of investiture and visitation, still remain in him. The latter is the power now called into exercise; and his majesty having never been pleased to appoint commissioners for that purpose, it is to be exercised by his Chancellor here; that is by the members of this honorable court who possess the powers of the Chancellor: not indeed sitting on this bench as a court of chancery, but as a court of visitation at any other time or place, at which you shall think proper to call the incumbent before you.

Colonel Bland, who came to the bar as a volunteer in this cause, also admitted the ecclesiastical jurisdiction of the court, but denied, that that gave them cognisance of this matter. He denied that our churches were either donative, presentative or collative, but urged they were sui generis, of a constitution peculiar to themselves, and not resembling any before known to the law. The result of this peculiarity he contended to be, that the right of visitation was in the vestries.

John Randolph, Attorney General, for the defendant, confined himself entirely to the answering Mr. Wythe, as the other gentlemen had declared against the jurisdiction of the court in this particular case, and so far were in favor of his client. But he contended further that this court had not a general ecclesiastical jurisdiction. The scope of his argument was, that the legislature meant only to give them jurisdiction in testamentary* matters, which are of ecclesiastical cognisance in England; this being the only branch of that jurisdiction of which they then stood in need, and by no means to extend their cognisance to every other branch of that law.

The court adjudged that they possessed ecclesiastical jurisdiction in general, and that as an ecclesiastical court they might proceed to censure or deprive the defendant, if there should be sufficient cause. But on the importunity of the Attorney General, a re-hearing was granted.

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109 *Robin et al. v. Hardaway, et al.

April, 1772.

Indians—Statute of 1682—When Repealed.—The statute of 1682, ch. 1 which made slaves of all Indian servants imported by sea or land, and of all Indians sold as slaves by other Indians trafficing in this state was repealed by the act of 1705.

These, were several actions of trespass, assault and battery, brought by the plaintiffs against persons who held them in slavery, to try their titles to freedoms. They were descendants of Indian women brought into this country by traders, at several times, between the years 1682 and 1748, and by them sold as slaves under an act of Assembly made in 1682. The question therefore was, when that act was repealed, and whether it ever was?

Mason, for the plaintiffs, first premised an historical state of the several acts of Assembly, which had been made on the subject of Indians, with their causes and effect.

1662, c. 136. Purvis. 96. The first he took notice of was, an act made in the year 1662, entitled 'acts concerning the Indians.' Reciting that the discontents and fears of the English and Indians proceeded, chiefly, from the wrongs done the Indians by the English, which brought on acts of revenge, and, in the end, a general disturbance of the peace, and then enacting, among other things, that the properties of the Indians should be confirmed to them, and their persons so secured, that whoever should take by fraud or force their goods, or injure their persons, should make such satisfaction and suffer such punishment, as if the wrong had been done to an Englishman. And after many other provisions in their favor, it enacts, 'that what Englishman, trader, or other, shall bring in any Indians as servants, and shall assign them over to any other, shall not sell them for slaves, nor for any other time than English of the like ages should serve by act of Assembly;' which by the 98th act of the same session, was till twenty-four years of age, if under sixteen, and if more than sixteen, then five years and no longer. This law he considers from the nature of its provisions to be,

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*This could hardly be, because by the act of 1661, c. 64. the county courts were empowered to grant probate of wills, and administration of estates. So that at the time of giving this power to the General court, they less wanted this branch of ecclesiastical judicature than any other. Again, this ecclesiastical jurisdiction was giveu to the General court by the act 1705, c. 19. Now, though as members of the legislature, they had passed that law in 1705, they were so far from meaning thereby to give themselves this particular branch of ecclesiastical jurisdiction, that in 1711, they passed another act for this purpose particularly, on a supposition, doubtless, that they had it not before. See the act 1711 c. 2.—Edition 1829.

what indeed it calls itself, a treaty of peace made by one free people with another; and, as a proof, that our Assembly then considered themselves as having no rights over the Indians. Nor does the clause, limiting the time of their servitude, prove the contrary; for having, by the preceding parts of the act, put them on a footing with Englishmen, as to other wrongs done their persons or properties, it proceeds in the article of servitude also, to put them into an equal state.

1665, c. 8. Purv. 134. entitled 'an act concerning the Indians' takes from the Indians and lodges in the Governor of Virginia, the power of electing their Warowance, or chief commander. This was the first act of sovereignty assumed by the Assembly, 110 and the *consequence was a war, which appears to have ensued from the recital of the act of

1666, c. 1. Purv. 140. entitled 'an act for a cessation,' which says, the communication between Virginia and Carolina was cut off by a war with the Indians.

1666, c. 8. entitled 'an act concerning Indians,' made at the same session, was never printed, nor is now to be found in the rolls of the house of Burgesses; but its purport was, to make it death for any Indian to come into Henrico county, as appears by the act of

1671, c. 5. Purv. 174. entitled 'an act repealing the act making it death for Indians coming into Henrico county.' And though this act does not describe the one it repeals by its date or chapter, yet Purvis, who complied about the year 1682, when the law of 1666, c. 8. was probably extant, notes this to have been the law repealed by 1671, c. 5.

1670, c. 12. Purv. 172. 'an act concerning who shall be slaves.' The words of it are, 'whereas some disputes have arisen whether Indians taken in war by any other nation, and by that nation that takes them sold to the English, are servants for life or term of years; it is resolved and enacted, that all servants not being Christians, imported into this country by shipping, shall be slaves for their life time, but what shall come by land shall serve, if boys and girls, until thirty years of age, if men and women, twelve years and no longer.'

1675-6, c. 2. entitled 'an act prohibiting trade with Indians,' recites that they were then engaged 'in a most chargeable and dangerous war' with the Indians, so that the fire kindled by the act of 1665, and other acts of usurped power was not yet extinguished. This act of 1675-6, c. 2. was never printed, but is still extant among the rolls of the house of Burgesses.

1676, c. The Indian slaves when taken

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But this as well as the other laws of that session were made by the command and compulsion of the rebel Bacon, who obliged the assembly to declare war against the Indians, and to appoint him general of their forces. All these laws, however, were repealed at the next session by the act of

1676-7, c. 4. Purv. 198. entitled 'an act declaring all the acts, orders or proceedings of a grand Assembly, held at James City in the month of June 1676, void 'null and repealed.'

He then produces a * * * of the Assembly from their rolls of February 20, 1676-7, who state it as a reason why they had declined entering into a war with 111 all the Indians, that *only about twenty of them had aggressed, and that it was wrong for the offence of a few to involve whole nations in war. And the use he makes of these several acts is to shew that the war, to effectuate which the subsequent acts were made, was unjust on our part; that we were the aggressors, as the Assembly themselves confess; and have no other excuse for it but the compulsion of Bacon. During the course of this war was made the act of

1679, c. 1. Purv. 229. entitled 'an act for the defence of the country against the incursions of the Indian enemy.' Which after enacting that every forty titheables should set forth one man and horse completely armed; that these should form a standing army to proceed on duty, and other things, has these words; 'And for the better encouragement, and more orderly government of the souldiers, that what Indian prisoners or plunders shall be taken in war, shall be free purchase to the souldier taking the same.' In justification of this act, perhaps it will be said, the law of nature allows us to make slaves of captives in war: but that was in the opinion of heathens only. Grotius, Puffendorf, and all the Christian writers on that subject, say, that to justify such a measure, the war must have been just; whereas the present one was confessedly not so.

1680, c. 4. Purv. 257. 'An act for continuation of the several fortifications and garrisons at the heads of the four great rivers,' repeals a part of the act of 1679, to wit, the clause directing that every forty titheables should set forth a soldier, and the number of soldiers to twenty for every fort.

1682, c. 1. Purv. 282. 'An act to repeal a former law, making Indians and others free,' is the law on which the defendants rely for their title. It recites and repeals the act of 1670, which made temporary servants only of Indians taken in war by other Indians, our neighbors and confederates, as this act calls them, and sold to the English; and then enacts that 'all servants except Turks and Moors, whilst in amity with his Majesty, which from and after the publication of this act, shall be brought or imported into this country, either by sea or land, whether Negroes, Moors, Mulattoes, or Indians, who, and whose parents and native country were not Christians, at the time of the first purchase of such servants by some Christian, although afterwards and before such their importation and bringing into this country, they shall be converted to the Chrsitian faith, and all Indians which shall here-

after be sold by our neighboring Indians, or any other trafficking with us and for slaves, are hereby adjudged, deemed and taken, and shall be adjudged, deemed and taken to be slaves.' This act by making slaves of the Indians taken in war, and sold by our friendly Indians, who
112 * by the act of 1670, were only temporary servants, put such friendly Indians, as to their captures, on a footing with our own soldiers, whose captives were slaves by the act of 1679.

1682, c. 7. 'An act for disbanding the present souldiers in garrison in the forts at the heads of the several rivers: as also for the raising of other forces in their stead,' repeals the act of 1680; recites that there was now a peace with some of the Indians, and therefore reduces the number of forces, but shews the war continued as to others, by keeping up a part of the forces, and directing their proceedings on the approach of the enemy.

1684, c. 7. Rolls of house of Burgesses. 'An act for the better defence of the country,' expressly repeals the acts of 1679, 1680, and 1682, c. 7, provides other troops for protecting the frontiers, and re-enacts nothing derogatory of the rights of freedom. Then comes the act of

1686, c. 9. Rolls of the house of Burgesses. 'An act repealing the seventh act of Assembly made at James City, the 16th day of April, 1684.' Which after repealing the said act, enacts that 'the souldiers settled by the said law at the heads of the four great rivers shall be disbanded,' and says no more. So that while it takes away the repealing act of 1684, it shews it does not intend to re-establish the acts of 1679, 1680, and 1682, c. 7. by re-enacting matter contradictory to them. Consequently that clause of the act of 1679, which made 'the Indians taken in war, free purchase to the souldiers taking the same,' was still under repeal. Indeed it could not be otherwise, because there being now no soldiers to take them, no Indians could come within the description.

1691, c. 9. Rolls of the house of Burgesses. 'An act for a free trade with Indians.' This enacts 'that all former clauses of former acts of Assembly, limiting, restraining, and prohibiting trade with Indians be, and stand hereby repealed, and they are hereby repealed; and that from henceforth there be a free and open trade for all persons, at all times, and at all places, with all Indians whatsoever.'

1705, c. 49. Collection of law in 1733, p. 218. 'An act concerning servants and slaves,' enacts 'that all servants*
113 imported *and brought into this country by sea or land, who were not Christians in their native country, (except Turks and Moors in amity with her Majesty, and others that can make due proof of their being free in England, or any other Christian country, before they were shipped, in order to transportation hither) shall be accounted and be slaves, and as such, be here bought and sold, notwithstanding a conversion to Christianity afterwards.' And it repeals all other acts so far 'as they relate to servants and slaves, or to any matter or thing whatsoever, within the purview of this act.'

Having thus premised the several acts of Assembly, so far as they threw light on this subject, or on one another, he observed, that but four of them have imposed servitude or slavery on Indians; to wit,

1662, which makes temporary servants of those brought in as servants by Traders. This was never repealed till 1705.

1670, which makes temporary servants of those taken in war by our friendly Indians. This was expressly repealed by the act of 1682, c. 1.

1679, which makes slaves of those taken in war by our soldiers. This was expressly repealed by the act of 1684. And

1682, c. 1. which made slaves of all Indian servants imported by sea or land, and of all Indians sold as slaves by other Indians trafficking with us. This is the act on which the defendants rely, supposing it to have been in force when the ancestors of the plaintiffs were brought into this country. But on the contrary he proposed to prove,

I. That it was originally void in itself, because it was contrary to natural right.

II. That it was virtually repealed by the act of 1684. If not, yet,

III. It was virtually repealed by the act of 1691. And if by neither of these, then,

IV. It was actually repealed in 1705.

I. He observed that we came to this new world, not called by the invitations, nor provoked by the injuries of its inhabitants. That by force we dispossessed them of the wilds they had inhabited from the creation of the world; which was carrying far enough our violation of their rights. That we did not therefore pretend, in the general, to reduce their persons under our dominion. Of some of them indeed we accepted the subjection; but this was a civil union of the one state with the
114 other, not a domestic and *servile submission of individuals to individuals. Accordingly, the freedom of the confederate or united states was secured by

*The act of 1748, c. 14. Revisal of 1748, pa. 285. instead of the words 'all servants imported,' substitutes 'all persons who have been or shall be imported;' an alteration of few words indeed, but of most extensive barbarity. It has subjected to slavery the free inhabitants of the two continents of Asia and Africa (except of the small parts of them inhabited by Turks and Moors in amity with England) and also the Aborigines of North and South America, unless Mason's observation on the word 'shipped,' shall be thought to avail them. It even makes slaves of the Jews who shall come from those countries, on whose religion ours is engrafted, and so far as it goes, supposes it to be founded on perfect verity. Nay, it extends not only to such of those persons as should come here after the act, but also to those who had come before, and might then be living here in a state of freedom.—Edition 1829.

solemn treaties. This is the case of our tributary and friendly Indians, whose liberty could not be invaded by any act of Assembly, without committing so fundamental a violation of these treaties, as would dissolve the union or confederacy, and restore them again to their natural Independence. As little could the wars we waged against others of them, justify the reducing the captives to slavery. Because all such wars, whether we or they commenced hostilities, were just on their part, entered into pro aris et focis, to defend from the invasion and encroachments of hostile strangers, that native soil in which the God who made had planted their fathers, and said to them, 'over this thou shalt have dominion.'* So that if we apply these acts of our legislature to the captives from hostile tribes of Indians, they cannot be justified on the rights of war; if to those in amity with us, they are infractions of the federal as well as natural rights of those people. No instance can be produced where even heathens have imposed slavery on a free people, in peace with them. The Indians of every denomination were free, and independent of us; they were not subject to our empire; not represented in our legislature; they derived no protection from our laws, nor could be subjected to their bonds. If natural right, independence, defect of representation, and disavowal of protection, are not sufficient to keep them from the coercion of our laws, on what other principles can we justify our opposition to some late acts of power exercised over us by the British legislature? Yet they only pretended to impose on us a paltry tax in money; we on our free neighbors, the yoke of perpetual slavery. Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice. And cited 8 Co. 118. a. Bonham's case. Hob. 87; 7 Co. 14. a. Calvin's case. And so he concluded the act of 1782, originally void, because contrary to natural right and justice.

II. But if this law had possessed any original validity, it would have been repealed, or, which is the same in effect, rendered useless by the act of 1684. The describing words of the act of 115 *1682, are, 'servants hereafter brought or imported by sea or land, whether Negroes, Moors, Mulattoes, or Indians, and all Indians which shall hereafter be sold by our neighbor Indians, or any other trafficking with us, as and for slaves.' To come within this description, then, they must be servants at the time they are imported or sold by our neighboring Indians as slaves. Now servants they could not be in their own country, for it is notorious there is no such thing as servitude known among any of the Indian tribes. Even their captives in war, they either adopt into their families to supply the place and represent the person of some relation lost in the war, or make them free members of their country, or kill them. As little could they be servants among our southern neighbors of Carolina; for till the year 1715, they had no slave law there, nor yet in Maryland.

And since they could come to us no other way, it is plain they could not be servants at the time of their coming. Nor must it be supposed the legislature, by the other of the alternative descriptions, 'sold as slaves,' intended to create a servitude which did not exist before; for by these words they mean to include only those who may be legally so sold. We cannot suppose they intended to give their sanction to the sale of an Indian as a slave, whom the person selling had no authority so to sell. It was a daring act of injustice, worse than murder, in the vendor; can we believe the legislature meant to become his accomplices? The question then is, who were those Indians who might be legally sold as slaves? For they are the persons whose slavery is confirmed by this act. The answer is, Those who were or should be taken under the act of *1679, the only act which had given any person authority to sell Indians as slaves, and therefore the only sales the act of 1682 meant to confirm. If there be any doubt of this, the preamble of 1682, will confirm it. It consists of three members; the 1st. recites the act of 1670; the 2nd. shews in what manner it bore 116 on the *purchasers of Negroes, Moors and Mulattoes; the 3rd. member of the preamble shews how it affected the purchasers of the Indians described in the same act 1679, and then goes on to enact. So that the preamble proposes the subject of the act, to wit, Negroes, Moors, Mulattoes, and the Indians of †1679, and does

*Gen. 1. 28.—Edition 1829.

*It seems however, clear, this act intended to take in as well those described in the act of 1670, to wit, 'Indians taken and sold by our friendly Indians,' as those of the act of 1679, who were the captives of our own soldiers. Or else the act of 1682, would have done nothing; for those under 1679, were slaves without it. However, it is as plain, that while the former branch of the description applies to those only who were servants before their coming here, the latter is confined to those who were servants under the act of 1670, whom it makes slaves instead of servants. So that the Indians brought in by our traders, and sold as servants under the act of 1662, are still out of that of 1682, whose basis is purely those of 1670 and 1679; or their state after 1684, may be thus expressed. The act of 1662, had never been touched. That of 1670, had indeed been demolished by that of 1682, but a new edifice raised on its ruins. That of 1679, was expressly repealed by that of 1684.—Edition 1829.

†These arguments are so contradictory, that I can hardly suppose the plaintiff's counsel so used them:

therefore restrain the generality of the enacting clause, if the expressions of that should be thought to take in any others. This construction of the act is well grounded and just, whereas any other would be most unjust: and it is a rule in law that wherever an act or statute will bear two constructions, the one of which is just, the other unjust, the former is to be adopted. If then none were continued in slavery by this act of 1682, but those who might be made slaves by that of 1679, the repeal of 1679, by the act of 1684, was in effect a repeal of that of 1682, because it took away the subject matter on which it was to work. Before 1682, no Indian could be legally sold as a slave, unless under the act of 1679. The sales under that act, then, were the only ones confirmed by the act of 1682. Consequently when those sales are put down, the act of 1682, becomes of no use, unless to confirm those made before the repeal. Or, still to vary its point of view, 1679 was the basis of 1682. When that was demolished, the superstructure fell of course. Accordingly, it is notorious that it was the universal opinion in this country, that the law of 1682, was repealed in 1684. Both bench and bar were in possession of that belief; the latter advising, the former adjudging the law to be so, and under that persuasion hundreds of the descendants of Indians have obtained their freedom, on actions brought in this court. Nor was ever the propriety of these decisions called into question till within these four years. The gentleman (Colonel Bland) who is now of counsel on the other side, started the doubt at the bar, on no other foundation, as I conceive, than the want of an express repeal. But it is hoped the virtual repeal will answer the same end, and that we shall again be permitted to return into our wonted channel of adjudication.

III. But if it was not repealed by the act of 1684, then it was by the act of 1691, which repealed 'all former clauses of former acts of Assembly, limiting, restraining, and prohibiting trade with Indians.' By this it was made lawful for the Indians to come into this country, at any time, for the purpose of trade. But can we suppose, that as soon as they came, they should be picked up and sold as slaves? If so, this fair faced act was but a trap to catch
117 *them, an imputation which would do indignity to any legislature. It is a rule that 'when any power is given by any act or statute, all incidents necessary to the making it effectual, are also given.' Thus the statute of Glocester, c. 5. giving him in reversion an action of waste against his tenant for life or years, has been deemed to give him authority to enter into the houses or lands letten, to see if any waste be done, without his being subject to an action of trespass for such entry. 2 Inst. 306. This operates then so far as an implied repeal or alteration of the common law, which had given the tenant a right to bring such an action. So in our case, when a law gives right to the Indians to come into our country to trade, it gives them all incidents necessary to the exercise of that right, as protection of their persons, properties, &c. and consequently takes from every other the right of making them slaves, and so far implies a repeal of the law of 1682. If, contrary to this rule, that law continued still in force, the Indians could not come to trade with us, and so the new law would not produce its effect of opening a free trade with them. These two acts then being contradictory, which is to prevail? The latter surely. Under the words of the act of 1691, the question may be shortly asked, whether that of 1682, which subjected Indians to slavery as soon as they entered this country, restrained their trade or not? If it did, it was repealed by this of 1691, which said that 'all former acts restraining their trade should be repealed.'

IV. He proceeded to shew it was repealed in 1075, if it was then subsisting.*

The act of 1705, c. 49. describes the persons who are thenceforth to be considered as slaves. But two of the marks or characters there required, do not apply to any Indians. For first, they are not servants, that condition of life being unknown to them, as I have before observed; nor were they ever shipped; whereas the same act describes only such persons as could not make proof of their being free in some Christian country before they were shipped for transportation hither; plainly designing such foreign infidels only as are brought hither by sea, and not the free Aborigines of this continent, whose rights we had sufficiently violated when we took from them their lands, without adding further aggravation by enslaving their persons. The act having described who
118 should *be slaves, repeals 'all other acts, so far as they relate to servants and slaves.' So that if the act of 1682, related to servants and slaves, it was hereby repealed.

Colonel Bland, for the defendants.

I. He insisted that the law of 1682, was not void in itself. That societies of men could not subsist unless there were a subordination of one to another, and that from the highest to the lowest degree. That this was comformable with the general scheme of the Creator, observable in other parts of his great work, where no chasm was to be discovered, but the several links run imperceptibly into one another. That in this subordination the department of

yet do my notes, taken while he was speaking, confirm them in so many places, that I can as little suppose the error in myself.—Edition 1829.

*Here, he says, there was a committee then appointed, to revise and reduce into one body all the laws then in force; and an act to repeal all such as were not in that revisal, of which the law of 1682, was one. This appointment was by the acts 1699, c. 8. 1700, c. 3. The former has no such repealing clause. The latter I have never seen.—Edition 1829.

slaves must be filled by some, or there would be a defect in the scale of order. That, accordingly, Puffendorf, b. 6. c. 3. s. 10. proves it to be founded on the law of nature. In the earlier stages of social confederacies, we find this connection between master and servant established. If this had been contrary to the law of nature, it could never have been tolerated under the Jewish theocracy. Yet that it was so tolerated, Holy writ affords us ample testimony. In fact there is no great difference between slavery in its absolute state, and that species of it called villeinage, known to our common law. This too, derived its origin from the rights of war, the ancestors of the villeins having been originally captives in war. So that this is a plain recognition of that right by our municipal law, under which, therefore, as well as under the law natural, the captor may hold his prize. The laws of 1679 and 1682, particularly, so much complained of, were founded on principles of self-defence, and may be considered as proofs of the humanity of our ancestors, who substituted this punishment on the Indian captives, instead of those cruel deaths they inflicted on ours. But certain it is, they are much less unjust than the laws making slaves of negroes, inhabitants of Africa. They can never injure our properties or disturb our peace: Indians, were perpetually invading both. Yet is no objection made to the validity of the negro laws on account of their injustice, by the counsel on the other side. But he denied that these laws, if they were contradictory to natural justice, could therefore be disregarded by a court of law, and cited 1 Bl. 91. to prove that 'if we could conceive it possible for the Parliament to enact a thing to be done which is unreasonable, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.'

II. He denied that the act of 1682, was repealed by that of 1684. He observed that the one of 1679, was not the sole ground of this, but that the act of 1670, was its 119 principal foundation. This *was our first slave law, and bore on its face so glaring an absurdity, to wit, the making slaves of those infidels who came by sea, and only temporary servants of those who came by land, that it was thought to affect the reputation of the legislature, and was therefore repealed by the act of 1682; which put them all on a footing. But he said, that before either of the laws of 1670 or 1679, great numbers of Indian captives were held in slavery, every man thinking himself entitled, under the law of nature, to his captives in war. That these, therefore, as well as those under the laws of 1670 and 1679, afforded matter for the operation of the act of 1682. That also long before this,* negroes had been brought into this country and were held as slaves by the persons who had purchased them. There was indeed a set of negroes after the year 1679, who, having been brought in by land, were under the law of that date but temporary servants, and these are the subject of one of the main branches of the act of 1682; so that when the act of 1684, repealed that of 1679, it took away only one of the many foundations of 1682. There still remained subject to its operation, 1. The Indians taken in war before the year 1670, and held by the captors in slavery, under the law of nature. 2. Negroes brought in and sold as slaves before that time. 3. Indians and negroes brought in by land after 1670, and under that act held in temporary servitude. On all these the act of 1682, continued to operate, so that in fact none were withdrawn from its power but the few described by the act of 1679, to wit, those who might thereafter be taken in war by our own soldiers, whenever we should have soldiers.

III. That the law of 1691, was no repeal of that of 1682. To prove this, he said, the acts of assembly which have been cited on the other side may be distinguished into two classes, totally independent of, and unconnected with one another, to wit, those relative to slavery, and those relative 120 to trade. And he enumerated *and arranged them under these heads: and first of those relative to slavery.

1662, makes temporary servants of Indians brought in by our traders. But this act extended only to friendly not to hostile Indians, as appears by the clause directing such Englishmen as live in their neighborhood to assist them in their fencing. This act is distinguished from all others by this circumstance, that it relates to friendly Indians, and puts them on a footing with servants of other nations; whereas all the other acts relate to hostile tribes, of whom therefore they make slaves. Of the latter class, were the ancestors of the people now before the court.

1665, 1666, c. 1. c. 8. 1671, c. 5. do not

*The first negroes brought into this country were in the year 1619, about the last of August, when a Dutch man of war came in and sold twenty to the settlement. Smith's history of Virginia, 126. note. There was no separate property in lands or labor at that time, but all worked together for the common good, and consequently the right to these negroes was common; or perhaps they lived on a footing with the whites, who, as well as themselves, were under the absolute direction of the president. Beverley and Stith. 182. who takes this on his authority, states the arrival of these negroes in 1620. But Smith is most to be credited, as he had it from the relation of John Rolfe, a member of the council, and our first secretary, who was on the spot. In 1625, another negro called Brass, was taken in at the West Indies, by one Captain Jones, to assist in working his vessel hither. I find an order of the General court of October 3, 1625, that he shall 'belong to Sir Francis Wyatt, then governor, as his servant, notwithstanding any sale by captain Jones, on any challenge by the ship's company.' Rot. N. 1. fo. 85. 96. I suppose this order was made on some litigation of the property in the said negro.—Edition 1829.

concern either trade or slavery, nor can they throw any light on the present subject. The first empowers the Governor to appoint the Werowance, but this could not have brought on the war which followed. It is the custom to this day for the Governor to make such appointment. The second relates to the making of tobacco; the third and fourth to the carrying on our war with the enemy.

1670. This was the first establishment of slavery by any express act of the legislature. This law is related to that of 1662, as enlarging the field of servitude. That had made temporary servants of Indian friends brought in by our traders; this does the same as to the captives in war made by our Indian friends, and as to negro servants brought in by land, and makes slaves of those imported from beyond sea.

1677. He produces a treaty of peace made with the Indians, by the fifteenth clause of which, it is provided, that no Indian in amity with us, shall be sold as a servant for any longer time than English servants are bound to serve by act of Assembly, and that they shall not be slaves at all. Which treaty is signed by the chiefs of about ten nations, all of whom appear by their names to be our neighbors. This explains the laws of that period, and shews they were not meant to extend to our neighboring and friendly Indians.

1679, makes slaves of Indian prisoners taken by our own soldiers, and so still extends the circle of slavery; but not so as to take in our friendly Indians in violation of the treaty before mentioned.

1682, c. 1. is the great law now in question, and is made solely on the subject of slavery. This repeals the law of 1670, on account of its absurdity, and removes the groundless distinction between servants coming in by land and those coming by sea. But still it affects only the hostile tribes of Indians.

He then proceeded to the acts of the second class, to wit, those made to regulate our trade with the Indians.

121 *1662, c. 114. Purv. 83. entitled 'free trade.' This act was not cited on the other side. It repeals all former laws restraining trade with the Indians, lays it open to every person for every article except for beaver, otter, or other furs. Till this act was made, none but the person called the 'Cape Merchant' could trade with the Indians.

1667, c. 3. Purv. 217. 'An act licensing trading with Indians,' is another act on the subject of trade.

1680, c. 8. Purv. 270. 'An act licensing a free trade with Indians' almost verbatim the same* with the act of 1691, relied on by the plaintiffs.

1691. This act comes next, and comes properly after these. It has no relation to those made on the subject of slavery, it was not made by any eye to them, and should not, therefore, have any effect on them. If the legislature had meant by this to repeal the act of 1682, they would have done it in express terms, and not merely by a side wind, the effect of which they must have foreseen would at least occasion dispute.

IV. The act of 1705, does indeed repeal that of 1682, but it re-enacts very nearly the same matter. Compare them together.

1682. All servants brought or imported into this country by sea or land.	1705. All servants imported and brought into this country by sea or land.
Whether Negroes, Moors, Mulattoes or Indians.	
Who and whose parents and native country were not Christians, at the time of the first purchase of such servants by some Christian.	Who were not Christians in their native country.
Except Turks and Moors, whilst in amity with his majesty.	Except Turks and Moors in amity with her majesty.
	And others that can make due proof of their being free in a Christian country, before they were shipped in order to transportation hither.
122 *And all Indians which shall hereafter be sold by our neighbor Indians, or any other trafficking with us, as and for slaves.	
Shall be slaves.	Shall be slaves.

The only difference is that the act of 1705, omits the clause which speaks particularly of Indians sold to us as slaves by our neighbor or other Indians. But this clause was tautologous in the act of 1682; the former words having been sufficient to comprehend them in that, as the words answering to them, are in this act. They are imported by land, and were not Christians in their native country, which are the material characters of the act of 1705. So that the plaintiffs get little by this repeal, when

*There is a remarkable difference occasioned by the alteration of a single word. This act says, there shall be a free trade with our 'friendly' Indians; that of 1691, with 'all' Indians. Applying this to Colonel Bland's observation, it should seem to favor the plaintiffs. The act of 1670 and 1679, he said, related to hostile Indians alone. Therefore, in 1680, the legislature, that their act opening a trade might not repeal these laws, expressly give the license of coming to trade to 'friendly' Indians only. But in 1691, when a general peace was now established, they extend their license to 'all' Indians, because they meant that all should be now on a footing.—Edition 1829.

the same matter is instantaneously re-enacted.

Mason, in reply, denied that Puffendorff justified slavery on the principles of natural law. That on the contrary, b. 6. c. 3. s. 2. 4. 5. he proves it to have no foundation in nature, but to be derived from contract alone. That if the Israelitish practice was a proof of the morality of any act, we might under that, indulge ourselves with a plurality of wives, this being agreeable to the laws of the Jewish theocracy; so that this proof by doing too much, does nothing at all. That as to the difference between slavery and death, in point of humanity, he thought that those savages shewed infinitely the most, in adopting the latter rather than the former, inasmuch as no life at all is preferable to a painful one. That as to the objection drawn from the superior injustice done the Africans, by the laws imposing slavery on them, though he would not undertake to justify them, yet he conceived them less unjust than those now in question. For the Africans are absolute slaves in their own country, none but the King being a freeman there. So that the act of Assembly only continued a slavery which existed before, whereas, as to the Indians, the slavery is created by the acts.

That as to the express repeal of the act of 1682, which might have been made if intended in 1691, it would have been improper, as is shewn on the other side, as it would have discharged negroes from slavery, which was not intended. Therefore the virtual repeal answered their purpose better, because it acted partially.

And lastly, that the act of 1705 does indeed describe servants brought in by land as well as by sea, but another part of the description is, that they shall have been shipped. This then explains what is meant by 'servants brought in by land,' to wit, such as having been transported by shipping to our neighboring colo-
123 nies, *are afterwards brought here by land, of which there were formerly great numbers.

The court adjudged that neither of the acts of 1684 or 1691, repealed that of 1682, but that it was repealed by the act of 1705.

Carter v. Webb, Ex'r of Cocke.

May, 1772.

Wills—Remainderman—Right to increase of Stock.—A testator devised to his wife the use of certain lands, slaves and stocks during her life, with remainder to his son Charles. The wife married again and the stock was increased by the second husband to a very large degree. After the death of the wife and her second husband the executor permitted the remainderman to enter on such parts of the land as were not under cultivation and to employ the slaves, whenever they were not engaged in finishing the crops then growing, to make preparations for the succeeding crop with the agreement that he should pay a stipulated hire for them if the general court should decree the defendant entitled thereto. HELD, that the remainderman was not bound to pay hire for the services of the slaves, and that he was also entitled to the increased value of the stock.

The late Secretary Carter, by his last will and testament, devised to his wife the use of certain lands, slaves and stocks, during her life, with remainder to his son Charles Carter, the plaintiff. Mrs. Carter intermarried with Mr. Cocke, and many years after, died in the month of June 1771. Mr. Cocke died also in the month of August of the same year. Though he had freely used of the stock, both by consuming and selling, yet he left it improved and increased to a very great degree. His executor, Mr. Webb, permitted Mr. Carter, the remainder man, to enter on such parts of the land as were not then under culture, and to employ the slaves (whenever they were not engaged in finishing the crop then growing) in making preparations for a succeeding crop; under this agreement, however, that Mr. Carter should pay a stipulated hire for such services of the slaves, if the General court should decree the defendant entitled thereto. The plaintiff insisted that in this particular case, he was entitled to immediate possession of the lands themselves, and whatever was growing on them; and lastly, that he was entitled to the whole stock, however increased, and was not obliged to accept so much thereof only, as was equal to what the testator had left. To determine these several rights, a friendly bill and answer was this day put in, and argued by Pendleton and J. Randolph, Attorney General, for the plaintiff, and George Wythe for the defendant.

Pendleton.—There are three questions in this case.

I. Whether the slaves in possession of a tenant for life are, under the act of 1748, c. 5. to be continued on the plantations till the 25th of December, for the benefit of the decedents representatives?

II. If they are, Whether it be not solely for the purpose of finishing the crop, so that the executor may not charge the remainder man hire for their services, when not engaged in finishing it?

III. Whether, where the use of stock is bequeathed, the legatee is entitled to the whole improved stock, or shall be compelled to accept stock of equal value.

124 *1. He admits that by the common law 'he who sows shall reap.' But the common law does not oblige the remainder man to find reapers; so that nothing in the common law will affect this question; but it arises, and must be determined, on the act of 1748, solely.

He premises that the general words of a law are restrained, or its particular words enlarged, to answer the intention of the legislature.

To discover the intention he considers, 1st. the subject matter on which that act was to work, which the act itself describes to be the estate of the deceased, and not

those things wherein his interest was limited to expire with his life. The law having in the first twenty-three clauses, established the rules for probate of wills and granting administration of estates, proceeds to point out the executor's or administrator's duty. Section 24, he is to make an inventory of 'the estate to him committed.' Now if these slaves are to be committed to him to employ till December, he must make an inventory of them; which is neither agreeable to law or practice.

Section 25, the court is to appoint appraisers of 'the testator's or intestate's slaves,' not of those which had ceased to be his.

Sections 26, 27, 28, still speak of the testator's estate, goods, chattels, &c.

Section 29. No executor or administrator shall sell any 'slaves of his testator or intestate' but where there is a deficiency of personal assets. Every clause hitherto has in view only the slaves which may be called the testator's, at the time when the inventory is made, appraisers appointed, sale thereof made, or in general, which may be called his after he is dead; and not those in which he had ceased to have an interest. We must therefore suppose their object was the same, (viz. the testator's proper slaves) in the succeeding clause (30th), which directs that 'where any person shall die between the 1st day of March and the 25th day of December, the slaves which such person was possessed of, at the time of his death, shall be continued on the plantations occupied by the deceased till the 25th day of December, for the making and finishing a crop,' &c. And the rather, because the next clause (31st) directs that all the slaves of the deceased person shall be delivered up, after the 25th of December. The legislature still confining their ideas to such slaves as were the testator's on the 25th of December, and surely they mean that the same slaves shall be continued on the plantations, which they in the next clause direct to be delivered up at the end of the year. So again in

Section 32, they say the executor shall not be liable for any slave dying before December the 25th, 'though such slave
125 be inventoried *and appraised,' which shews they are speaking of those slaves only which are to be inventoried and appraised, and it had before confined the inventory and appraisement to the testator's or intestate's slaves; that is, the slaves which are his at the time of the inventory or appraisement made. The legislature, I say, in the preceding and subsequent clauses, having plainly under their contemplation only those slaves which were the testator's after his death, must be understood as speaking of the same in the intermediate clause.' The words 'where any person possessed of slaves,' &c. are indeed very general, but I before observed that general words of a law are always restrained within the apparent intention of the legislature. That the word 'possession' must be restricted in some degree, in the present case, is evident; for if taken in its full latitude it would extend to the slaves of strangers, which should happen to be in his possession. The only question then is, how far it is to be restrained? I answer till it squares with the meaning of the legislature. 2nd. What their meaning was, when they used it in this act, may be collected, not only from the subject matter described in these particular instances, but also from the sense in which they use it in other acts. Thus the slave act of 1727, sect. 4, gives all the slaves to which a feme covert has a right, or of which a feme sole is 'possessed,' to her husband. Yet the court have ever considered the word 'possession,' here, as commensurate with the word 'right' used before, and given slaves to, or withheld them from the husband uniformly, whether the feme were sole or covert. Thus if a feme sole have right to slaves, though she be not possessed of them, they have been given to the husband: so where she happens to have the possession, but not the right to them, at the time of intermarriage, the latitude of the word 'possession' is restrained to right only. The 5th section of the same act allows an infant of eighteen years to bequeath any slave 'whereof he shall be possessed;' yet the court have ever considered the word 'possession' here as synonymous to 'right' or 'title,' and allowed such infant to bequeath slaves to which he had right or title, though not in possession of them. So that this word 'possession, whenever applied by our legislature to slaves, corresponds to the word 'seisin' as applied to lands, that is, it includes the two ideas of possession and of property, or right.

3rd. The intention of the legislature may be also discovered from the persons they had in view. They meant to interpose only among legatees, and to prevent them from ruining the family by taking their slaves before the crop was saved.

From all which he concludes the legislature, when they directed that the slaves of which a person is possessed, at the
126 time of *his death, shall be continued on his plantations till the 25th of December, meant only that his own proper slaves should be so continued, notwithstanding any bequests thereof to legatees in his will; and did not mean to continue slaves to which his title had ceased, to the prejudice of a remainder man, whose paramount title had now sprung up.

II. He urges that if they are to be kept on the plantations, it is for the sole purpose of finishing the crop, and not to hire out. The words of the law are express that they shall be continued on the plantation 'for the making and finishing a crop of tobacco, corn, or other grain.' And as the finishing the crop will not engage the whole of their time, it would be most unreasonable that they should not, when not so engaged, be employed in making preparations for a succeeding crop for the heir or remainder man. It is known that such

preparations must be made almost in the summer of the preceding, for the crop which is to be made in the subsequent, year. More especially in parts of the country where, as in the present instance, wheat is the principle article of cultivation. This grain should be put into the ground five months before the slaves are to be delivered up, and the ploughing of the ground must be still earlier than this.

Suppose these slaves, instead of being given in the same remainder man who was to have the lands, had been given to distant legatees, the legatee could confessedly have made no demand of hire for services performed at vacant intervals; and surely the executor cannot have any greater right than the legatee.

III. As to the increase of the stock, it may be observed that Mr. Cocke has had the free use thereof. They have manured his lands, fed him with their milk, clothed him with their fleeces; they have been slaughtered for his table, &c. sold to fill his purse, and what more could he ask? He has killed freely, eaten freely, sold freely; can he make any other uses? The use is what was given. They have had that use most liberally; what remains then must go to Mr. Carter. The individual cattle which were given by the testator have long ago been dead, so that if the remainder man has no title to the increase, he has title to nothing. That the original stock would be dead, the testator must have foreseen. But he foresaw, at the same time, that a representative would be living, to wit, their increase. This increase then is what he must have meant for his son, when he gave him the cattle after a devise of the use of them to his widow.

Nor can it be thought that a return of stock pari numero, is what the testator intended. Cows, horses, &c. differ greatly in value, and an equal number may be chosen from a large stock who shall
127 *not be worth one fourth of the original. And it is therefore concluded, that after the liberal use of the stocks which the legatee for life has made, the increase should go to the devisee over.

Wythe, for the defendant.—He includes Pendleton's 1st. and 2nd. questions under one, viz.

I. Whether the representative of Mrs. Cocke is entitled to the labor of the slaves till December the 25th?

II. Who is entitled to the increase of the stock?

I. To determine the 1st. he enquires into the nature of, and right to emblements, because he thinks our act of Assembly has put the profits of slaves on a similar footing.

Emblements are not by the common law, considered as fixed to the freehold like trees, shrubs, &c. but, even while growing are considered as chattels personal, as much as if they were actually severed. Thus Swinb Part. vi. § 7 (3.) 'emblements or corn growing on the ground ought to be put into the inventory.' And Bro. Emblements. pl. 5. 'if a man leases to two for life, one dies, the lessor enters and leaves to W, who sows the land, the other first lessee enters on him and takes the goods, et bene. 46 E. 3. 32.' Again ib. pl. 9. 'It is admitted that where a parson dies after the first day of May, where the land is sown, and then another parson is made, and then the emblements are severed, the executor of the first parson shall have the tenths, and not the present parson; and where a man sows the land, and dies before severance, the executor shall have the emblements and not the heir. 21. H. 6. 30.' ib. pl. 26. 'If a tenant in dower sows the land, and takes a husband, who makes his executor, and dies before severance of the corn, the feme shall have the emblements, and not the executor of the husband; et contra, if the baron sows the land, and dies before severance, there the executors of the baron shall have the emblements. The reason seems, that he who bore the labor and cost of the emblements shall have them.' So Swinb. *Part vii. § 10. (8.) says that a bequest of bona mobila, will pass the emblements. From which he concludes that the emblements or unsevered crop, follow the person of the sower, wherever the determination of his interest or term is uncertain. And this rule is founded in policy and justice. In policy, because to declare that 'he who sows shall reap,' is a great encouragement to put the earth into culture; in justice, because the sower hath laid out his labor on the lands when he had right to do so; his interest therein is become equal to that of the owner of the soil, because commonly the crop growing is worth as much
128 as the land on which *it grows; and is therefore not to be set aside, by the small injury of a temporary detention of the lands from the heir.

He then proceeds to consider the several acts of Assembly which have been made.

Act 1711, c. 2. s. 17. was the first. It enacts that where any person shall die 'whilst his crop, &c. is in the ground unfinished,' the slaves 'employed in the said crop at the time of such decease' shall be continued on the plantations till December the 25th, and shall then be delivered up. The legislature, by this act, intended to put the profits of slaves employed in cultivating the earth, on the same footing as emblements; and he admits that under this law, if there had been no crop in the ground, the heir might immediately have taken possession.

The act of 1730, c. 8. s. 10. 11. is the first which gives the tenant a greater interest both in the lands and slaves, than he had at the common law. For at the common law, he was entitled to nothing but what was actually in the ground. But this act fixes a period, viz. the first of March,† and

*He delivers it as the better opinion, though controverted.—Edition 1829.

†But this period only determines who is entitled to the additional benefits of this new act. For the common law as to emblements, and the act of 1711

if the person dies after that, entitles him not only to what is in the ground, but also to 'make and finish a crop.' On the first of March there is no Indian corn, or oats in the ground, no tobacco planted in hills; so that before this act he was entitled only to the articles of wheat, rye, and the tobacco plants as they would grow in the plant patches. Yet preparations are at this time made for the other articles of Indian corn, oats, and tobacco. And the legislature therefore gives him the benefit of these, or any other necessary preparations. And the same principles of justice and policy, are the basis of this law.

The act of 1748, c. 5. s. 30. does not alter that of 1730, but sect. 31. obliges the executor to deliver the slaves clothed, which the other acts had omitted.

So that these acts being made on the principles and plan of the common law, with respect to emblements, only that they are still more liberal to the tenant, it should be expected they would entitle every person to their benefit, who was entitled to emblements at the common law, as Mrs. Cocke was. And in fact the words of the act are sufficiently extensive. 'Where any person dies, the slaves he was possessed of, shall be continued on the plantations 'occupied,' &c. If then Mrs. Cock was a 'per-
129 son,' if she was 'possessed,' *and if she 'occupied' the plantations, her representative is entitled to keep possession.

Objected that the word 'possession' when applied to slaves, corresponds with 'seisin' when applied to lands.

Answer. The instances adduced do not prove this. The words of the act of 1727, c. 11. s. 4. are 'where any feme sole is possessed of any slave as of her own proper slave,' &c. So that the legislature cautiously restrict the word 'possessed,' which they knew would have been too extensive, to a possession as of her own property. So the next clause (5th) says an infant may dispose 'of the absolute property' of the slaves whereof he is possessed, which he could not do, if the absolute property was not in him, but in a stranger.

Objected that sect. 31. of this law of 1748, calls them 'the slaves of the deceased person,' and from thence it is inferred that the 30th section must have under view, also, 'the slaves of the deceased person.' Whereas, those in which his interest has ceased cannot with propriety be called his slaves.

Answer. The legislators were not speaking with a critical regard to propriety, or they would not have called any slaves 'the slaves of a deceased' person. There can be no property where there is no proprietor. But all they meant was that the slaves which were his (whether for life or in fee) while living, shall be continued in the possession of his representative.

Then if the slaves are to be continued in the possession of the executor, no question can be made, how they are to be employed, and for whose benefit? For the benefit of the estate, without doubt. And who is to judge of the mode of employment which may produce the greatest benefit? The heir or executor? To determine that they shall be employed in nothing but 'finishing the crop,' and that at vacant intervals they shall work for the heir, would introduce perpetual confusion and dispute. Is the heir to go on the plantation, to count the hills of tobacco and corn; to say 'so many slaves, if well looked after, will finish this crop, I will take the rest;' or 'the whole slaves will finish it at such and such times, I will take them at the intervals?' And who is to judge of the time necessary for finishing, or the degree of diligence with which the slaves are overlooked? The heir? Impossible! The executor? Will it be said, no? Then who is to interpose between them? Must application be made always to a court of justice? Then there must be a law suit whenever there is a death in the country. The truth is, the finishing the crop was the principal purpose of continuing the slaves with the executor; but if any little additional benefit can be made by their labor at vacant inter-
130 vals, it is less injurious *to give him that also, than it would be inconvenient to subject them to two masters.

II. As to the right to the increase of the stock. At the common law, we know there was no such thing as a limitation of a chattel. 1 P. W. 6; 1 Abr. Eg. 360. pl. 4. However, with the assistance of a distinction between the use and the property, limitations were at length introduced. The first, or temporary legatee, being supposed to have only an use, while the property passed immediately to the devisee over. This distinction was introduced from the civil law into our ecclesiastical courts, where testamentary causes are determined, and determined according to the civil law; and thence into our court of chancery, the judge of which, used generally to be a clergyman. And according to the rules of the civil law have these cases been determined. Now Justinian, Lib. 11. tit. IV. defines an usufruct to be 'jus alienis rebus utendi, salva rerum substantia.' But this could only be of things permanent in their nature. What then was their law with respect to things the use of which is to consume them? Justinian ubi supra, § 2, lays it down. 'Constituitur auten ususfructus non tantum in fundo et aedibus, verum etiam in servis, et jumentis, et cæteris rebus; exceptis iis quæ ipso usu consumuntur: nam hae res neque naturali ratione, neque civili, recipiunt usumfructum: quo in numero sunt vinum, oleum, frumentum, vestimenta: quibus proxima est pecunia numerata: namque ipso usu, assidua permutatione, quodammodo extin-

as to the profits of slaves, seem to me not repealed. So that if a person dies before the first of March, he is clearly entitled to his emblements under the common law, and I see not what bars his right to keep the slaves till December the 25th, under the act of 1711. This act of 1730, is merely affirmative.—Edition 1829.

guitur. Sed utilitatis causa senatus censuit, posse etiam earum rerum usumfructum constitui, ut tamen eo nomine haeredi utiliter caveatur: itaque, si pecuniae ususfructus legatus sit, ita datur legatario, ut ejus fiat; et legatarius satis det haeredi de tanta pecunia restituenda, si morietur, aut capite minuetur, ceterae quoque res ita traduntur legatario, ut ejus fiant: sed, aestimatis his, satis datur, ut, si moriatur, aut capite minuatur, tanta pecunia restituatur, quanti hae fuerint aestimatae. Ergo senatus non fecit quidem earum rerum usumfructum (nec enim poterat) sed per cautionem quasi-usufructum constituit.' So that if the thing were permanent in its nature, it was capable of an usufruct, and was to be restored specifically; if it was consumable by use, it could then only support a quasi-usufruct, and security was given for a restitution of its value. Thus where a man gives the use of corn, wine, &c. to one for life, and then gives the corn, wine, &c. to another, he cannot be understood literally to give an usufruct, but a quasi-usufruct, and to mean that an equal quantity shall be restored to the remainder man. So of money, the same guineas are not to be returned, but as many. It is so understood in common speech. When we speak 131 of lending wine, *corn, &c. we expect not the same, but an equal quantity returned. The question then is, whether the stock, in the present case, was of the permanent, or consumable kind. 1 Abr. Eq. 361. pl. 8. A farmer bequeathed his stock (which consisted of corn, hay, cattle. &c.) to his wife for life, and then to another. The Master of the Rolls said the devise was good, but if any of the cattle were worn in using them, the wife was not answerable; and if any were sold as useless, she was only to answer the value at the time of the sale. Hayle v. Burrodale, 1702. But the cattle here spoken of, must have been of the draught, not the proletarian kind. Stocks in the general, consisting of horses, black cattle, sheep, hogs, are surely of the consumable kind. The principal use of some, and the sole use of others, is to supply us with food. So says Justinian. Lib. 2 Tit. 1. § 37. 'In pecudum fructu etiam foetus est, sicuti lac, pilus, et lana: itaque agni, haedi et vituli, et equuli, et suculi, statim naturali jure dominii fructuarii sunt.' Cicero defin. Lib. 1. c. 4. et, ib. § 38. 'Sed si gregis usumfructum quis habeat, in locum demortuorum capitum ex foetu fructuarius submittere debet.' If then in case of any mortality the usufructuary is to sustain the loss, he ought in reason to have the gain. 'Qui sentit onus sentire debet et commodum.' And it is the more reasonable in this case, because the increase is produced, in great measure, by the care and expense of the usufructuary. Suppose Mr. Carter had called on Mrs. Cocke for security, (for this the chancellors in conformity with the civil law as above cited, have determined he might do) the security would have been to restore an equal quantity only. If then the stock had diminished, still an equal quantity must have been returned, and surely if it is increased, the same equal quantity will fulfill the undertaking of the security; and he concluded that the increased value should go to the executor.

Randolph, attorney general, in his reply to Wythe's 2nd point, said, that as Mr. Carter might have demanded security of Mrs. Cocke at first for an equal quantity, so when that quantity was increased he might have required additional security. And that if the stock had diminished without any default in Mrs. Cocke, she would not have been bound to reparation. He said that the use of the stocks and of the slaves were given to her by the same clause and words of the will; and that she might as well demand the issue of the slaves* as of the stocks.

The court determined that the slaves 132 should be continued on *the plantation till the 25th of December, but that this was solely for the purpose of finishing the crop, and therefore, that Mr. Carter should not pay hire for the services of the slaves at leisure times. And they decreed Mr. Carter entitled to the increased value of the stock.

Smith v. Griffin.

October, 1772.

Bequest of Personalty—Slaves—Whether They Pass.—Slaves do not pass under a bequest of personal estate.

The testator had by will, after some other legacies to his wife of about £100 value, bequeathed to her 'one fourth part of his personal estate.' The persons to whom the other three fourths were given, of whom the heir at law was one, had divided with the widow the slaves as well as personal estate, and had signed the deed of partition. Afterwards, the widow dying, the heir at law brought his bill for the slaves allotted her, insisting that by the devise of personal estate, slaves did not pass. But the court dismissed the bill; two of the judges, the Secretary T. Nelson and Page, declaring their opinions in favor of the defendant, were founded on the partition made between the heir and widow, and that, had the question been simply, whether slaves would pass by a devise of personal estate, they should have determined it in the negative: in which they were not contradicted by the other judges. Present T. Nelson, Lee, Byrd, Burwell, Fairfax, Page and Wormley.

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*Justinian Lib. 2. Tit. 1. § 37. cited above, subjoins these words immediately to those: 'partus vero ancillae in fructu non est; itaque ad dominum proprietatis pertinet, absurdum enim videbatur, hominem in fructu esse: cum omnis fructus rerum natura gratia hominis comparaverit.'—Edition 1829.

Herndon et al. v. Carr.

October, 1772.

Wills—Slaves—After Acquired.*—Slaves acquired after the testator has made his will do not pass under it.

William Carr the testator, having a wife and several children, viz. William, the defendant, his eldest son and heir at law, and others, plaintiffs, and being seised and possessed of an estate in lands, slaves and personal chattels, by will, dated August 2, 1760, after giving several specific legacies, bequeathed the residuum of his estate in these words; 'all the rest of my estate, both real and personal, not herein particularly mentioned, to be equally divided
133 *between my wife and children, viz. William, Ann, Elizabeth, Charles, Agnes, Walter, Phœbe and Thomas; and I do hereby give the estate by this clause of my will devised, to my said wife and children, respectively, and to their heirs forever. Provided, nevertheless, that if either of my said children die before they arrive to the age of twenty-one years or marry, that their part given by this clause, be sold by my executors, and the money arising by such sale be equally divided among my wife, if living, and all my children or their representatives.' By a codicil to his will annexed, dated August 12, 1760, he empowered his executors, of whom Southerland (a defendant) was one, to divide his personal estate according to his will. Within a few days afterwards, one Walter Chiles, having a considerable estate in lands, slaves and personal goods, died intestate, leaving, as his representatives, the children of two deceased sisters, viz. the testator William Carr, and his younger brothers and sisters, children of the eldest sister, and the defendant Southerland and his younger brothers and sisters, children of the youngest sister. Whereby the said William Carr, the testator, and the said Southerland, became entitled each to a moiety of the slaves of the said Chiles, paying to their brothers and sisters a proportion of their value. William Carr, the testator, had notice of this accession to his estate, and died soon after without having altered or republished his will. And the question was, whether the slaves which descended to him, after making the will, should pass by the will or not?

Wythe, for the plaintiffs, that they would. He admitted that lands, which the devisor has not at the time of making the will, cannot by any words be made to pass under that will; and cited the cases of Buncker v. Cook, and Arthur v. Bockenham, reported in Gibb's Law of Evidence, which depended on the same will, wherein this point was solemnly adjudged. A principal reason for this is drawn from the words of the statute of wills; 'every person having any manors, lands, tenements, or hereditaments, holden in Socage, &c. shall have full power to devise, &c.' But this was made to give a testable quality only to those things which were not testable before, as lands, tenements, hereditaments, &c. But slaves were or would have been testable from their own nature; so that they are out of the purview of this statute. Another reason why the statute does not extend to them is, that the clause which gives full power of devising makes only 'manors, lands, tenements or hereditaments, holden in Socage,' devisable. Now a slave is not a manor, land, or tenement, at all: it is indeed made a hereditament by a subsequent act of Assembly, but not of that kind described by the statute; that is 'a hereditament
134 holden *in Socage.' So that for this reason also, slaves have not their testable quality from the statute of wills, but from their own nature; for the same reason the restriction of the statute formed by the word 'having,' does not extend to them; so that they may be considered as if that statute had never been made. They were then in their nature devisable. Then comes an act of Assembly which makes them 'real estate;' of course they were now become 'real estate devisable.' And this act having no restrictive words, future acquisitions of them might be disposed of by will, as well as of other subjects, whose testable quality had never been abridged. Such, for instance, are personal goods, which may confessedly be bequeathed, though not in possession of the testator at the time of making the will. So that, were we to consider slaves as real estate purely, those after acquired, would have passed in the present case.

But we will now consider what kind of estate they are, and to what rules they are subject. They are neither real nor personal purely, but are of an amphibious nature. Thus they are real where the proprietor dies intestate, but personal in every other instance. They are liable to execution for debts; marriage is an alienation of them; they pass by will as a chattel personal, and no remainder of them can be limited. In the present case, therefore, they should be considered as personal estate, because they resemble that as to their transient nature, and also as to the particular quality now under consideration, to wit, alienation by testament.

An important consequence of an adjudication against the plaintiffs would be, that negro children born after making the will, cannot be made to pass by that will; because they would to every intent be a new acquisition, as if added to the family by purchase. So that in large estates, where a child is born, perhaps, every day, the will must be solemnly republished every day, or the testator will die intestate as to part of his property. He therefore concluded, 1st. That if slaves were considered as real estate, future acquisitions of them might be devised. 2nd. But that, as to their testable quality they are personal estate, and, of course, may be so devised.

Pendleton, for the defendants, said, that as it was admitted on the other side, that

*But see § 2512, Code 1887.

after acquired lands cannot be devised, so he would admit that personal chattels, in the same situation, might. And that the question was, whether slaves should be considered as lands or as personal chattels? This question the act of Assembly has determined for us by making them real estate. By this alteration of their legal nature, they would have been rendered indevisable; because by the common law
135 of England no real estate *could be devised. The statute of wills has made devisable such real estates as come within the description of 'manors, lands, tenements and hereditaments,' and the act of Assembly which made slaves real, gave them expressly the heretable property, which brought them under the operation of the statute of wills as an hereditament. Otherwise that act which took from them their testable, with their personal character, would have made them intestable when it made them real, had it not superadded such a property as would bring them within the purview of the statute of wills. Nor does the objection weigh, that they are not a hereditament 'holden in Socage,' because the Socage tenure is mentioned by the statute only by way of example, and in contradistinction to tenures of a base nature, which were not intended to be made devisable. If, therefore, slaves derive their testable quality from the statute of wills, they must take its subject to the restriction of the statute, that a person not 'having,' may not devise them.

There is another reason for the distinction between real and personal estate in the present case, besides that drawn from the statute of wills; that is their nature and value. Lands are in their nature fixed and permanent, not experiencing that daily and hourly transfer from one owner to another, which personal chattels do. In their value they are greatly distinguished from chattels, in so much, as to render it well worth the testator's attention to change his will when he changes his landed possessions, and to be too great to be thrown into a sweeping residuary clause. Now these reasons are applicable to property in slaves, which are not the subject of perpetual transfer from hand to hand, but live in families with us, are born and die on our lands, and, by their representatives, may continue with us as long as the lands themselves. Again in their value they are distinguished as lands, the slave being worth as much as the ground he cultivates. For this reason our laws have put them on a footing with lands.

He answered the objection that a will must be republished on the birth of every new child, in order to pass it, by saying that slaves being considered as lands, the will speaks from the time of making it, and of course, by a devise of the mother her subsequent issue passes; so that there is no such danger of a partial intestacy. He also strongly urged the case of Harrison v. Harrison, and endeavored to shew it could be determined on no other principle than the one now insisted on.

But he argued, that the slaves now in question could not pass, for a reason independent of their peculiar nature. The will of the testator is the efficacious principle in testamentary alienation; in support of that, words may do any thing; against it, they can do nothing. So that admitting whatever was the object of the testa-
136 tor's *mind when he penned this clause, might pass under it, we may well ask, could the testator, when making his will, have the slaves in question under his contemplation? Could he foresee, or reasonably expect, his uncle was to die before him; that he should die intestate too; and that his own death would follow so closely as to leave him no leisure to enquire into the size and nature of the accession to his estate; to consider what would be a convenient disposition of it, and to make the necessary addition to his will? We may say it is at least improbable he should have all this in view. His words are a further assurance he had not. For there is nothing future in them, nothing which discovers an extended prospect into futurity. They are merely present, 'all the rest of my estate,' &c. If then these slaves made no part of the idea which he endeavored to express by the residuary clause; he did not will them to pass, and therefore they did not pass.

John Randolph, Attorney General, on the same side, mentioned what Lord Holt had somewhere declared to be the strongest reason why after acquired chattels should pass, and lands should not. Because, in the case of lands, if they did not pass by the will there was yet a person appointed by the law to take them, to wit, the heir; but if after acquired chattels were adjudged not to pass to the executor by the will, there could be* no person to take them, which would be an inconvenience. As Pendleton had insisted slaves were within the word 'hereditament' in the statute of wills, so he said they were within the word 'tenement' in the same statute; and for a proof of this referred to† some passages in my Lord Coke's comment on the Magna Charta.

*Does not every partial intestacy prove that this cannot be the reason of the difference between a bequest of after acquired lands and chattels, where, though a part of the personalty is undisposed of by the will, yet the law gives it to the executor. Swinb. part IV. § 2. says, that by the bare nomination of an executor, all the goods pass to him, though there be not a single legacy in the will.—Edition 1829.

†I can find nothing like it, unless it be the comment in 2 Inst. 28, on the words 'salvo contenemento,' where it is said 'contenement signifieth his countenance which he hath together with, and by reason of, his freehold, and therefore is called contenement, or continence, and in this sense doth the statute of E. 3. and old Nat. Brev. use it, where countenance is used for contenement. The armor of a soldier is his countenance, the books of a scholar is his countenance, and the like.' See also Barrington's observations on Mag. Charta, cap. 14. —Edition 1829.

Wythe's reply, as to its new matter, was confined principally to Harrison's case, shewing that the residuary clause in that case was expressed so peculiarly as to exclude the slaves which came to the testator afterwards, and that the court went on that exclusion.

It was decreed the new acquired slaves did not pass under the will, by the opinions of Lee, Burwell, Fairfax, Page and Wormley, against the Secretary T. Nelson, and Byrd. The Governor gave no opinion.

APPENDIX.

Whether Christianity is a Part of the Common Law?

In Quare impedit, in C. B. 34. H. 6. fo. 38, the defendant, Bishop of Lincoln, pleads that the church of the plaintiff became void by the death of the incumbent; that the plaintiff and. I. S. each pretending a right, presented two several clerks; that the church being thus rendered litigious, he was not obliged, by the ecclesiastical law, to admit either until an inquisition de jure patronatus in the ecclesiastical court; that, by the same law, this inquisition was to be at the suit of either claimant, and was not ex officio to be instituted by the Bishop, and at his proper costs; that neither party had desired such an inquisition; that six months passed; whereon it belonged to him of right to present as on a lapse, which he had done. The plaintiff demurred. A question was, How far the ecclesiastical law was to be respected in this matter by the Common law court? And Prisot c. 5. in the course of his argument, uses this expression, 'a tels leis que ils de seint eglise ont en ancien scripture, covient a nous a donner credence; car ceo common ley sur quel touts manners leis sont fond s. Et auxy, Sir, nous sumus obliges de conustre lour ley de saint eglise: et semblablement ils sont obliges de conustre nostre ley, et, Sir, si poit apperer or a nous que l'evesque ad fait come un Ordinary fera en tiel cas, adonq nous devons ceo adjuger bon, ou auterment nemy,' &c. It does not appear what judgment was given. Y. B. ubi supra, 3. c. Fitzh. Abr. Qu. imp. 89 Bro. Abr. Qu. imp. 12. Finch mis-states this in the following manner: 'to such laws of the church as have warrant in holy scripture, our law giveth credence;' and cites the above case, and the words of Prisot in the margin. Finch's law, B. 1. c. 3. published 1613. Here we find 'ancien scripture' converted into 'holy scripture;' whereas it can only mean the antient written laws of the church. It cannot mean the scriptures, 1st. Because the term antient scripture must then be understood as meaning the Old Testament in contradistinction to the New, and to the exclusion of that; which would be absurd, and contrary to the wish of those who cite this passage to
138 prove that *the scriptures, or Christianity, is a part of the common law. 2nd. Because Prisot says, 'ceo (est) Common ley sur quel touts manners leis sont fondes.' Now it is true that the ecclesiastical law, so far as admitted in England, derives its authority from the common law. But it would not be true that the scriptures so derive their authority. 3rd. The whole case and arguments shew, that the question was, How far the ecclesiastical law in general should be respected in a common law court? And in Bro's Abr. of this case, Littleton says 'les juges del Common ley prendra conusans quid est lex ecclesiae vel admiralitatis et hujus modi.' 4th. Because the particular part of the ecclesiastical law then in question, viz. the right of the patron to present to his advowson, was not founded on the law of God, but subject to the modification of the law-giver; and so could not introduce any such general position as Finch pretends. Yet Wingate (in 1658) thinks proper to erect this false quotation into a maxim of the common law, expressing it in the very words of Finch, but citing Prisot. Wing. Max. 3. Next comes Sheppard (in 1675) who states it in the same words of Finch, and quotes the Y. B. Finch and Wingate. 3 Shep. Abr. tit. 'Religion.' In the case of the King and Taylor, Sir Matthew Hale lays it down in these words; 'Christianity is parcel of the laws of England.' 1 Ventr. 293; 3 Keb. 607. But he quotes no authority. It was from this part of the supposed common law, that he derived his authority for burning witches. So strong was this doctrine become in 1728, by additions and repetitions from one another, that in the case of the King v. Woolston, the court would not suffer it to be debated, Whether to write against Christianity was punishable in the tempora courts, at common law? saying it had been so settled in Taylor's case, ante, 2 Stra. 834. Therefore Wood, in his Institute, lays it down, that all blasphemy and profaneness are offences by the common law, and cites Strange, ubi supra. Wood, 409. And Blackstone (about 1763) repeats, in the words of Sir Matthew Hale, that 'Christianity is part of the laws of England,' citing Ventr. and Stra. ubi supra. 4 Bl. 59. Lord Mansfield qualified it a little, by saying, in the case of the Chamberlain of London v. Evans, 1767, that 'the essential principles of revealed religion are part of the common law.' But he cites no authority, and leaves us at our peril to find out what, in the opinion of the judge, and according to the measure of his foot or his faith, are those essential principles of revealed religion, obligatory on us as a part of the common law. Thus we find this string of authorities, when, examined to the beginning, all hanging on the same hook; a perverted expression of Prisot's; or on nothing. For they all quote Prisot, or one another, or nobody. Thus,
139 Finch quotes Prisot; Wingate *also; Sheppard quotes Prisot, Finch and Wingate; Hale cites nobody; the court, in Woolston's case, cite Hale; Wood cites Woolston's case; Blackstone that and Hale; and Lord Mansfield, like Hale, ventures it on his own authority. In the earlier ages of the law, as in the Year books for instance, we do not expect much recurrence

to authorities by the judges; because, in those days, there were few or none such, made public. But in later times we take no judge's word for what the law is, further than he is warranted by the authorities he appeals to. His decision may bind the unfortunate individual who happens to be the particular subject of it; but it cannot alter the law. Although the common law be termed Lex non scripta, yet the same Hale tells us, 'when I call those parts of our laws Leges nor scriptæ, I do not mean as if all those laws were only oral, or communicated from the former ages to the latter merely, by word. For all these laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty. They are for the most part extant in records of pleas, proceedings and judgments, in books of reports, and judicial decisions, in tractates of learned men's arguments and opinions, preserved from antient times, and still extant in writing.' Hale's Com. Law, 22. Authorities for what is common law, may, therefore, be as well cited as for any part of the lex scripta. And there is no better instance of the necessity of holding the judges and writers to a declaration of their authorities, than the present, where we detect them endeavoring to make law where they found none, and to submit us, that one stroke to a whole system, no particle of which, has its foundation in the common law, or has received the 'esto' of the legislator. For we know that the common law is that system of law which was introduced by the Saxons, on their settlement in England, and altered, from time to time, by proper legislative authority, from that, to the date of the Magna Charta, which terminates the period of the common law, or lex non scripta, and commences that of the statute law, or lex scripta. This settlement took place about the middle of the fifth century; but Christianity was not introduced till the seventh century; the conversion of the first Christian King of the Heptarchy, having taken place about the year 598, and that of the last about 686. Here, then, was a space of two hundred years, during which the common law was in existence, and Christianity no part of it. If it ever, therefore, was adopted into the common law, it must have been between the introduction of Christianity and the date of the Magna Charta. But of the laws of this period, we have a tolerable collection, by Lambard and Wilkins;
140 *probably not perfect, but neither very defective; and if any one chooses to build a doctrine on any law of that period, supposed to have been lost, it is incumbent on him to prove it to have existed, and what were its contents. These were so far alterations of the common law, and became themselves a part of it; but none of these adopt Christianity as a part of the common law. If, therefore, from the settlement of the Saxons, to the introduction of Christianity among them, that system of religion could not be a part of the common law, because they were not yet Christians; and if, having their laws from that period to the close of the common law, we are able to find among them no such act of adoption; we may safely affirm (though contradicted by all the judges and writers on earth) that Christianity neither is, nor ever was, a part of the common law. Another cogent proof of this truth is drawn from the silence of certain writers on the common law. Bracton gives us a very complete and scientific treaties of the whole body of the common law. He wrote this about the close of the reign of Henry III, a very few years after the date of the Magna Charta. We consider this book as the more valuable, as it was written about the time which divides the common and statute law; and therefore gives us the former in its ultimate state. Bracton, too, was an ecclesiastic, and would certainly not have failed to inform us of the adoption of Christianity as a part of the common law, had any such adoption ever taken place. But no word of his, which intimates any thing like it, has ever been cited. Fleta and Britton, who wrote in the succeeding reign of E. I., are equally silent. So also is Glanvil, an earlier writer than any of them, to wit, temp. H. 2; but his subject, perhaps, might not have led him to mention it. It was reserved then for Finch, five hundred years after, in the time of Charles II., by a falsification of a phrase in the Year book, to open this new doctrine, and for his successors to join full-mouthed in the cry, and give to the fiction the sound of fact. Justice Fortescue Aland, who possessed more Saxon learning than all the judges and writers before mentioned put together, places this subject on more limited ground. Speaking of the laws of the Saxon Kings, he says, 'the ten commandments were made part of their law, and consequently were once part of the law of England; so that to break any of the ten commandments, was then esteemed a breach of the common law of England; and why it is not so now, perhaps, it may be difficult to give a good reason.' Pref. to Fortescue's Rep. xvii. The good reason is found in the denial of the fact.

Houard, in his Coutumes Anglo-Normandes, I. 87, notices the falsification of the laws of Alfred, by prefixing to
141 them, four *chapters of the Jewish law, to wit, the 20th, 21st, 22nd and 23rd chapters of Exodus; to which he might have added the 15th of the Acts of the Apostles, v. 23 to 29, and precepts from other parts of the scripture. These he calls Hors d'oeuvre of some pious copyist. This awkward monkish fabrication, makes the preface to Alfred's genuine laws stand in the body of the work. And the very words of Alfred himself prove the fraud; for he declares in that preface, that he has collected these laws from those of Ina, of Offa, Aethelbert and his ancestors, saying nothing of any of them being taken from the scripture. It is still more certainly

proved by the inconsistencies it occasions. For example, the Jewish legislator, Exodus, xxi. 12, 13, 14, (copied by the Pseudo Alfred § 13.) makes murder, with the Jews, death. But Alfred himself Ll. xxvi. punishes it by a fine only, called a weregild, proportioned to the condition of the person killed. It is remarkable that Hume (Append. I. to his History) examining this article of the laws of Alfred, without perceiving the fraud, puzzles himself with accounting for the inconsistency it had introduced. To strike a pregnant woman, so that she die, is death by Exod. xxi. 22. 23. and Pseud. Alfr. § 18. But by the Ll. Alfred ix. the offender pays a weregild for both the woman and child. To smite out an eye or a tooth, Exod. xxi. 24—27. Pseud. Alfred. § 19, 20, if of a servant by his master, is freedom to the servant; in every other case, retaliation. But by Alfred Ll. xl. a fixed indemnification is paid. Theft of an ox or a sheep, by the Jewish law, xxii. Exod. 1. was repaid five fold for the ox, and four fold for the sheep; by the Pseudograph § 24, double for the ox, and four fold for the sheep. But by Alfred Ll. xvi. he who stole a cow and calf, was to repay the worth of the cow, and 40s. for the calf. Goring by an ox, was the death of the ox, and the flesh not to be eaten; Exod. xxi. 28; Pseud. Alfr. § 21. By Ll. Alfr. xxiv. the wounded person had the ox. This Pseudograph makes municipal laws of the ten commandments: § 1—10, regulate concubinage; § 12, makes it death to strike, or to curse father or mother; § 14, 15, give an eye for an eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe; § 19, sells the thief to repay his theft; § 24, obliges the fornicator to marry the woman he has lain with; § 29, forbids interest on money; § 28, 35, make the laws of bailment, and very different from what Lord Holt delivers in Coggs v. Bernard, and what Sir William Jones tells us they were; and punishes witchcraft with death, § 30, which Sir Matthew Hale 1 P. C. ch. 33, declares was not a felony before the stat. 1, Jac. c. 12. It was under that statute, that he hung Rose Cullender, and
142 Amy Duny, 16 Car. 2. (1662) *on whose trial he declared, 'that there were such creatures as witches, he made no doubt at all; for 1st. The scriptures had affirmed so much. 2nd. The wisdom of all nations had provided laws against such persons—and such hath been the judgment of this kingdom, as appears by that act of parliament which hath provided punishments proportionable to the quality of the offence.' And we must certainly allow greater weight to this position 'that it was no felony till James's statutes,' deliberately laid down in his H. P. C., a work which he wrote to be printed and transcribed for the press in his lifetime, than to the hasty scriptum, that 'at common law, witchcraft was punished with death as heresy, by writ de heretico comburendo,' in his methodical summary of the P. C. pa. 6.; a work 'not intended for the press, nor fitted for it and which he declared himself he had never read over since it was written.' Preface. Unless we understand his meaning in that to be, that witchcraft could not be punished at common law as witchcraft, but as a heresy. In either sense, however, it is a denial of this pretended law of Alfred. Now all men of reading know that these pretended laws of homicide, concubinage, theft, retaliation, compulsory marriage, usury, bailment, and others which might have been cited from this Pseudograph, were never the laws of England, not even in Alfred's time; and of course, that it is a forgery. Yet, palpable as it must be to a lawyer, our judges have piously avoided lifting the veil under which it was shrouded. In truth, the alliance between church and state in England, has ever made their judges accomplices in the frauds of the clergy; and even bolder than they are; for instead of being contented with the surreptitious introduction of these four chapters of Exodus, they have taken the whole leap, and declared at once that the whole Bible and Testament, in a lump, make a part of the common law of the land; the first judicial declaration of which was by this Sir Matthew Hale. And thus they incorporate into the English code, laws made for the Jews alone, and the precepts of the gospel, intended by their benevolent author as obligatory only in foro conscientiæ; and they arm the whole with the coercions of municipal law. They do this, too, in a case where the question was, not at all, whether Christianity was a part of the law of England, but simply how far the ecclesiastical law was to be respected by the common law courts of England, in the special case of a right of presentment. Thus identifying Christianity with the ecclesiastical law of England.

TH: JEFFERSON.

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DECISIONS OF CASES IN VIRGINIA

BY THE

HIGH COURT OF CHANCERY,

WITH REMARKS UPON DECREES

BY THE

COURT OF APPEALS

REVERSING SOME OF THOSE DECISIONS.

By GEORGE WYTHE.

DISTRICT OF VIRGINIA TO WIT.

BE IT REMEMBERED THAT, on the sixth day of january, in the year of our lord one thousand seven hundred and ninety-five, and of the independence of the united states of America the nineteenth, GEORGE WYTHE, of the said district, has deposited in this office the title of a book, the right whereof he claims as author, in the words following: "Decisions of cases in Virginia, by the high court of chancery, with remarks upon decrees by the court of appeals, reversing some of those decisions," in conformity to the act of the congress of the united states, intituled "an act, for the encouragement of learning, by securing the copies of maps, charts and books to the authors and proprietors of such copies, during the times therein mentioned."

WILLIAM MARSHALL, cl. D. C. V.

Reprinted by THE MICHIE COMPANY, by authority of Act of Legislature, approved February 24, 1900.

TO THE

HONORABLE JOHN ROBERTSON,

JUDGE OF THE CIRCUIT COURT OF CHANCERY. FOR THE RICHMOND CIRCUIT,

THE PRESENT EDITION OF THESE REPORTS, A FAVORED CHILD OF THE OLD AGE OF THEIR VENERABLE AUTHOR, IS RESPECTFULLY DEDICATED; NOT ONLY AS A TOKEN OF PERSONAL ESTEEM AND REGARD, BUT AS AN HUMBLE TRIBUTE JUSTLY DUE TO THE LAST CHANCELLOR, IN VIRGINIA,—HER LAST JUDGE WITH EXCLUSIVE CHANCERY JURISDICTION,—WHO, OCCUPYING WORTHILY FILLS THE SEAT OF THE ILLUSTRIOUS

WYTHE,

AND UPON WHOM, WHETHER IN PUBLIC OR PRIVATE, HAS FALLEN THE MANTLE OF WYTHE'S INTEGRITY.

—Edition 1852.

ADVERTISEMENT.

[In edition of 1852.]

WYTHE'S REPORTS

Of decisions made by him in the High Court of Chancery, having been long out of print, and commanding, whenever a copy has been exposed to sale, quite a high price, the publisher has undertaken to present to the legal profession and the public this new and only complete edition. He was encouraged to engage in such an enterprise also by the great eminence of the author as a scholar and a jurist, and by his exalted reputation as a citizen and a patriot. At first it was his intention simply to reprint the work, in octavo form, with an index and abstracts of the cases. But during the publication his plan became enlarged, as stated in the preface. This enlargement will, he trusts, render the edition more valuable, and recommend it to the favor of the legal profession, for whose benefit it has been made. He is able to furnish also

JEFFERSON'S REPORTS,

uniform with those of his illustrious preceptor; the two bound up together, or in separate volumes. The possession of these works has long been the desideratum with lawyers and other collectors of books; and together with that of

BARRADALL'S REPORTS,

now in MS., but which the publisher hopes ere long to lay in type before the public, will enable any one to complete the list of Virginia Reporters.

Richmond, January, 1852.

PREFACE.

[Edition of 1852.]

In 1795, Chancellor Wythe published a folio volume entitled, "Decisions of Cases in Virginia, by the High Court of Chancery, with remarks upon decrees by the Court of Appeals, reversing some of those decisions. Richmond: Printed by Thomas Nicolson," pp. 167. In 1796–9 he published seven additional cases, in several octavo pamphlets, by the same printer.

The Editor will not seek to recommend this edition of those Reports to the favor of the public, by an exaggeration of its practical utility to the practising lawyer. At the same time, he does not see how any member of the legal profession, imbued with a proper spirit towards that profession, or towards those who have been exemplars and ornaments in it, can feel indifferent to such a work, or to the reward of that enterprise which has ventured to bring it once more within the reach of every one.

When the present edition was first contemplated, the publisher's plan extended only to a reprint, with an index and analyses of the cases, of the folio work published in 1795; to which, of course, he added as soon as he discovered them, the reports of cases subsequently published in pamphlet form. The idea of a more enlarged plan, embracing copious annotations and references to cases in pari materia, was suggested to him; and the Editor was willing to undertake the task; but the delay in getting out such a work, the increased expense, and the fact that such new modern matter would be mostly sought in works written for the purpose of embodying it, deterred him from adopting the suggestion. The undertaking of the Editor was, therefore, circumscribed by the wishes of the publisher.

But the work before us has its utilities, that are by no means inferior. It is no unimportant link in the history
viii *of the Jurisprudence of our State; showing how the mind of an upright, acute and fearless Judge worked under a severance from foreign authority, and sought right and justice amidst the conflicts of interest, prejudice and popular excitement. These reports and comments exhibit throughout a manly and vigorous independence of thought; the most sterling integrity; the most transparent sincerity of conviction; the most unwavering steadiness of moral principle; and a highly enlightened sense of equity, untrammelled by dicta and unswerved by prejudice or partiality. From their perusal no one can arise without feeling the corresponding principles within himself encouraged and strengthened, and their opposites, if any, rebuked and cowered. If their author could not commit such a memorial to the keeping of posterity with a confident feeling of its being appreciated, who may do so?

Few members of the bench or bar can hope to occupy such positions, so that their opinions will be of sufficient practical utility to commend them to their professional brethren, after they shall have gone from among us. None, indeed, but those of the Judges of the Appellate Courts of last resort, can rest securely upon such a foundation. And yet, shall the stores of wisdom and experience treasured up by the luminaries of the bench, in courts not supremely appellate, be forever lost; and all that shall remain of them, their genius, their labors and their learning, be but that brief traditionary apotheosis which their contemporaries, or their successors, hand down, at fartherest for a generation or two? This consideration alone should secure from the legal profession a high degree of favor to the work here tendered them. So far as the weight of names can go, few are so fortunate as to have had a Wythe for their author, with a Clay for his amanuensis.

The extent of the original plan of the publisher has already been stated. The editor felt constrained, however, to introduce references to the decisions of the Court of Appeals in the cases reported by the venerable Chancellor, and to volunteer a few notes. He congratulates the public that a more valuable and important enlargement has been produced by
ix *the liberality of Wm. Green, Esq., of Culpepper, whose legal learning is so well known. The editor, conferring with him in reference to this edition, just after it was commenced, discovered that he had meditated editing the work himself, and had collected materials for the purpose; but other engagements had prevented him from executing it. He at once evinced a deep interest in the enterprise, and to make it the more successful, freely tendered the use of his notes and references. It was deemed best to insert the most material of them as an appendix. But before Mr. Green could find leisure to reduce them to the order he desired, the printing of the text had proceeded so far that references to the appendix could not be inserted in the proper places. This omission, however, is supplied by references made in the list of cases, and in the appendix. We have no doubt the public will feel indebted, as we do, to Mr. Green, for his valuable additions.

In this edition, the cases reported have been arranged, with a few exceptions, chronologically,—according to the date of the decision of them by the High Court of Chancery.

The reasons for retaining the orthography and punctuation of the original, are too obvious to be stated. To have altered them, would have changed and marred the literary portrait which the work presented of the author and his times.

The folio copy used in preparing this edition, was kindly furnished by Hon. P. V. Daniel, of the Supreme Court of the United States; and the supplementary cases by Mr. Green;—they having been collected and bound in a volume, formerly owned by Mr. Madison, whose autograph it still bears.

Abstracts of the cases and an index were indispensable, and a memoir of the author seemed highly appropriate to accompany the reports: these must speak entirely for themselves. With these explanatory remarks, the work is committed to the profession and the rest of the public.

Richmond, January 1st, 1852.

CHRONOLOGICAL TABLE OF THE VIRGINIA REPORTS.

[Edition 1852.]

GENERAL COURT.

Barradall's, 1 vol. now in MS. but soon to be published.		
Jefferson's, 1 vol. embracing also some of the cases from the MS. Reports of Sir John Randolph, Mr. Hopkins and Mr. Barradall, - - - - -	Before the Revolution	1730 to 1772
Virginia cases, 2 vols. by Brockenbrough and Holmes Js.	1786–1826	

COURT OF APPEALS.

Call's, 4th volume, - - - - - -	1779–1803	1779 to 1806
" 3rd " - - - - - -	1790, 1801 & 3	
Washington's, 2 vols. - - - - -	1790–1803	
Call's 6th vol., cases scattering from - -	1796–1806	
" vols. 1, 2 & 5; and part of 4th & 6th, -	1797–1806	
Henning & Munford's, 4 vols. - - - -	1807–1809	1806 to 1828
Call's 6th volume, a few cases in - - -	1809–14 & 18	
Munford's 6 vols. - - - - - -	1809–1820	
Gilmer's, 1 " - - - - - -	1820–1821	
Randolph's 6 " - - - - - -	1821–1828	

COURT OF APPEALS AND GENERAL COURT.

Randolph's, 4th & 6th volumes, - - -	1826–1828	1826 to 1851
Leigh's 12 vols. - - - - - -	1829–1841	
Robinson's, 2 vols. - - - - - -	1842 & 43	
Grattan's 7 " - - - - - -	1844–1851	

CHANCERY COURTS.

Wythe's, 1 vol. High Court of Chancery, - -	1788–1798	1788 to 1809
Henning & Munford's, part of 2nd and 4th vols. Richmond Superior Chancery Courts - - -	1806–1809	

UNITED STATES CIRCUIT COURT.

Call's, part of 6th vol. cases scattering from -	1793–1825	1793 to 1833
Brockenbrough's, 2 vols. - - - - -	1802–1833	

MEMOIR OF THE AUTHOR.

[In edition of 1852.]

Conspicuous personages, who, like Wythe, make the History of their Times, may properly stand forth from the canvass of History, in all their individuality,—their portraiture being only the bolder for being the less minute. Yet Biography differs from History essentially in this;—that in the former details may be given, and personal traits and features displayed, that would be lost in the generalizations of the latter.

The little, however, that has been recorded of the long and useful life of Mr. Wythe, partakes more of eulogy than biography. The following is believed to contain the most that is now known of his history.

George Wythe was born in the County of Elizabeth City, Virginia, in 1726. His mother was one of five daughters of Mr. Keith, a Quaker gentleman of good fortune and education, and author of a work on mathematical and other subjects, who migrated from Great Britain to the town of Hampton, in 1690: his father owned a good estate on Back River, and died intestate, survived by his wife and three children. The elder brother being the heir at law, it is said that his mother's moderate circumstances induced her to undertake George's education herself; an office which, though her natural and acquired qualifications well fitted her for it, was, as is usual in such cases, but imperfectly discharged. She, however, besides English, taught him the rudiments of Latin; and also aided him in those of Greek; for though she did not understand it herself, yet having learned the alphabet, she, by a close collation of the English version with the Greek Testament, assisted him in the translation. As she must have had sufficient means from her dower, and the aid of her elder son, to send George to school, it is probable that her parental anxiety, or the want of a
xii convenient school, *was the true cause that kept him at home; and though his literary advantages were thus limited, she no doubt implanted in his character the seeds of that strength and uprightness which are said to have marked her own.

With this limited scholastic education, he was sent to study law with his uncle-in-law, Mr. Dewey, a lawyer of distinction in the County of Prince George. Here not much pains was bestowed upon him; his time was chiefly devoted to what is termed the drudgery of a lawyer's office. He apparently made very little progress in his legal studies. Yet it might be very fallacious to infer that that drudgery had no connection with or influence upon his future success. The profession of law requires labors and sacrifices of its votaries; and some who have been, at the outset, drudges, have by the very patience, perseverance, accuracy and closeness of observation which so called drudgery necessarily engenders and inculcates, become its greatest luminaries.

But the labors and toils of the student may be lightened by the attention and judicious encouragement of the preceptor; and no doubt Mr. Wythe profited by his own experience under Mr. Dewey, when in after years he so zealously devoted himself to the guidance and instruction of candidates for the bar.

After his return home, in about two years, he gave himself assiduously to self-improvement; and without assistance made considerable progress not only in Law, but in Latin and Greek Literature, and in the liberal sciences.

His mother died before he attained his majority. Her death and that of his brother put him in possession of the means of self-indulgence, and he now gave himself up to a long career of pleasure and dissipation. It cannot be supposed, however, that his studies were entirely suspended by his unfortunate habits; for such thirst of knowledge as he had imbibed could not have been slacked by the intoxicating drafts of pleasure, and must still have been indulged in the intervals of dissipation. He must, too, from his position, connexions and circumstances have enjoyed all
xiii the advantages *of the society for which lower Virginia was then, as now, distinguished; and may even have caught some aspirations after better things from the men with whom he may have met and mingled in the old metropolis of Williamsburg. These suppositions are confirmed by the history of too many of the gifted young sons of Virginia; misguided indeed like Wythe, and whilst moving in the best society, prostituting both genius and learning to dissipation and extravagence; but unfortunately not endowed with his self-control, nor like him recalled to the paths of usefulness and honor. In Wythe's reckless course of ten years, there does not appear to have been any great depravity of conduct. Having the means to "live like a gentleman," he felt no incentive to exertion. But at the age of thirty, by his own strength of will and better purpose, he broke the chains which evil habits might have bound indissolubly around him, and entirely reformed his whole life. The particular causes of this change are not stated: Whether love, the foreseen exhaustion of his resources, his own penitent reflections, or the influence of interested friends; or several of them combined. He appears now to have resumed the study of

the Law, under a Mr. Lewis, whose daughter he married. Lord Tenderden, we think, has observed that poverty has been the greatest friend of the legal profession. A prospective vision of its approach may have stimulated the exertions of Wythe. Rapid success after his admission to the bar, crowned his learning, industry and eloquence. But he never ceased to deplore the follies and imprudences of which he had been so long guilty; to regard the time allotted to them as irretrievably lost, and to warn the many young men who came under his influence to profit by his example.

The chancery bench of Virginia furnishes other examples of the strength of moral principle; not only in the case of Mr. Wirt, whose friends placed him there with the hope of reforming him; but of another who has since adorned it and in whom years of integrity and morality have borne testi-
mony to the principles that were
xiv strengthened by the *temptations,
which he by his own decision of character resisted in youth.

Moral grandeur is the truest; and would that our great men not only possessed more of it; but based it upon the precepts and practice of the Christian faith. Mr. Jefferson speaks of the elevated philosophy of Mr. Wythe; but, better still, Mr. Munford speaks, as we shall see, of his faith as a christian.

Wythe, then, it would appear, came to the bar in Williamsburg after the year 1756;* and the following facts shew the eminence to which he must have arisen in the short space of five years. In 1760, Jefferson entered William and Mary College, as a student; and in less than two years thereafter, through the influence of Dr. Small, was taken under the instruction of Mr. Wythe. Dr. Small was Professor first of Mathematics, and afterwards of Philosophy and Belles Lettres in William & Mary. How Mr. Jefferson regarded his interposition is shewn by himself. He says, "He (Dr. S.) returned to Europe in 1762, having previously filled up the measure of his goodness by procuring for me from his most intimate friend, George Wythe, a reception as a student of law under his direction, and introduced me to the acquaintance and familiar table of Gov. Fauquier, the ablest man who had ever filled that office. With him and at his table, Dr. Small and Mr. Wythe, his amici omnium horarum, and myself formed a partie quarree, and to the habitual conversations on these occasions, I owed much instruction. Mr. Wythe continued to be my faithful and beloved mentor in youth, and my most affectionate friend through life. In 1767, he led me into the practice of the law, at the bar of the General Court, at which I continued till the Revolution shut up the Courts of Justice."†

*The biographies of Wythe lead to the impression that he studied with Mr. Lewis, and came to the bar, after his reformation, and about the age of thirty, (i. e. about 1756;) but this is by no means certain.

†Memoir, Corres., &c., of Jefferson, Vol. I., p. 2.

When Mr. Wythe first entered the House
of Burgesses is not stated; but he soon
xv took there an honorable stand *among
men who were the master spirits of their times. From the commencement of the revolutionary spirit of the Colonies, he warmly espoused their cause. Yet his independent course did not lose him the esteem of the royal Governors, for he was intimate with all but Dunmore; nor of the government party, for he was several times elected to the honorable office of clerk of the house, and also to the speaker's chair, with their support.

In 1764, (aged thirty-eight,) he drew up for a committee of the burgesses, of which he was a member, a remonstrance to the English House of Commons; but it was too bold for the times, though only expressive of the principles which he was ready to avow and maintain. After some softening it was adopted by the house. Still he was one of those who opposed as unseasonable and inexpedient the famous resolutions of Patrick Henry, concerning the stamp act, in May, 1765. Henry's matchless, yea miraculous, eloquence carried them through; but the next day, he having gone home, the fifth resolution,* that had been most opposed, and had been carried by only one vote, was expunged. In 1768, however, they had come up fully to Henry's ground. Mr. Wythe was still a prominent member of the House of Burgesses, which now adopted resolutions asserting in determined language their exclusive right to tax the Colonies; and complaining of the violation of the British Constitution by Parliament and of the oppression of trying in England persons charged with having committed offences here. Governor Botetourt endeavored in vain to procure a copy of these resolutions from the Clerk, Mr. Wythe, and in hope of preventing the completion of their passage dissolved the assembly; but they had anticipated him and already spread them upon the records of their body. The next year, (1769,) the people triumphantly sustained their representatives and returned them to the As-
sembly. Jefferson had then entered
xvi the house as a *member: and now
preceptor and pupil stood side by side in defence of the rights and liberties of the Colonies. Mr. Jefferson prepared a draft of instructions to be given to the delegates, who should be sent to the Congress he meant to propose; but it was thought too bold for the existing state of things. It was, however, printed in pamphlet form under the title of "A summary view of the rights of British America." In it he took the ground which he regarded as the only tenable and orthodox one, that the relation between these Colonies and Great

*It was as follows: "That the general assembly of this colony have the sole right and power to lay taxes and impositions upon the inhabitants of this colony; and that every attempt to vest such power in any person, or persons whatsoever, other, than the general assembly aforesaid, has a manifest tendency to destroy British as well as American freedom." Wirt's Life of Henry, p. 57.

Britain was exactly the same as that of England and Scotland, after the accession of James and until the Union; and the same as her present relation with Hanover, having the same executive chief, but no other necessary political connection. In this doctrine he says he could not get any one to agree with him but Mr. Wythe,* who concurred in it from the first dawn of the question, what was the political relation between us and England? Perhaps Mr. Wythe had instilled this doctrine into him. Enough has been stated to shew with what ardor and ability Mr. Wythe must have continued to devote himself to his profession and his country. But little of his acts is recorded until 1775. He then joined one of the earliest corps of volunteers, and evinced his promptness to sustain in the field the cause he had espoused in council. He wore a hunting shirt, carried a musket, and joined in the military parades which took place in Williamsburg during the latter part of Lord Dunmore's administration. But his friends at length persuaded him that he could be more useful to the state in a civic sphere.†

For that incompetent and corrupt representative of the Crown, Lord Dunmore, whose character and conduct were
xvii *well calculated to bring the royal authority into contempt Mr. Wythe had anything but respect; he regarded him as mean and ignorant. One day, in the General Court, over which Governor Dunmore then presided, Mr. Wythe and Mr. Nicholas were engaged on one side of a cause; Mr. Pendleton and Mr. Mason on the other. The case being called, Mr. Wythe urged the trial of it; Mr. Pendleton wished it continued, as Mr. Mason was absent, and there were two counsel on the other side. Lord Dunmore had the indelicacy to say to Mr. Pendleton, "Go on, sir, for you'll be a match for both of them." "With your Lordship's assistance," retorted Mr. Wythe, sarcastically, but at the same time bowing politely. The spectators enjoyed the rebuke, so keenly and politely administered. Yet Mr. Wythe was a man of kind and benevolent heart. In 1775, he was appointed a delegate to the Continental Congress; and the next year joined heartily in the debates urging the Congress, in pursuance of the recommendation of Virginia, to declare the colonies free and independent; and fearlessly signed the immortal Declaration drawn by his own grateful pupil. The same year, 1776, he was appointed, with Mr. Jefferson and others, to revise the entire jurisprudence of the State, and to adapt it to her independent position, and the republican principles embodied in her new Government. The part specially undertaken by Mr. Wythe, was the British Statutes from the 4th year of James I, to the then present period. Mr. Jefferson took the British Statutes prior to the 4th James I; including the Statutes of descents, for religious freedom, and apportioning crimes and punishments: Mr. Pendleton, the Virginia laws: All, however, revised the work of each. They made their report in 1779, and many new laws, rendered necessary by the new order of affairs, were from time to time adopted; but the main body of the revision was not acted upon till 1785. The code adopted was then termed the Chancellor's Revisal. In the two sessions of the assembly in 1777, between his return from Congress and his appointment as Chancellor, Mr. Wythe was Speaker of the House, but took an active and efficient part in whatever was
xviii before the committee of the *whole.

His pure integrity, judgment and reasoning powers, gave him great weight.* Towards the close of the same year, he was appointed one of the three Judges of the High Court of Chancery; and on the new organization of that court, in 1788, sole chancellor.

The High Court of Chancery was established in 1777, in the second year of the Commonwealth. It consisted of three judges, chosen by a joint ballot of both houses of assembly, commissioned by the Governor, and to hold their office "so long as they demeaned themselves well therein." Their salary was five hundred pounds; but was increased the next year to £800; and the next to £1200. The Court had general jurisdiction in all causes in chancery, whether by original or on appeal; but no original suit could be instituted therein for a less sum than ten pounds, except against a justice of a county or other inferior Court, or the vestry of any parish. It held two terms a year, in the City of Williamsburg.†

The oath required by the Judges shews the spirit in which the administration of justice was regarded by the pure patriots of that day:—a spirit, too, in which Wythe is universally admitted to have executed his office:‡ "You shall swear that well

*Memoir, Corresp., &c. of Mr. Jefferson, Vol. I., p. 6, 7 and 92. As to Mr. Henry, (who might have been expected to concur,) Mr. Jefferson sent him a copy of the MS. and says, "Whether Mr. Henry approved the ground taken, or was too lazy to read it, (for he was the laziest man in reading I ever knew,) I never learned: but he communicated it (the MS.) to nobody." p. 7 of Memoir, &c.

†See a communication in the Richmond Enquirer of June 10th, 1806, in relation to Mr. Wythe.

*It was not alone by his labors in Congress and the General Assembly that he endeavored to serve the cause of his country. There is still extant a copy of an address to the Hessians, written by him, to induce them to desert the unjust cause they were defending. Geo. W. Randolph, Esq. informs me that he has seen the address among the papers of Mr. Jefferson, recently purchased by Congress. What use was ever made of it, I am not advised.

†9 Hen. Stat. 389—399, 521.

‡The seal of the court, too, was a perpetual momento of the stern and uncorrupt impartiality that should characterise the judicial office. The Chancellor says that he was indebted to the ingenious Benjamin West, the celebrated painter, for the allusion among the devices on that seal to the story of Sisamnes related by Herodotus. For accepting a bribe, Cambyses had Sisamnes killed and flayed, and his skin cut in straps and stretched about the judicial seat. He then appointed Otanes, son of Sisamnes, judge, and told him to remember the seat upon which he sat to administer justice.—Herod. Lib. V. cap. 25-6. See following reports, p. 211.

and truly you will serve this commonwealth in the office of a judge, and that you will do equal right to all manner of people, great and small, high and low, rich and poor, according to equity and good
xix conscience, and the laws and *usages of Virginia, without respect to persons. You shall not take by yourself, or by any other, any gift, fee or reward of gold, silver, or any other thing,* directly or indirectly, of any person or persons, great or small, for any matter done or to be done by virtue of your office, except such fees or salary as shall be by law appointed. You shall not maintain by yourself, or by any other, privily or openly, any plea or quarrel depending in the Courts of this Commonwealth. You shall not delay any person of right, for the request or letters of any person, nor for any other cause; and if any letter or request come to you contrary to law, you shall proceed to do the law, any such letter or request notwithstanding. And finally, in all things belonging to your said office, during your continuance therein, you shall faithfully, justly and truly, according to the best of your skill and judgment, do equal and impartial justice, without fraud, favor or affection, or partiality."

Such special oaths, however, unnecessarily encumbered our Statute Books, till the amendment in that respect recently introduced by the New Code. Whilst there has been in the judiciary of Virginia every grade of ability and efficiency, all have been remarkably upright; and even where some of the judges have been of immoral character, they have never incurred any imputation upon their official integrity. No Bacon, or Macclesfield, or Jeffreys, or Thorpe has ever disgraced the Bench of this Commonwealth.

In 1780 the Court was removed to Richmond. The currency having become still further depreciated, the salaries of the Judges were changed to 20,000 lbs. tobacco, payable quarterly, the value to be fixed by a jury of freeholders before the County Court of Henrico; and were finally fixed at £300 in specie.—The Judges of the High Court of Chancery were ex-officio Judges of the Court of Appeals, where they were entitled to precedence. Judge Pendleton was President of both. The other high chancellors were first R. C. Nicholas, and afterwards Mr. Blair.

In 1788, the number was reduced to
xx one, and the terms of *the court increased to four a year, still a holder at Richmond. The jurisdiction extended over the whole state till 1801, when the State was divided into three districts, and with a Superior Court of Chancery, and a separate Chancellor in each. These Courts were held at Richmond, Staunton and Williamsburg; and such remained the system till after Mr. Wythe's death.

During the revolution the courts were almost entirely closed, which no doubt gave Wythe and many other leading patriots the opportunity to devote nearly their whole time to the service of the State. His time and talents were not all that he contributed, for he suffered many pecuniary sacrifices; and the greater part of his slaves were carried over to the enemy, by the dishonest manager of his Hampton estate.

By a change in the organization of William and Mary, effected chiefly by Mr. Jefferson, who was then governor of the State, and one of the visitors of the college, a professorship of law was established, and Chancellor Wythe appointed to fill it, in 1781. He discharged its duties with great ability and usefulness for eight years.

It has already been stated that, as Chancellor, he was one of the Judges of the first Court of Appeals,* in which his intrepidity and uprightness were forcibly exhibited in opposing and vacating as unconstitutional, the action of one branch of the Legislature. That court held in the case of the Commonwealth v. Caton et als, 4 Call 5, that the treason law of 1776 was constitutional; and the House of Delegates could not, without the concurrence of the Senate, pardon persons condemned by the General Court, under that law.

In delivering his opinion, Wythe J. said: "although it was said the other day, by one of the Judges, that imitating that great and good man, Lord Hale, he would
xxi sooner quit *the bench, than determine this question, I feel no alarm, but will meet the crisis as I ought; and in the language of my oath of office, will decide it according to the best of my skill and judgment. I have heard of an English Chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the crown; and that he would do it at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely it is mine to protect one branch of the Legislature, and consequently the whole community, against the usurpations of the other; and whenever the proper occasion occurs, I shall feel the duty, and fearlessly perform it." Such was really the spirit of the man and the Judge, as he had other occasions to prove. One other will yet be mentioned.

Some biographers have stated that Wythe was a member of the Convention of 1787, which formed the Constitution of the United States. This is a mistake. He was appointed one of the seven deputies from Virginia. But he, prevented perhaps by his double duties of Chancellor and Professor, and Patrick Henry never took their seats. He was, however, a member of the State Convention which ratified the

*See the anecdote related by Mr. Clay, infra.

*Which consisted of the Judges of the High Court of Chancery, those of the General Court, and those of the Admiralty, assembled together. Chan. Rev. 102. And the sitting members in the case of Caton, &c., were Pendleton, Wythe and John Blair, chancellors; Paul Carrington, Bartholomew Dandridge, Peter Lyons, and James Mercer, Judges of the General Court; and Richard Carter, one of the Judges of the Court of Admiralty. This was in Nov., 1782. 4 Call 5.

Federal Constitution, and presided over their deliberations in Committee of the Whole. He was a strenuous advocate of the ratification of the instrument; and Chairman of the committee which reported the amendments thereto proposed by Virginia. He was a member afterwards of the Republican party, which he adorned by truly republican virtue and simplicity; and twice successively presided over the college of electors in Virginia.

In 1789, when he became sole chancellor, he resigned his professorship in Williamsburg, and removed to Richmond, that he might be nearer the theatre of his judicial duties, and more convenient to those who might require his official services during the vacation of his Court.

The other occasion referred to in which his intrepid uprightness displayed itself, was in the case of the British Debts in 1793. After the peace, in 1783, there
xxii were in *Virginia many persons who owed debts in England; among whom was Mr. Robinson, who had been the Treasurer of the Commonwealth. The Legislature had passed a law that payments of paper money into the loan office of the state in satisfaction of debts to British creditors should discharge the debtors. Such men as Edmund Pendleton and Peter Lyons, as administrators of Robinson, sought for their intestate's estate, the protection of a payment under that law. The Court below had extended it to them, and the popular feeling was in their favor. But the venerable chancellor stemmed the tide, and decreed against them; and lived to enjoy the satisfaction of receiving the applause even of those who wished and would have justified a different decision. "A Judge," says he, "should not be susceptible of national antipathy, more than of malice towards individuals;—whilst executing his office, he should be not more affected by patriotic considerations, than an insulated subject is effected by the electric fluid in the circumjacent mass, whilst their communication is interrupted. What is just in this Hall is just in Westminster Hall, and in every other praetorium upon earth. Some judges in the West India Islands have been execrated by citizens of the United American States, for several late sentences against the latter, in favor of British subjects, in certain maritime causes; justly execrated if fame hath not mis-reported their conduct. None of those citizens, surely, can wish to see the tribunals of their own country so polluted."*

In 1795, Mr. Wythe published a report of this case, with a number of others in this Court, in a folio volume. Though some of the cases reported were ended in that Court without appeal, and in others the decrees were sustained by the Court of Appeals, yet the chief object of the publication seems to have been to vindicate the decisions of the author from the opposite opinions of the Appellate Court; and in a few instances, of his associate chan-
cellors. In general, and in his
xxiii *writing on other subjects, his style may have deserved the compliments sometimes paid to it; but there is in it as exemplified in his Reports, though some are very well written, no little of stiffness and formality, with some affectation and even pedantry. Even good style is exceedingly various; and one may write well in a bad style. The tone of his comments on the reversal of his decrees by the Court of Appeals, together with the selection of several of the cases reported and commented on, suggests the idea that there was some pique or jealousy between him and some of the judges of the higher Court. Enquiries have confirmed this. The same impression has been produced on other minds by the same evidences; and one of the senior judges of the State writes, that "during their lives there seemed to be a very general impression on the public mind that the personal feeling of Mr. Pendleton and Mr. Wythe towards each other, were less kind and amicable than might have been expected in the bosoms of two men so universally respected for their general amiable temper. In the case of Eppes and Randolph, there is a remark made by Judge Pendleton, in reference to his venerable compatriot, which I have alway wished could be expugned from the report."*

In 1796–9 Mr. Wythe published separately, in pamphlet form, reports of seven other cases decided in this Court, with comments upon the reversal of them by the Court of Appeals. All these reports are contained in the volume herewith submitted to the public.

The long period of seventeen years between his removal to Richmond and his death was spent in the faithful discharge of the duties of his office, to which he gave his undivided attention. It is impos-
sible, however, but that a man
xxiv *of his position, influence and positive character should have felt a deep interest and sometimes taken a leading part, by counsel at least, in many important public matters. We have seen that he presided twice over the electoral college; and being not only the personal but political friend of Jefferson during the memorable struggles about the year 1800, from his nature and the spirit of the

*See the following Reports, p. 211: Mr. Munford in his funeral oration says: "Yet to the immortal honor of the people of Virginia, be it said, those decisions did not diminish his popularity; but made them admire and respect him more than ever."

*2 Call 184. The remark is this: "The term re-acknowledgment [of a deed] seems to have produced in the mind of the Chancellor mistaken ideas. * * * A mistake which information from our clerk would correct." In the same Report Judge Pendleton uses the phrase "clashing jargon" in such juxta position with a comment upon the Chancellor's opinion under review, that it also has been by some construed into an unfriendly hit at the Chancellor; but we hope it was intended to refer only to the conflict between the cases alluded to as cited by the counsel in the argument of the case. 2 Call p. 185.

times, we know that he could not have been inactive any farther than his judicial office rendered it imperative. The following characteristic letter* belongs to this period.

"WYTHE TO JEFFERSON."

"The friends of Alexander Quarrier will not be a little gratified by hearing that his son, of whom they think well, hath been promoted to some office which he shall be found qualified to execute. Farewell. 4th of July, 1801."

This is certainly brief and non-committal; but intended as it no doubt was, it had more weight than the puffs for office now too much in vogue; whilst its curt generality would commend it to the adoption of the multitudes, who are constantly solicited to aid the asporations of those of whose qualifications they know nothing. It brings to mind the general letter of introduction which Dr. Franklin was constrained to draw up, whilst he was our minister to France, in order to save his sincerity, whilst he complied with the application for such letters that were constantly made to him.

As a practitioner of law, Mr. Wythe erected for himself the highest standard of propriety, candor and fidelity; and a letter of his is still extant,† in which he declines undertaking a cause tendered him, because he could not conscientiously promote the views of his client.

xxv *As a judge he was not only fearlessly upright and independent, but able, punctual, attentive and industrious. John Randolph used to say of him "that he lived in the world without being of the world. That he was a mere incarnation of justice,—that his judgments were all as between A. and B.; for he knew nobody, but went into Court as Astræa was supposed to come down from Heaven, exempt from all human bias."‡ Mr. Wythe himself declared, that even "compassion ought not to influence a judge, in whom, acting officially, apathy is less a vice than sympathy."§ His learning was extensive both in his profession, and in general science and literature; and he has taken a quaint and even eccentric pleasure in stamping upon his reports and records of his Court‖ traces of his learning; especially in logic, mathematics and the classics. "Not only was the father of poetry his intimate companion, but the philosophers, historians, and even dramatic poets of antiquity were as familiar to him in their original dress as were almost all the meritorious works of the day in his vernacular tongue. The writer of this sketch has heard him denominated emphatically 'the walking library.' "*

Mr. Wythe had been twice married; first, as already stated, to the daughter of Mr. Lewis, with whom he studied

xxvi *law; and secondly to a member of the wealthy and influential family of Taliaferro. The only child he ever had died in infancy. He was a widower for several years before his death.

His earthly career was terminated suddenly and unexpectedly, though he was in his eighty-first year on the 8th of June, 1806. Like Jefferson and all the leading men of that day, he was in favor of

xxvii the emancipation of slave. *He had liberated three, a man, woman and boy, and by his will made suitable provision for their support. He had taught the boy to read and write.—The legatee of the greater portion of his estate was his great nephew, George Wythe Swinney, the Grandson of his sister.—The freedom died in his life time, and a codicil to his will increased the provision made for the boy, —which, in case the boy should die before the age of twenty-one, was also to go to the nephew. The boy died suddenly, a few days before Wythe himself, and a second codicil to the will, reciting that the

*Kindly furnished us by Geo. Wythe Randolph, Esq., grandson of Mr. Jefferson. The original closely resembles print,—the usual style of Mr. Wythe's writing.

†Among the papers of Mr. Jefferson recently purchased by Congress.

‡From a letter of Judge Beverly Tucker to the Editor.

§Following Reports, p. 283.

‖Communication in the Richmond Enquirer, June 10th, 1806.

*An instance of this occurs in the decree rendered in May, 1804, expounding the will of Patrick Henry. After quoting the parable in St. Mathew, ch. xx, he says "the land was a gift, not naturalie or moralie to be retributed or countervaled by price, by pounds or dollars, and their fractional parts, but meriting an intirelie different remuneration, namelie, th' effusion of 'a gratefull mind, Which owing owes not, but still pays, At once indebted and discharged;' " Then he adds this note. "Paraphrase, by Milton of 'commode autem, quicumque dixit; pecuniam qui habeat, non reddidisse; qui reddiderit, non habere; gratiam autem et qui retulerit, habere; et qui habeat retulisse.' Cic' de offic' lib' 2, cap' 20. One, whoever he was, said well, 'a debitor, before paiment, may have the money due, and have it not after paiment; but he who is grateful, both hath what he paieth, and paieth what he hath.' The same sentiment occurs in this passage. 'Dissimilis est pecuniæ debitio et gratiæ, nam qui pecuniam dissolvit, statim nom habet id, quod reddidit: qui autem debet, æs retinet allenum gratiam autem et qui refert habet; et qui habet, in eo ipso quod habet, refert.' Cic' pro Cn' Plancio, c' 19, for which I was obliged to m' Warden. G.' W' " A little mathematics is also introduced into the same decree. But a more amusing instance occurs in a "dissertation and decree" rendered March 7th, 1806, not long before his death. The question was whether certain devisees took estates for life, or estates tail, converted into fees. The conflicting arguments of counsel seem to have produced a singular impression upon him. At one time, he says, "a phalanx of authorities, adjudged cases so styled, hath been mustered, and an argument, a rhapsody, replete with law learning, hath been formed to prove, &c." And again, "Aulus, Gellius, (lib' 5, cap' 10) in his attic lucubrations, observes that those arguments are very vicious which, against him who uses them, may with equal cogencie be retorted by his antagonist, and of which he gives an example, which is in the note." That note is as follows: "Eualthus, a wealthie young man, desirous of studying eloquence and of learning to plead causes, and for that purpose becoming a disciple of Protagoras, an acute sophist, and paying to him one-half of a liberal fee which he required, contracted to pay him the remainder whenever he, Eualthus, should plead a cause and prevail in it. Eualthus, for a long time, was the pupil of his præceptor, and made a considerable progress in oratorie and jurisprudence, but would not engage in the practice of Law. Protagoras suspecting that Eualthus declined it, to avoid payment of the other half of the fee, institutes an action against him, for breach of contract, expect-

boy had died that morning, revokes all the devise in behalf of Swinney, and leaves the whole estate to be equally divided among Swinney's brothers and sisters. These facts and the circumstances attending the venerable chancellor's death excited suspicion that poison had been administered to him; and Swinney was subjected to a public prosecution for the crime of murder, accompanied by the blackest ingratitude.

"How oft alas! does goodness wound itself,
And sweet affection prove the source of woe!"

The circumstances of suspicion were quite strong; two indictments were found against him, in September 1806; he
xxviii *was tried upon one and acquitted, and then the attorney for the commonwealth entered a nolle prosequi.* But four indictments had also been found against him for a misdemeanor in obtaining money, the preceding April, from the Bank of Virginia, upon a false check in the name of Mr. Wythe. He was, therefore, remanded to jail to be tried upon these. He was convicted and condemned to six months' imprisonment in jail, and to one hour's exposure on the pillory, at the market house in the city of Richmond. But this sentence was never executed. The General Court had arrested one judgment; but the appeal to them on another indictment was ineffectual; yet the Court below granted him a new trial, and the prosecuting attorney entered a nolle prosequi.† The unfortunate man then sought refuge in the West; where his career was brought to a premature and miserable close. During the Chancellor's sickness, he endeavored to continue the discharge of his duties; and despite the racking pains which he suffered, studied cases pending before him, and lamented deeply the inconvenience and delay with his sickness would cause to the suiters in his Court.‡ Great solicitude was felt for his recovery. As soon as the news of his death was made public, the
xxix bells of the city *were set a tolling, the Executive Council assembled, adopted an order for a public procession, and appointed Wm. Munford, Esq., one of their body, to pronounce a funeral oration over the deceased.§ Mr. Munford had been a pupil and protege of Mr. Wythe. After the death of his father, whilst he was pursuing his studies at William & Mary, he would have been compelled to leave college in consequence of the embarrassments of his father's estate. Mr. Wythe, who had observed his assiduity, was then about to remove to Richmond, and proposed to him to come and study in his office. The generous offer was accepted; and Mr. Munford's conduct ever afterwards evinced his gratitude. The duty assigned him by the Executive Council was promptly discharged with ardor and affection; and he drew a moral and intellectual portrait of his departed friend, which any one might envy.‖

ing that a cunning argument, as he thought one that he had devised to be, would insure success. When the parties were convented before the judges, Protagoras addressing his speech to Eualthus began thus, 'Know, said he, thou most foolish young man, that thou must pay to me I demand, whether the judgment be against thee or for thee; for if it be against thee, my wages will be due by the Court's sentence; but if it be for thee, my wages will be due by the contract, because thou wilt have gained a cause.' To which Eualthus answered, 'Know thou, too, most wise master, that it cannot either way be that I must pay to thee what thou demandest, whether the judgment be for or against me; for if it be for me, by the Court's sentence nothing will be due to thee; if it be for thee, nothing will be due to thee by the contract, because I shall not have gained a cause.' The Judges thinking what was said on both sides to be dubious and inexplicable, lest their sentence on whichever side it should be pronounced, should refute itself, left the matter undetermined and adjourned the cause in diem longissiman" Again he says,—"The argument, (of the pliff's counsel,) then, at this time is as unseasonable as the condolence in the address of ambassadors from Troas to Tiberius Cæsar upon the death of Augustus Cæsar, which had happened a long time before: to which part of that address, the Emperor to whom it was presented, as Josephus relates, answered that he heartilie condoled with them upon the death of their Hector." Again he says: "Dyonisious Halicarnassus in his commentarie upon Homer remarks, that one principal art of an orator is to use arguments the weakest he can invent to maintain that side of an argument which pretends to patronise but wishes to be decided the other way, and oppose most faintlie those arguments which are urged against him. Thus Agamemnon, pretending to recommend abandonment, which he reallie dreaded, of the the siege of Troy, gave the most powerful reasons for its continuance. And the arguments of the pliff's counsel appear to the Court to favour the contrarie side of the question, conclusivelie." In another decree, (Sept. 18, 1805.) he quotes Justinian's Institutes, Homer's Odyssy, Xenophon, and the Alcestis of Euripides. In another case, (6th of March, 1801.) in construing the will of Robert Beverly, deceased, he decides that "that the pliff., the widow, is not entitled to the carriages, with the caps and boots provided for the drivers thereof claimed in her bill. ('Fine subjects for a HIGH Court of Chancery, are they not?' exclaims he in a note.) "Nor is she entitled to the pipe of wine, which although ordered by the testator for the use of his family, had not arrived, and so was not part of 'the liquors in or about the house at the time of his death.'" These few instances have been taken from the records of the Court.

*At the time of the poisoning, the Chancellor had been confined at home by indisposition. Swinney, indignant at the kindness and munificence of his uncle to the colored boy, intended to poison the boy, and put the poison in the coffee for breakfast, not expecting that the Chancellor would think of coming from his chamber, or would be in any danger of partaking of it. But during his absence, the Chancellor did make his appearance and drank of the coffee. The woman also died. These facts were obtained from Dr. John Dove, who then resided in that neighborhood, and was present when Mr. Wythe breathed his last. The residence of Mr. Wythe in Richmond was a yellow wooden house, with hip-roof, situated on the corner of Fifth and Grace Streets. The garden attached to it extended to Franklin Street, and embraced half the square. It was cultivated as a market garden for several years after his decease. For several years after that sad event, the house was occupied; but then became so delapidated that it was untenanted. Finally the youths of the city, who had formed a Thespian Corps, obtained the use of it gratis for their performances, and knocked down the partitions to make it to suit their purposes. Its ruins and its garden have now made way for some of our handsomest mansions.

†The records of these proceedings have been consulted in the office of the Superior Court of Law for Henrico County. See also 1 Va. Cas. pp. 146, 150.

‡Munford's Eulogy.

§It is believed that his remains were deposited in the grave-yard around St. John's Church, in Richmond. But the place is not marked by the slightest memorial. Ought not the bar of Richmond to have it identified, if practicable, and appropriately eenotaphed.

‖This oration is published in the Richmond Enquirer, of June 13th and 17th, 1806.

He rescued his memory, too, from the charge of infidelity that had been asserted against it; and says that in his last sickness he repeatedly prayed to Jesus Christ as his Saviour; and the correspondent in the Enquirer, already referred to, says, that not long before his death, he exclaimed "let me die righteous." Mr. Munford thus feelingly speaks of his zeal in the cause of education: "The most remarkable instance of his genuine patriotism, to which I confess I am rendered most partial, perhaps, by my own experience of its effects, was his zeal for the education of youth. Harrassed as he was with business, enveloped with perplexing papers and intricate suits in Chancery, he yet found time for many years to keep a private school for the instruction of a few young men at a time, always with very little, and often demanding no, compensation."

He also bears hearty testimony to the private virtues of the Chancellor, his frugality, simplicity, benevolence
xxx and *modesty. Though naturally of a quick temper, he had brought it under his control. Quickness and even impatience of temper are, however, entirely compatible with true kindness of heart, and a disposition to be just to every one. He was sometimes facetious with his friends; but his general deportment was reserved. Although he lacked neither quickness of parts, nor colloquial talents, he was cautious and taciturn,* unless roused by some improper remark, and then he was apt to retort with great severity. He possessed dry humor and considerable wit, and indulged in sarcasm when treated with disrespect. Of this an instance has been given in his retort upon Lord Dunmore.

"In debate," says Mr. Call, "Mr. Pendleton was more captivating; Mr. Wythe, more argumentative. 'Cæsar ne priorem, Pompeius ve parem,' was a question which produced no animosity between them; but at which the world never decided."

In venturing the opinion, that this question has been decided in favor of Mr. Pendleton, it is not intended to disparage Mr. Wythe. Though there may never have been between these two honored men any feeling strong enough to be styled animosity, yet it seems apparent from
xxxi the circumstances *already adverted to, that from some cause, there was some unpleasant feeling between them. Pendleton's nature was milder than Wythe's and he did not manifest this feeling as much as the Chancellor did.

Other and abler pens will complete this tribute to his memory. "His virtue," says Mr. Jefferson, "was of the purest kind; his integrity inflexible and his justice exact; of warm patriotism, and devoted as he was to liberty and the natural and equal rights of men, he might truly be called the cato of his country, without the avarice of the Roman; for a more disinterested person never lived. Temperance and regularity in all his habits gave him general good health, and his unaffected modesty and suavity of manners endeared him to every one. He was of easy elocution, his language chaste, methodical in the arrangement of his matter, learned and logical in the use of it, and of great urbanity in debate. Not quick of apprehension, but with a little time profound in penetration, and sound in conclusion. His stature was of the middle size, well formed and proportioned, and the features of his face manly, comely and engaging. Such was George Wythe, the honor of his own and the model of future times."

Besides those of lesser distinction, Mr. Wythe was the preceptor of two presidents, and a Chief Justice of the
xxxii *United States. The following letter† shew that his connections

*He sometimes politely bowed in persons calling on business, attended to it and then politely bowed them out of the house, without speaking a word. He was in the habit of going very early, rather in dishabille, to a neighboring bakery to buy his own bread: and for days successively put down his money and took his loaf without uttering a word. Judge Beverly Tucker, communicated the following anecdotes: Mr. W. visited nobody but his relation, Mrs. Taliaferro, who lived four miles from Williamsburg; and being a great walker always went on foot, sometimes taking young Munford with him. One evening as they set out together, M. said on leaving the door, "a fine evening, sir." To which, as they entered Mrs. T.'s house, the old man replied, "yes, a very fine evening."—There was then a coffee-house in Williamsburg, next door to which my informant lived, and much of the gossip of which, of course, reached her. One evening, she says, Mr. W. was seen approaching the coffee-house. "Here comes Mr. Wythe," said one; "I wonder if he will talk this evening." Some said yes, some, no. "I'll make him talk," said a saucy negro boy, who being always about the house had become a sort of licensed pet of the customers. The old man entered, walked in silence to the fire, and turned his back to it, stood with his hands behind him. The boy put the hot poker in his hand. "What did you do that for?" was all he said. Judge T. also gives the following personal reminiscence of him, and says: "I was taught from my childhood to venerate him as the purest of human beings." "I have still," says he, "in my mind's eye, the tall, pale, extenuated old man, that I used to see walking silent and alone before the door, and whom we boys always beheld with a feeling akin to superstitious awe. I recollect that once meeting me alone, he surprised me by patting me on the head, speaking kindly to me; and then putting his long bony finger into my hand, leading me up into his chamber, and showing me a swarm of bees at work in a hive which he had fitted against one of the panes of his window." Judge Tucker when he penned these sentences was filling the chair of law in the University of William & Mary, that was first filled by Mr. Wythe. He has since gone to his last account, full of merited honors. We tender to his memory the respectful tribute of a grateful pupil. These details of Mr. Wythe are given to complete the picture of the man. Even his eccentricities and affectations, if such they be deemed, leaned to virtue's side, and were the natural result of his studious and retired mode of life operating upon the qualities which long formed the basis of his character.

†For that letter special acknowledgments are hereby tendered to the writer. It came very promptly in response to a simple request, made by one who had no claims upon his attention save those of a cordial respect manifested, as opportunity has offered, during an acquaintance of several years; and at a time when it was known that the pressure of numerous engagements, caused by a long abscence from home, furnished so good a reason for not complying with it as almost to have prevented it from being made. The public, like ourselves, will feel deeply indebted to that generous disposition to pay tribute to the worthy, and that grateful affection towards a venerable friend which have furnished them the following sketch. We were unwilling to weave it into our own narrative.

with the eminent greatness of his country are not yet severed:*

ASHLAND, May 3, 1851.

My Dear Sir,—I duly received your favor of the 21st ult., in which you inform me that one of the Richmond booksellers intends to publish a new edition of the reports of the lamented Chancellor Wythe, and you express a wish that I would furnish a brief memoir of the illustrious author. It would be a most pleasing and grateful task to comply with your request, if I possessed the requisite authentic materials, and the requisite capacity to prepare the work. But the first condition does not exist, and it is therefore unnecessary to dwell upon the second. My acquaintance with the Chancellor commenced in the year 1793, in my 16th year, when I was a clerk in the office of the court over which he presided, and when I think he must have passed the age of three score years and ten. I knew nothing personally of his career at the bar, of his ancestry, or of the part which he had taken in public affairs. I understood that he was born in Elizabeth City, that he was taught the Greek letters by his mother and afterwards by her assistance, and by his own exertions, he became an accomplished Greek scholar. How he learned the Latin language I do not remember to have heard, but probably at William & Mary college, or at some other college in lower Virginia. When I first knew him, his right hand had become so affected with the rheumatism or gout, that it was with difficulty he could write his own
xxxiii name. *Owing to that cause he engaged me to act his amanuensis and I attended him frequently, though not every day, to serve him in that capacity for several years. Upon his dictation, I wrote, I believe, all the reports of cases which it is now proposed to republish. I remember that it cost me a great deal of labor, not understanding a single Greek character, to write some citations from Greek authors, which he wished inserted in copies of his reports sent to Mr. Jefferson, Mr. Samuel Adams, of Boston, and to one or two other persons. I copied them by imitating each character as I found them in the original works.

Mr. Wythe was one of the purest, best, and most learned men in classic lore that I ever knew. Although I did not understand Greek, I was often highly gratified in listening to his readings in Homer's Illiad and other Greek authors, so beautifully did he pronounce the language. No one ever doubted his perfect uprightness, or questioned his great ability as a Judge. I remember an incident which occurred in my presence which demonstrated with what scrupulous regard he avoided the possibility of any imputation upon his honor or his impartiality. A neighbor of his, Mr. H——who had the reputation of being a West India nabob, and who at the time had an important suit pending in the Court of Chancery, sent him a demijohn of old arrack, and an orange tree for his niece, Miss Nelson, then residing with him. When the articles were brought into Mr. Wythe's house, with the message from the donor, Mr. Wythe requested the servant to take them back to his master, and to present to him his respects, and thanks for his kind intentions, but to say that he had long ceased to make any use of arrack, and that Miss Nelson had no conservatory in which she could protect the orange tree. I was amused at another scene, which I witnessed between him and the late Justice Washington of the Supreme Court, then practising law in the city of Richmond. He called on the Chancellor with a bill of injunction in behalf of General ——, to restrain the collection of a debt. The ground of the application was that the creditor had agreed to await the
xxxiv convenience of General ——, for the payment of the debt, and that it was not then convenient to pay it. The Chancellor attentively read the bill through, and deliberately folding it up returned it to Mr. Washington, enquiring with an ineffable smile upon his countenance, "do you think, sir, that I ought to grant this injunction?" Mr. Washington blushed and observed, that he had presented the bill at the earnest instance of his client.

Mr. Wythe's relations to the Judges of the Court of Appeals were not of the most friendly or amicable kind, as may be inferred from the tenor of his reports. Conscientiously and thoroughly convinced of the justice and equity of his decrees, he was impatient when any of them were reversed, and accordingly evinces that feeling in his reports. Mr. Pendleton, from what I have heard, and the little I knew of him, I suppose was more prompt and ready, and possessed greater powers of elocution than his great rival. Mr. Wythe's forte, as I have understood, lay in the opening of the argument of a case, in which for thorough preparation, clearness and force, no one could excel him. He was not so fortunate in reply. Mr. Pendleton, on the contrary, was always ready both in opening and concluding an argument, and was prompt to meet all the exigencies which would arise in the conduct of a cause in court. The consequence was that Mr. Pendleton was oftener successful than Mr. Wythe in their struggles at the bar. On one occasion, when Mr. Wythe, being opposed to Mr. Pendleton, lost the cause, in a moment of vexation he declared, in the presence of a friend, that he would quit the bar, go home, take orders, and enter the pulpit. You had better not do that replied his friend; for, if you do, Mr. Pendleton will go home, take orders, and enter the pulpit too, and beat you there. Mr. Pendleton was far less learned than Mr. Wythe, but he possessed more versatile talents, was an accomplished gentleman, and better adapted to success in general society

*The Hon. Littleton W. Tazewell, still living, was one of his pupils.

and in the busy world. Although not so finished a scholar as Mr. Wythe, he had a much more pleasing style of composition.

The high consideration in which
xxxv Messrs. Pendleton and *Wythe were both held was often evinced by the distinguished honors and eminent offices which they received from their parent state. It was particularly exhibited in the organization of the Convention which adopted the Constitution of the United States, when Mr. Pendleton was appointed to preside over the body, and Mr. Wythe to preside over the Committee of the Whole, which he did during, I believe, the entire sitting of the Convention, the Constitution having been considered and discussed in Committee of the Whole.

Mr. Wythe's personal appearance and his personal habits were plain, simple and unostentatious. His countenance was full of blandness and benevolence, and I think he made, in his salutations of others, the most graceful bow that I ever witnessed. A little bent by age, he generally wore a grey coating. And when walking carried a cane. Even at this moment, after the lapse of more than half a century since I last saw him, his image is distinctly engraved on my mind. During my whole acquaintance with him he constantly abstained from the use of all animal food.

It is painful and melancholy to reflect that a man so pure, so upright, so virtuous, so learned, so distinguished and beloved, should have met with an unnatural death. The event did not occur until several years after I emigrated from Richmond to the State of Kentucky, and, of course, I am not able from personal knowledge to relate any of the circumstances which attended it. Of these, however, I obtained such authentic information as to leave no doubt in my mind as to the manner of its occurrence. He had a grand nephew, a youth scarcely I believe of mature age, to whom, by his last will and testament, written by me, upon his dictation, before my departure from Richmond, after emancipating his slaves, he devised the greater part of his estate. That youth poisoned him, and others,—black members of his household, by putting arsenic into a pot in which coffee was preparing for breakfast. The paper which had contained the arsenic was found on the floor of the kitchen. The coffee having been drank by the Chancellor and his servants, the poison developed its usual effects. The Chancellor lived long
xxxvi *enough to send for his neighbor, Major William Duval, and got him to write another will for him, disinheriting the ungrateful and guilty grand nephew, and making other dispositions of his estate. An old negro woman, his cook, also died under the operation of the poison, but I believe his other servants recovered. After the Chancellor's death it was discovered that the atrocious author of it had also forged bank checks in the name of his great uncle, and he was subsequently, I understood, prosecuted for the forgery, convicted and sentenced to the penitentiary; but whether that was the fact or not, can be ascertained by a resort to the records of the proper criminal courts of Richmond.

I have written this hasty sketch, not as a memoir of the illustrious man of whom it treats, but for the purpose of contributing some materials, which may be wrought by more competent hands, into a biography more worthy of his great name and memory. I conclude it by an acknowledgment, demanded of me alike by justice and feelings of gratitude, that to no man was I more indebted, by his instructions, his advice, and his example, for the little intellectual improvement which I made, up to the period, when, in my twenty-first year, I finally left the City of Richmond.

I am with great respect,
Your friend and obedient servant,
H. CLAY.

MR. B. B. MINOR.

xxxvii *MR. WYTHE'S WILL.

"Contemplating that event, which one in the second year of his sixteenth lustrum may suppose to be fast approaching, at this time, the twentieth day of April in the third year of the nineteenth centurie since the christian epoch, when such is my health of bodie that vivere amem, and yet such my disposition of mind that, convinced of this truth, what Supreme Wisdom destinateth is best, obeam libens, i, George Wythe, of the citie of Richmond, declare what is hereinafter writen to be my testament, probablie the last: Appointing my friendlie neighbour William Duval executor, and desiring him to accept fifty pounds for his trouble in performing that office over a commission upon his disbursements and receipts inclusive, i devise to him the houses and ground in Richmond, which i bought of William Nelson, and my stock in the funds, in trust, with the rents of one and intrest of the other, to support my freed woman Lydia Brodnax, and freed man Benjamin, and freed boy Michael Brown, during the lives of the two former, and, after their deaths, in trust to the use of the said Michael Brown: and all the other estate to which i am and shall at the time of my death be entitled i devise to George Wythe Sweney the grandson of my sister.

GEORGE [L. S.] WYTHE."

"I, who have hereunder written my name, this nineteenth day of January, in the sixth year of the before mentioned centurie, revoke so much of the preceding devise to George Wythe Sweney as is inconsistent with what followeth. The residuary estate devised to him is hereby charged with debts and demands, I give my books and small philosophical apparatus to Thomas Jefferson, president of the United States of America: a legacie considered abstractlie, perhaps not deserving a place in his musaeum, but, estimated by my good will to him,

the most valuable to him of any thing which i have power to bestow. My stock in the funds before mentioned hath been changed into stock in the bank of Virginia. I devise the latter to the same uses, except as to Ben who is dead, as those to which the former was devoted. To the said Thomas Jefferson's* patronage i recommend the freed boy Michael Brown in my testament named, for whose maintenance, education or other benefit, as the said Thomas Jefferson shall direct, i will the said bank stock, or the value thereof, if it be changed again, to be disponed. And now,

'GOOD LORD, most mercifull, let poenitence
Sincere to me restore lost innocence;
'In wrath my grievous sins remember not;
My secret faults out of thy record blot;
That, after death's sleep, when I shall awake,
Of pure beatitude I may partake.

GEORGE WYTHE. [SEAL.]"

*ὁς
ψιλος δ' ην ανθρῶποισι;
Παντας γαρ ψιλεεσκεν.*

"I will that Michael Brown have no more than one half my bank stock, and George Wythe Sweneney have the other immediatelie.

"I give to my friend Thomas Jefferson my silver cups and gold headed cane, and to my friend William Duval my silver ladle and table and teaspoons.

"If Michael die before his full age, i give what is devised to him to George Wythe Sweney. I give to Lydia Brodnax my fuel. This is to be part of my will and as it were written of the parchment inclosed with my name in two places.

G. WYTHE, [SEAL.]

24 of february 1806.

"In the name of God, Amen!

I George Wythe, of the city of Richmond, having heretofore made my last will on the 20th April, in the third year of the nineteenth century since the christian epoch, and a codicil thereto on the 19th day of January, in the sixth year of the aforesaid century, and another codicil on the 24th day of February 1806, do ordain and constitute the following to be a third codicil to my said will; hereby revoking the said wills and codicils in all the devises and legacies in them or either of them contained, relating to, or in any manner concerning George Wythe Sweney, the grandson of my sister; but I confirm the said will and codicils in all other parts, except as to the devise and bequest to Michael Brown, in the said will mentioned, who, I am told, died this morning, and therefore they are void. And I do hereby devise and bequeath all the estate, which I have devised or bequeathed to the said George Wythe Sweney or for his use, xxxix *in the said will or codicils, and all the interest and estate, which I have therein devised or bequeathed in trust for, or to the use of the said Michael Brown, to the brothers and sisters of the said George Wythe Sweney, the grandchildren of my said sister, to be equally divided among them, share and share alike. In testimony whereof I have hereunto subscribed my name and affixed my seal, this first day of June in the year 1806.

G. WYTHE. [SEAL.]

"Signed, sealed, published and declared by the said George Wythe the testator as and for his last will and testament in our presence; and at his desire we have hereunto subscribed our names as witnesses, in his presence and in the presence of each other.

"(The interlineations of the words, "and another codicil on the 24th of February 1806," and of the words "will and codicils" and "grand" being first made; and the whole being distinctly read to the testator, before the execution of this codicil.)

EDM. RANDOLPH,
WM. PRICE,
SAMUEL GREENHOW,
SAM'L MCCRAW."

The foregoing will and first codicil are written upon parchment by the testator. The last codicil is believed to be in the handwriting of Edm. Randolph, Esq., and not that of Mr. Duval, as Mr. Clay supposed. The envelope has upon it the following endorsement, apparently in the handwriting of the testator:

"To William Duval,
to be opened when G. Wythe shall
cease to breathe, unless by him required
before that event.
Χαιρε!"

[From the Richmond Enquirer of June 10th, 1806.]

" 'Full of years; and full of honour.' "

"On Sunday morning the 8th inst., departed this life, the venerable chancellor of the Richmond district, GEORGE WYTHE. Over the suspected cause of his death, let us for a moment draw the veil. Every situation in life has its rights and its duties. Let us therefore respect the rights of the accused.

"But of the deep, the solemn, the xl almost unparalleled *impression produced by his death, we may be permitted to speak.—Let the anxious solicitude manifested for his recovery; let that sorrow which burys beneath it all political distinction; let the solemn and lengthened procession which attended him to his grave; declare the loss which we have sustained. Kings may require mausoleums to consecrate their memory; saints may claim the privilege of a canonization; but the venerable GEORGE WYTHE needs no other monument than the services rendered to his country, and the universal sorrow which that country sheds over his grave.

"When the news of his death was made

*[The character drawn by Homer (Iliad, lib. vi. v. 15,) of Axylus, and which is thus translated by Mr. Munford:

But Diomed, the great in battle, slew
Axylus, Teuthras' son, who, blessed with wealth,
In fair Arisba's beauteous town abode;
To all men justly dear, for all he loved," &c.—Ed.]

public, the bells of the city were set a tolling; the executive council assembled in their chamber, and determined on the following order of procession. It was published for the information of the citizens:

COUNCIL CHAMBER, June 8th, 1806.

ORDER OF PROCESSION,

Preparatory to the interment of
GEORGE WYTHE,
Late Judge of the High Court of Chancery for the Richmond District.

A Funeral Oration will be delivered at the Capitol, in the Hall of the House of Delegates, to begin precisely at 4 o'clock P. M. on to-morrow; after which the Procession will commence in the following order:

1. The Clergymen and orator of the Day.
2. Corpse
3. Physician.
4. The Executor and Relations of the deceased.
5. The Judges.
6. Members of the Bar.
7. The Officers of the High Court of Chancery.
8. The Governor and Council.
9. Other Officers of Government.
10. The Mayor, Aldermen and Common Council of the City of Richmond.
11. Citizens.'

"Need it be said, that the crowd which assembled in the capitol was uncommonly numerous, and respectable? After the delivery of a funeral oration by Mr. Munford, a member of the executive council, the procession set out towards the church, —It is no disparangement to the virtues of the living, to assert, that there is not perhaps another man in Virginia, whom the same solemn procession would have attended to his grave."

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*This indicates that these were the cases issued in pamphlet form after the folio work of 1795.

In the Court of Chancery.

BETWEEN
WILLIAM FARRAR, *plaintiff*,
AND
FRANCIS JACKSON, *defendant*.

1. **Slaves—Bill to Recover—Statute of Limitations.**—Statute of limitations pleaded to a bill by heir in tail to recover a slave, her increase and their profits. Defendant at time of purchase had no notice of plaintiff's title. Plaintiff replied that defendant's vendor had removed said slaves to a distance for the purpose of concealing them; that he could not by diligent search find out where, in whose possession said slaves were, till three months before he commenced suit. HELD, by two chancellors, that "upon the whole circumstances," the statute should not bar.
2. Remarks thereon by *Wythe, Ch.* who dissented.

THOMAS FARRAR, tenant in taille of lands, to which slaves were annexed, sold, for his life, two of them, a woman and a boy her child, to James Waddill, who sold them to John Pruett, from whom the defendent, supposing them to be the property of John Pruett, purchased them for 75 pounds.

The plaintiff, eldest son and heir in taille of Thomas Farrar, was not able to discover in whose possession the two slaves, with several others born by the woman after the sale of her, were, until more than five years had elapsed from the time, when his right of action accrued by the death of his father; but soon after he discovered them to be in possession of the defendant, against him this suit was commenced, in Amelia county court in chancery, to recover the two negroes, with the after-born children of the woman, and their profits.

The bill stated, that the defendent knew or suspected the slaves which he bought to be under incumbrance, and John
2 *Pruett not to have power to convey a legal title to them, and therefore took from him a warranty in the bill of sale.

The defendant, by answer, alledged himself to have been a purchaser for a valuable consideration honestly paid, and denied notice of the plaintiffs title before the purchase, but confessed that he had notice, sometime after he had purchased the slaves, and paid for them, that they were entailed; and pleaded the statute for limitation of actions in bar of the plaintiffs demand.

The plaintiff replied, that he ought not to be precluded, because the slaves were removed, by John Pruett, to such a distance from the plaintiffs residence, for the purpose of concealment, that, though the five years had elapsed from his coming of age, before suit commenced, he could not, in all that time, by the most diligent search, find out where, or in whose possession, the slaves were, and never made this discovery until three months before the commencement of this suit.

Many witnesses were examined, but no material fact, more than the facts stated before, and admitted by the answer, were proved, unless it be this; that the defendent, after having notice of the plaintiffs title, which notice probably was in the life time of Thomas Farrar, proposed to sell the slaves to one who might carry them to some remote parts, perhaps with design to prevent a recovery of them by the plaintiff.

The county court dismissed the bill. the high court of chancery, to which the plaintiff appealed, on the 20 day of may, 1788, reversed the decree, two of the three judges, whereof the court at that time consisted, declaring their opinion, in opposition to the other, to be, that the plaintiffs title to the slaves claimed by him is well established, and that, upon the whole CIRCUMSTANCES of the case, the defendent ought not to be admitted to avale himself of the act of limitations in bar of such title, and decreed the defendent to deliver up the slaves, and pay their profits, an account whereof was directed to be stated by auditors, to the plaintiff.

Upon this opinion, he who dissented from his colleagues submits to censure these

REMARKS:

The circumstances, upon which the plea was disallowed must be one or some or all of the following: the warranty contained in the bill of sale from John Pruett to the defendent; the removal of the slaves by John Pruett to a great distance, for the purpose of concealment; the defendents failure to disclose his possession of the slaves to the plaintiff, after his title to them, and searches to discover the possessor of
3 them, were *known to the defendent; the defendents treaty, with a dealer in slaves, to transport them to remote places, and thereby to hinder the plaintiff from reclaiming them.

The first of these circumstances, is at most, a slight presumptive evidence of a suspicion that John Pruetts title might not be a good title. but how this can prevent the operation of the statute is not discerned; and therefore this circumstance is believed not to be one of those to which the two judges alluded.

The second circumstance is thought to be not more pertinent, and therefore perhaps was also not intended. for any thing done by John Pruett, in which the defendent did not act a part, ought not to be detrimental

to the latter, and that he acted any part in the removal of the slaves by John Pruett is not proved, nor even pretended, in the bill or replication.

The third circumstance is not admitted to be one upon which the defendent ought not to have the benefit of the statute. for a bona fide purchaser for a valuable consideration, without notice of the title of another, according to numberless determinations by courts of equity, is not bound to discover that which will enable the true owner to recover the thing claimed. and such a purchaser was the defendent. his failure then to discover his possession of the negroes, which discovery a court of equity would not have compelled him to make, was not a wrong. nor is such a silence comprehended in the 6th section of the statute for limitation of actions, providing that a party absconding or concealing himself, or by removal out of the country, or out of the county of his residence, when the cause of action accrued, or by any other indirect ways or means, defeating or obstructing any person or persons, who have title thereto, from bringing and maintaining actions within the times limited by the act. If this silence be comprehended in that section, it must be by the words, indirect ways or means defeat or obstruct any person or persons from bringing and maintaining actions. a man who defeateth another must do something. but he who is silent doth nothing. a man, who obstructeth another, must either throw the obstruction in his way, or must suffer the obstruction which he, the obstructor, had thrown in the others way, to remain their. For the words of the act are, if any person obstruct another, in bringing his action within the time limited, such defendent, that is the party obstructing, shall not be admitted to plead the act. The party therefore who is not admitted to plead the act is he who originaly caused the obstruction, not he who suffered an obstruction, which a third party had caused, to remain. the obstruction to the plaintiffs commencement of his action within
4 the time limited in this case *was, that he did not know in whose possession the slaves were, but John Pruett, by removal of the slaves to a great distance, not the defendent, caused that ignorance. the defendent, therefore, did not obstruct the plaintiff in commencing his action within the time limited. consequently the defendent is not inhibited to plead the act. the defendent doth not appear at any time to have denied the slaves to be in his possession, and that he was bound to go or send to the plaintiff and give him information thereof perhaps no man will say.

The fourth circumstance was, that the defendent meditated and proposed a sale of the slaves to one, who might transport them to places remote, for the purpose probably of defeating or obstructing the plaintiff. but the defendent did not prosecute his design; the defendent, therefore, did not thereby defeat or obstruct the plaintiff, more than he would have defeated or obstructed him, if the design had never been conceived. consequently the defendent, by this circumstance, was not inhibited to plead the act. besides, the court could not regularly consider this circumstance, because it was not charged in the bill. if it had been charged, the defendent, by answer, might have denied the fact, and against that denial the proof, which was the attestation of a single witness, would not have prevaled.

From the decree of the high court of chancery the defendent appealed, but the parties compounded the matter.

BETWEEN

EDMUND PENDLETON, *plaintiff*,

AND

THOMAS LOMAX, administrator of Lunsford Lomax, *def't*.

[Absent *Pendleton C.*, a party to the suit.]

1. **Notes—Joint Endorsement*—Statute of Limitations.†**—P. & L. were joint endorsers for W., who made to P. an assignment to indemnify him for said endorsement among other liabilities. In 1756, P. took in the protested bill of W. endorsed by him and L. and executed P.'s own bond for the balance due thereon. 1768, he sued L. for half of said balance, with interest. L. plead the stat. of limitations. P. replied that he was employed many years in settling W.'s affairs, and the suit was within the time since the amount to be contributed had been ascertained. Plea overruled by county court and appeal to H. C. C. The two chancellors being divided, case adjourned to court of appeals,‡ who held: That under the particular circumstances the statute should not bar.

2. Remarks thereon of *Wythe, C.*

5 *THOMAS WYLD, on the first day of May, 1753, drew a bill of exchange, on Berkeley, Chauncey, and company, of London, for 440l. 12s. 0d. sterling, payable to Lunsford Lomax and the plaintiff, who endorsed it, and endorsed it, at the request of the drawer, to give him a credit, thereby becoming his sureties. the bill was protested. The holder of it was Benjamin Waller, for the benefit of John Harmer and John Lidderdale, in England, to whom the money was due.

The plaintiff moreover endorsed two other

*See the principal case cited in Fields v. Harrison, Wythe 281.

†See 3 Call 538.

‡[This appeal is reported in 3 Call, 538; and, besides the question as to the time at which the statute of limitations begins to run, decides that "a trustee retaining money in his hands for an unreasonable length of time shall pay interest." Wythe C. thought the cause of action arose in 1756, when P. took up the bill of Exchange and gave his bond for the money due upon said bill. But it was held that the act of limitations ought not to commence till the trust was concluded. The bill stated this to have been in 1762; but from the Commissioner's Report it appeared that the last receipt for W's estate was in 1764, and the last disbursement in 1765. So that the suit in 1768 was not barred. 3 Call, 545.—Ed.]—Note in edition of 1852.

bills of exchange, drawn by Thomas Wyld, on Berkeley, Chauncey, and company which were protested: one for 400 pounds sterling, to which Thomas Turner was intitled, and the other for 500 pounds sterling, to which James Mills was intitled.

In order to indemnify the plaintiff from loss by means of his endorsements, Thomas Wyld, by indenture, on the 8 day of june, 1753, conveyed all his estate, and assigned all his credits, to the plaintiff, giving him an irrevocable power of attorney to collect, the latter in trust to sell the estate and to apply the money, to be raised by sale thereof, and by collection of the credits, to payment of the debts of Thomas Wyld in this order, to wit, 601. 13s. 6d. of current money of Virginia, due to Preswick and Thomas; 660 pounds of current money due to James Mills, for which Thomas Birch and James Falkner were Thomas Wylds sureties; 400 pounds sterling due to Thomas Turner by a protested bill of exchange, drawn by Thomas Wyld, and endorsed by the plaintiff and James Taylor; 500 pounds sterling due to James Mills, by a bill of exchange, drawn by Thomas Wyld, and endorsed by the plaintiff, if the bill should be protested, as was expected; 4401. 12s. sterling due to John Harmer and John Lidderdale, by the bill of exchange drawn by Thomas Wyld, and endorsed by the plaintiff and Lunsford Lomax, if the bill should be protested, as was also expected; and several other debts therein after mentioned.

The money produced, by the sale of Thomas Wylds estate, and the collection of his credits, after being applied to payment of those debts, which, by the deed of trust, were to be first discharged, was so far from being sufficient to indemnify the plaintiff that, on account of the bill
6 for 4401. 12s. sterling, 5311. 1s. *7d. of current money of Virginia, remained due; which the plaintiff discharged, taking up the protested bill, and giving his own bond, for payment of the money remaining due on the bill to Benjamin Waller.

The protested bill of exchange was taken up, and the bond executed in discharge of it was dated, in november, 1756.

But the plaintiff, as he alleged, perplexed with much business, did not, until some time in the year 1766, demand one half of this money, with interest, from Lunsford Lomax, who refused to pay it.

To recover the money and interest the plaintiff commenced a suit against Lunsford Lomax, in the county court of Caroline in chancery.

That defendent pleaded the statute of limitation of actions, in bar of the plaintiffs demand; to which the plaintiff replied, that, in the sale of Thomas Wylds estate, and collection of his credits, the plaintiff was employed many years, and until it was completed, his loss, and the moiety of it, which the defendent ought to contribute, could not be ascertained. Lunsford Lomax died before the argument.

A bill of revivor was filed against the present defendent, who relied upon the same plea.

The county court overruled the plea.

The defendent appealed to the high court of chancery, which at that time consisted of three judges.

One of them was the plaintiff, who therefore could not sit in the cause. another was of the opinion that the plaintiffs right of action accrued the fourth day of november, 1756, when he took up the bill of exchange, and gave his own bond for payment of the money due upon it; and that not having commenced the suit before the year 1768, his demand was barred by the statute for limitation of actions, and that the decree was erroneous. the third judge seemed inclined to affirm the decree. and therefore the case, that it might not remain undecided, (a) was adjourned, for difficulty, as it was said, to the court of appeals: who on the 7 day of july, 1790, delivered this
7 *OPINION,

'That the act of limitations is no bar to the demand of the plaintiff, under the particular CIRCUMSTANCES of his case.'

REMARKS:

In this opinion is implied, that if these circumstances had not been in the plaintiffs case, he would have been barred. let us then enquire if the circumstances ought to have prevented the bar.

The circumstances are not particularly mentioned in the opinion. the multiplicity of business, with which the plaintiff in his bill allegeth himself to have been perplexed, will surely not be pretended to be one of those circumstances. the only others are those stated in the replication. in considering which the following facts, proved by the plaintiffs own documents, deserve attention.

The bill of exchange was drawn and endorsed the first day of may, 1753; the deed of trust was executed on the 8 day of june, 1753, and acknowledged before Hanover county court on the same day. the trust estate was sold before the 25 day of april, 1754, perhaps six months before, for on

(a) Whether the decree in this case, the court being divided, ought not to have been affirmed was not discussed at the hearing. the consequence of equal suffrages in criminal prosecutions, is absolution of the accused. Æschylus, in his Eumenides, informs us that such was the dictate of Minerva, in the case of Orestes, when of the judges, who tried him for slaying his mother, the same number was on each side of the question. the like in trial of a slave, by the statute made in 1748, chap. 31, of the edition in 1769, Sect. 7. the reason may be that the accused is presumed to be innocent until he shall be condemned; and a majority at least must condemn. in the court of appeals. by the act of their constitution, the sentence is affirmed. if the votes for reversal be not more than the votes for the contrary; because the sentence, before it shall be condemned for error, is presumed to be correct; and when the balance is in aequilibrio. the scale for affirmance of the sentence under examination having that presumption thrown into it preponderates. in the courts of common law, certain motions fail, if approved by half the judges only.—Note in edition of 1795.

that day the money due for the sale was payable, and by the deed the sale was to be on six months credit. the bill of exchange was taken up by the plaintiff, and his own bond executed for payment of the money remaining due upon it, the 4 day of November, 1756, of Thomas Wylds credits collected by the plaintiff, amounting to 11031. 11s. 3d. all except 91. 10s. 10d. were collected before and in the month of february, 1762, which last was six years before the plaintiff commenced his suit.

Now with what propriety could the replication state that the plaintiff could not ascertain his loss early enough to commence his suit for a contribution before 1768?

But whether he could or could not ascertain his loss sooner seems unimportant. if the deed of trust or letter of attorney had not been executed, the plaintiffs cause of action would have accrued, and consequently the time of limitation against him would have begun on the fourth day of november, 1856; because at that time the plaintiff discharged the bill of exchange, by executing his own bond for payment of the money due *thereby, and became the holder of the bill. the plaintiffs right of action, if he had a right of action, which seemeth indisputable, was founded, either on a compact, which, if not declared, is understood to exist, between those who jointly assume a burthen, that they will bear the burthen equaly, where different proportions have not been stipulated; in the same manner as a correspondent compact is understood to exist between joint adventurers in an enterprise that they shall share the profit: or founded on a substitution of the plaintiff by Harmer and Lidderdale in their place, by delivering the bill of exchange, which was an implicit assignment of their right, to him. on a substitution only, by the roman civil law, could a surety or a joint surety, who voluntarily paid the debt for which they were bound, compel the debitor, in one case, to reimburse the money, or the confidejussor, in the other case, to contribute towards his alleviation. (b) for, in the first case, the creditor, when he received his money from the surety non in solutum accepit, did not receive payment; it was not a payment, because a payment is the proper act of a debitor, and although the creditors right to receive the money afterwards cannot be exerted by him, any more than if he had formaly assigned the right to another man, the debitors obligation to pay the money to some one is not discharged;—the thing which he was bound to perform is not performed. a right to exact that performance, which remaineth unextinguished, not being exerciseable by the original creditor, is competent to the surety alone. to him therefore the creditor, when he received the money, quodammodo nomen debitoris vendidit; transferred the right to demand the money from the debitor; a silent transition of the right being wrought by the praecept of justice, which intitleth him, who is injured by the default of another, to reparation, and consequently granteth to him the means necessary to effect the reparation. the same reasoning is applicable, in the other case, where one surety payeth the whole debt; for to him the creditor is understood vendere caeterorum nomina, to transfer his right to demand so *much of the money as the other sureties ought to contribute. the plaintiffs right of action, which ever be the foundation of it, began when he discharged the whole money due to Harmer and Lidderdale, or when he was substituted in their place. the same must be the commencement of that period at the end of which the defendents right to prescribe was complete. if this would have been the case, on a supposition that the deed of trust and letter of attorney had not been executed, are any transactions between the plaintiff and thomas Wyld, transactions too in which Lunsford Lomax did not concur, which he doth not appear to have known, and of which he probably never heard, are these transactions such circumstances in the case of the plaintiff that the act of limitations ought to be no bar to his demand? or, in other words, can the obligations and rights of one man be changed by transactions between other men, to which he, not only did not consent, but was not even privy? if the plaintiff, by action commenced against Lunsford Lomax in 1756, had recovered one half the money for which the bill of exchange was drawn, without deducting the money received by the sales of Thomas Wylds estate and by the collection of his credits, Lunsford Lomax, if he might have compelled the plaintiff to apply the money so received towards his alleviation, would have been intitled to the same remedy, although the deed of trust and letter of attorney had not been executed. so much for the circumstances in the case of the plaintiff.

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Now let a few words be added on the circumstances in the case of Lunsford Lomax. that this man knew, had heard, or suspected, until the summer of 1766, that the bill of exchange, endorsed by him thirteen years before, had been protested, doth not appear, and is not even alleged. Benjamin Waller, or they for whose benefit he acted, if notice of the protest had not been given of it to Lunsford Lomax, in a rea-

(b) Fidejussoribus succurri solet, ut stipulator compellatur ei, qui solidum solvere paratus est, vendere caeterorum nomina. Dig. l. XLVI. tit. 1. l. XVII.

Cum al e ex fidejussoribus in solidum debito satisfaciat actio ei adversus cum, qui una fidejussit, non competit. potuisti sane, cum fisco solveres, desiderare, ut jus pignoris, quod fiscus habuit, in te transferretur: et si hoc ita factum est, cessis actionibus uti poteris. quod et in privatis debitis observandum est. C. l. VIII. tit. XLI. l. XI.

Cum is, qui et reum et fidejussores habens, ab uno ex fidejussoribus, accepta pecunia pra stat actiones, poterit quidem dici nullas jam esse: cum suum pereeperit, et perceptione omnes liberati sunt, sed non ita est, non enim in solutum accipit, sed quodammodo nomen debitoris vendidit, et ideo habet actiones, quia tenetur ad id ipsum, ut praestet actiones. Dig. lib. XLVI. tit. 1. l. XXXVI.—Note in edition of 1795.

sonable time, could not have charged him by his indorsement; and no man will pretend thirteen years to be a reasonable time. in these circumstances, the plea of the statute for limitation of actions in this case would be thought by some to be a legal and conscientious defense, if better judges had not determined the contrary.

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*BETWEEN 10

DAVID ROSS, *plaintiff*,

AND

PLEASANTS, Shore and company, and William Anderson, *defendants*.

1. **Awards—Reappointment of Valuers—Failure to Obtain Consent of Parties—Effect.**—R. bought of Defts. lands to be paid for in so much tobacco of certain inspections, as referees named should value them at. Some other transactions intervened. The referees (in 1781) made their valuation, not only in tobacco, but sterling money, and also adjusted the accounts between the parties. Judg'ts. were obtained against R. on the penal bonds he had executed. R. filed a bill for an injunction and for relief against the award. The Referees deposed that they had valued the lands as high as they did, in tobacco, in referrence to the whole award, and that they would not have thus valued it, had they not combined therewith the adjustment made of the accounts. The H. C. C. set aside the award, and appointed other valuers than those selected by the parties. *Wythe, C.* dissented from said appointment; and when sole chancellor reinstated the first valuation, and made that, in sterling money, the basis of his decree. The Court of Appeals also held that it was error to have appointed other valuers, without the consent of the parties; set aside their valuation; and also the first valuation, *in tobacco*, because of the manner in which the referees were induced to make it.
2. **Same—First Valuation—Foundation for Decision.***—The first valuation is a proper foundation for a just and equitable decision; if understood as intended by those who made it; i. e. according to the valuation in sterling money, not variable by changes in the value of tobacco. The Court of Appeals also held the same; but, as the contract was a specific one for tobacco, that the sterling valuation should be converted into tobacco, according to its price in sterling money, at the date of said valuation, to ascertain which an issue should be directed by the C. C.
3. **Same—Same.**—Instead of such issue, the price was fixed, by consent, by referees, whose decision both Courts affirmed.†
4. **Bonds‡—Assignment§—Assignee.**—*R.* drew bills payable to *P. S. & Co.*, of whose firm he was a member, which were received by one of their agents as part payment of said lands; but the proceeds were never applied to the use of *P. S. & Co.*; and the bills were protested. *R.* also obtained an assignment of a bond executed by *P. S. & Co.*, *which their said agent received in the same manner, but before said assignment, the firm of *R. S. & Co.*, of which *R.* was also a member, had assumed, for value, payment of said bond; of which he was bound to take notice. Held by both Courts, that *R.* was not entitled to a credit, against the purchase money of said lands, either of said bills or bond. 11
5. Commentary of the Chancellor.

THOMAS PLEASANTS, Thomas Shore, David Ross, William Anderson, and others, associated by the firm Pleasants, Shore, and company, having purchased lands, which had escheated from Lewis Burwell Martin, and Samuel Martin, David Ross, who owned one fourth part, in february, 1780, bought the shares of all his companions, agreeing to pay so much crop tobacco, inspected in 1779 or 1780, at the upper warehouses on James and York rivers, as William Cabell, George Carrington, Roger Thompson, John Coles, and Nicholas Lewis, or any three of them, should adjudge to be the value of those shares, with a commission of five per centum over and above the valuation, and in case the lands should not be valued before the first day of may then next, to pay five per centum per annum interest from that day, upon any balances which might be found due on account of the purchase at a final settlement; and, for performance of these agreements, bound himself, by one obligation, in the penalty of 1600000 pounds of merchantable crop tobacco, payable to Pleasants, Shore and company, whose share was two fourth parts, and by another obligation, in the penalty of 800000 pounds of like tobacco, payable to William Anderson, owner of the remaining fourth part; and the lands were to be granted to David Ross, which was accordingly done: he also bought the companys share of the black cattle on the lands.

About the same time, Thomas Pleasants, and William Anderson, the agents for Pleasants, Shore, and company, sold 400 hogsheads of their tobacco, for twenty

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*On the question of awards, see the principal case cited in Dawson v. Winslow, Wythe 114.

†[The first appeal in this case does not appear to have been reported. The last is in 1 Wash. 156. The Defts. P. S. & Co., &c., appealed from the valuation of the referees. The Court of Appeals expressed dissatisfaction with it; but held that they could not touch it. It was like the verdict of a jury, for which it had been substituted. The Court could interfere upon the ground of mistake; but such mistake must appear upon the face of the award. Affidavits may be introduced but they must tend to prove partiality or misbehaviour in the arbitrators, and not mistake in law or fact. There was no proof of the ground upon which they proceeded. They once agreed to give a certificate, but refused. On a thorough consideration of the subject and its consequences as a precedent, the Court thought the Chancellor was right. 1 Wash. 159. See Cochran v. Street, in this volume. The better opinion in England and in this country is opposed to admitting the affidavits of jurors to disturb their verdicts. Verdicts may be sustained by them. See Graham on New Trials and cases there cited. In Virginia jurors have been admitted to testify not only as to misbehavior but mistake. Cochran v. Street, 1 Wash. 79. See McCaule's case, 1 Va. cases, 271. Shobe v. Bell, 1 Ran. 39; Price's ex. v. Warren, 1 Hen. & Munf. 385. A change in the practice in Virginia would be sound policy.—Ed.]—Note in edition of 1852.

‡See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

§See monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

shillings sterling by the hundred pounds, to David Ross, Thomas Shore, and others, designated by the firm Ross, Shore, and company, who assumed on their parts, to pay so much of the money, in six weeks from that time, as was equal to the
12 debts which Pleasants, Shore *and company owed to Abel James, and Thomas Paschall, and the residue in six months to Isaac Governeur, towards discharging a debt which they owed to him.

David Ross made some payments to William Anderson, in may and june, 1780, procured a transfer to himself of the bond from Pleasants, Shore, and company, for payment of the debt which they owed to Thomas Paschall; and, on the second day of november, 1780, drew bills of exchange, on Walter Chambre, for more than 1200 pounds sterling, payable to Pleasants, Shore, and company, which Thomas Pleasants, one of their agents, acknowledged to have been received by him, and, with Paschalls transferred debt, to be a partial payment for the lands purchased of them, by mutual agreement to be settled in tobacco at twenty shillings sterling by the hundred pounds: but the bills were not applied to the use of Pleasants, Shore, and company, and were protested.

Four of the men appointed to value the lands met for that purpose, the 18 day of april, 1781, attended by David Ross and William Anderson.

To them, in order to prove the low price of tobacco, William Anderson produced a certificate that it had been very lately sold for ten shillings by the hunderd pounds weight, and observed further, that the british enemy, then in the country, might destroy or carry away what was in the warehouses: to obviate the argument from this danger, David Ross, after urging some considerations to shew that the tobacco ought to be rated higher, proposed that the circumstance of the hostile invasion should not affect the valuation of the lands at all, and, in that case, declared he would consent to be restrained from making payment, unless William Anderson should demand it, before the enemy should evacuate the country. this proposition William Anderson rejected, declaring that the tobacco was immediately wanted, and giving some other reasons.

The four referees then proceeded in the business, and stated their act on written papers, delivered to the parties, containing these words:

'We the subscribers, being mutually and indifferently chosen by David Ross, of the one part, William Anderson, of a second, and Pleasants, Shore, and company, of a third part, to arbitrate and determine a matter of difference in dispute between them concerning the purchase of several tracts of land formerly the property of Lewis Burwell Martin, and Samuel Martin, and after viewing the lands, and taking other information for our direction, and maturely and deliberately considering the subject matter of the said dispute, do
13 value the said land at 959205 *pounds of tobacco; and do find, after deducting the several payments made by the said Ross, as well to the said Anderson, as to the said Pleasants, Shore, and company, that there is a balance of 110537½ pounds of tobacco due to the said Anderson, and to the said Pleasants, Shore and company, 93003½ pounds of tobacco; therefore do award, that the said Ross do pay to the said Anderson the said quantity of 110537½ pounds of tobacco, and to the said Pleasants, Shore and company the said quantity of 93003½ pounds of tobacco, and on payment thereof that they severally do execute full and clear discharges for the same. it is to be remembered, that, in valuing the land above mentioned, so far as relates to the quantity of low-grounds, it being uncertain, we supposed it to be four hundred acres, and valued at the rate of one thousand pounds of tobacco per acre; and if it shall prove to be more than the quantity of real river low grounds, or less, as the case may be, that then they add or lessen to or from the price of the low ground, and of course, either add or lessen to or from the price of the high ground, that being valued at eighty five pounds of tobacco per acre. in witness whereof we do hereunto set our hands, the 18 april, 1781. George Carrington, John Coles, Roger Thompson, Nicholas Lewis.' on it was endorsed 'memorandum that 386600 pounds of tobacco is allowed for the sterling money paid by mr Ross to Pleasants, Shore, and company, and that neither interest nor commission are reckoned in the within valuation. Geo. Carrington, John Coles.' whereby the valuers appear to have discounted, at the rate of one hundred pounds for every ten shillings sterling, the tobacco supposed by them to have been paid by David Ross to Pleasants, Shore, and company in Paschalls bond, and the bills of exchange mentioned in the receipt of Thomas Pleasants, although, by the terms of that receipt, they were to be settled in tobacco at one hundred pounds for every twenty shillings sterling. they also gave David Ross credit against William Anderson for 26055 pounds of tobacco, a difference by them supposed between the value of 60994 pounds of tobacco, at the time when they were paid in may and june 1780, and the value in april following, when the lands were valued. but two of the referees in their examinations deposed, one, that, unless he had conceived himself authorized to settle the tobacco and money paid by David Ross, by the same scale as that by which he valued the land, he would not have valued it, or not in the manner he then did; and the other, that, if he had been prevented from adjusting the payments on the scale by which he valued the lands, either have valued the lands in another manner, so as to have been conformable to the payments, or not have acted at all in the business.

14 *On the 28 day of April, 1781, David Ross sent notes for a quantity,

about 174300 pounds of tobacco, to William Anderson, to be tendered to him, as well on his own, as on Pleasants, Shore, and company's, account, and in a letter by the same bearer, after explaining his reasons for making a tender, in the circumstances of the country at that time, when the british army, among other instances of the havock by which their progress might be traced, had burned one of the public tobacco warehouses, proposed another mode of payment, if the tobacco sent should not be acceptable.

Neither of these was approved of by William Anderson, who, at the meeting of the referees, had excepted to, and in a manner protested against their doing more than valuing the land in tobacco, the only matter submitted to them; and Pleasants, Shore, and company, as well as he, relying upon this exception, moreover insisted, that the referees, when they undertook unwarrantably to adjust the accounts between the parties, not only gave David Ross improper credits, that is, for Pleasants, Shore, and company's bond to Thomas Paschall, and the bills of exchange drawn on Walter Chambre, but, if they had been proper credits, allowed too much for them by one half: and William Anderson complained, of their increasing the payments made to him and consequently lessening the value of his share.

The parties being thus at variance, in September, 1782, actions of debt upon the obligations of David Ross, were commenced in the general court, by Pleasants, Shore and company, and William Anderson, in which actions, the declarations, after reciting the agreements and stating the valuation, assigned the breaches of the agreements in non-payment of the half, in one case, and of the fourth, part in the other case, of the 959205 pounds of tobacco to which the lands were valued, with the commission and interest.

On trial of issues, made up on the pleas of conditions performed, with leave to give any matter in evidence, the jury charged in both together found that David Ross had not performed the agreements, and that from him were due to Pleasants, Shore and company, 339890½, and to William Anderson 119370 pounds of tobacco, whereby the jury, although they allowed the plaintiff to discount the articles for which the referees gave him credits, appeared to have differed from those gentlemen in the quantity of the credits, probably accounting every twenty shillings sterling of the debt to Thomas Paschall and of the money for which the bills of exchange on Walter Chamble were drawn equal to one hundred pounds of tobacco, deducting 26055 pounds of tobacco added to the payments made by David Ross to William Anderson in may and june 1780: and
15 after *motions for new trials, which were rejected, judgments were entered for the penalties of the obligations, to be discharged by payment of the tobacco so found due by the verdicts respectively.

For an injunction to stay execution of these judgments, and for relief against them, so far as the tobacco recovered thereby might appear to exceed what was justly due, David Ross filed his bill in the high court of chancery; and an injunction was awarded until further order, according to the usual course of the court, chiefly upon these grounds stated in the bill: that the referees had informed David Ross, they valued the lands so highly, expecting the tobacco would be demanded and paid in a short time, which they were led to expect from William Anderson's declarations that the tobacco was immediately wanted, and the professed readiness of David Ross to make the payments: and that the defendents, if they would not abide by every part of what was done by the referees, ought not to have the benefit of one part, that is, of the high valuation made by them, which would not have been made but upon a supposition that the parties would acquiesce in the whole.

Upon filing the answers, supposed to have denied the equity of the bill, a motion was made to dissolve the injunction; but the court inclining to dissolve it in part only at that time, the defendents council consented that the matter should rest as it was, until the final hearing, which was appointed to be at the then next term.

At the hearing, which did not come on before the 13 day of may, 1788, this opinion and the decree following it were entered:

'It appears to the court that the valuers of the land bought by the complainant of the defendents, having valued the same in tobacco, when that commodity was in their opinion worth only ten shillings sterling per hundred weight, upon a supposition that they were at liberty to estimate upon the same standard the payments, which had been previously made in tobacco of greater value, and it appearing by their depositions, taken in this cause that if they had conceived differently, they would either have not valued the land at all, or would have adopted some other measure of its value, which supposition appears not to have been admitted on the trials at law, where their valuation was taken simply, and without connexion with the antecedent payments as not being within the submission to them: and therefore that the valuation thus made cannot be considered as a just and equal basis to the judgments which were founded thereon in a court at law: therefore it is decreed and ordered, that the said former valuations be
16 set aside, and it is referred *to William Cabell, John Minor, Reuben Lindsay, Joseph Carrington, and Charles Irving, gentlemen, or any three of them, to view and value in tobacco the land purchased by the complainant, as aforesaid, from the defendents, as the same was in their opinion worth at the time of the contract made between the parties, to wit, on the eighteenth day of february, one thousand seven hundred and eighty, without regard to any payments, and make report

to the court in order to a final decree, and it is further ordered that the injunction granted against the judgment obtained by the defendents, Pleasants, Shore, and company, be dissolved, as to one hundred thousand and thirty one pounds of tobacco, with interest from the 18 day of june, one thousand seven hundred and eighty two, and against, the judgment obtained by the defendent Anderson, as to ninety seven thousand eight hundred and two pounds of tobacco, with interest also from the twenty seventh day of june, one thousand seven hundred and eighty-three, and the costs at law in each suit.'

One of the court, which was composed of three judges at that time, dissented from so much of this decree as appointed other valuers, for the reason stated in the next opinion and decree by himself, when, in consequence of an act of the general assembly, he remained sole judge.

Four of the valuers last appointed reported their opinion to be, that the land purchased by the plaintiff of the defendents was worth 609600 pounds weight of tobacco of Pages, Richmond, Manchester, and Petersburg inspections, the eighteenth day of February, 1780.

On the 2 day of june, 1789, the cause was again heard, and the court rejected this report, because so much of the order as appointed another valuation of the land by different men, without consent of parties, was supposed upon revision not to be authoritative and, if what followed were right, to be unnecessary, delivered an opinion to this purpose; that the former valuation, now re-instated, is a proper foundation for a just and equitable decision, if it be so understood and interpreted as to correspond with the intention of those who made it, which intention is explaned by themselves to be this: to declare that the land with the improvements was worth 959205 pounds of tobacco at the time of making the estimate, when 100 pounds of tobacco were supposed by them to be equal to ten shilings sterling, according to which ratio the value in tobacco was announced, from an expectation caused by declarations of the defendent William Anderson that payment of so much of the consideration as remained due would be exacted before the price of tobacco would alter: and therefore the opinion of the court is, that
17 47961. 0s. *6d. sterling ought to be considered as the true value of the land and improvements at all times, not variable by changes in the price of tobacco, they who were appointed by the parties to make the valuation having confessedly referred to sterling money, compared with tobacco, as the balance by which they adjusted the value of the latter, and having conformably thereto augmented the quantity of proceding tobacco credits which they allowed to the plaintiff, and having unwarrantably made the valuation according to the price at that time, instead of the price at the time of the contract, or at the time limited by it for payment of the consideration. but the court is of opinion that the plaintiff is not entitled to credits against the defendents Pleasants, Shore, and company for the bills of exchange payable to them drawn by him on Walter Chambre, because the bills were not applied to their use, but were negotiated by the agents of the plaintiff, nor for the money due by their bond to Thomos Paschall, because before the assignment of that bond to the plaintiff the payment of that debt had been assigned by Ross, Shore, and company, for value received by them, of which assumption the plaintiff a member of the last named company also, either had notice, or was obliged at his peril to take notice. the court therefore decreed, that, upon the payment by the plaintiff to the defendents Pleasants, Shore and company of one half and to the defendent William Anderson of one fourth part, of the said 47961. 0s. 6d. sterling, with the addition of five per cenutm commission thereon, to be reduced into current money of Virginia, at the rate of thirty five per centum difference of exchange, and also their proportions of the value of the black cattle sold by them to the plaintiff, with interest upon the said several proportions, from the first day of may, 1780, after deducting the payments made by the plaintiff as well before as since the judgments, the injunction obtained by the plaintiff be perpetual. of which payments an account was directed to be made up.

From this decree, except as to taking the account, the defendents appealed; and here follow the

Opinion and decree of the court of appeals:

'That there is error, as well in the said decree (that is, the decree of 2 day of june, 1789) as in that of the thirtieth of may, 1788, therefore it is decreed and ordered that the said decrees be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. and this court proceeding to
18 make such *decree as the said high court of chancery should have pronounced, doth declare, that, the parties having chosen certain persons to value the land purchased, none others could without their mutual consent be substituted to perform the same; that the power delegated to those persons was merely to value the land, and not to adjust accounts, or settle any other disputes between the parties; that no time being fixed for the valuation to be made, or to which it should refer, in the case of a fluctuation in the price of land or tobacco, it ought to be governed by circumstances at the time of making the valuation, and not at the time of the contract; and no objection arises from the situation of the country at the time of proceeding to the work, since it was then done by the mutual consent of parties, who equally risqued a change from subsequent accidents; that what the valuers did in adjusting the accounts between the parties, was not only void as exceeding their pow-

ers, but improper in the exercise of what they assumed, in their allowing a credit to mr Ross, against Pleasants, Shore, and company of 386,685 pounds of tobacco, for 1933l. 8s. 7d. sterling, for bills of exchange never applied to their use, and for a debt due from them to Paschall, for which they had already made an appropriation of money due to them from Ross, Shore, and company by mutual consent, and in their allowance of a credit to the said Ross against William Anderson for 26055 pounds of tobacco, for a supposed difference between the value of 60994 pounds of tobacco paid in may and june 1780, at that time, and the value at the time of the valuation, there being neither law nor custom to warrant the scaling of a tobacco payment made in discharge of a tobacco debt; that what the arbitrators so did beyond their powers, being void and set aside, it would follow that the valuation should stand as an independent act pursuant to the power delegated, but since it appears that the valuers in estimating the sterling value of the land in tobacco, combined the idea of the adjustment they made of the accounts, without which they declare they would not have so estimated the price of tobacco, it is inequitable that the said estimated price of tobacco should bind the parties; that therefore the sterling value of the land then fixed by them, independent of the other circumstances, ought to stand as the basis of its value: and there being no precedent of a court of equity decreeing a payment in money of any kind, in discharge of a specific contract, where the thing covenanted for may be had, that the sterling money ought to be turned into tobacco at what was the current price of that commodity at the time of the valuation, which being a simple fact, independent of the value of the land, may and ought to
19 be *settled by a jury. therefore it is decreed and ordered that the second valuation of the land be set aside, and so much of the first valuation as fixes the value of the land in tobacco, but that 47961. 0s. 6d. sterling shall stand as the value of the land in that money; that an issue be directed by the court of chancery to try what was the current and average price in sterling money on the 18th day of april, 1781, of tobacco, passed at the inspections of Page's, Richmond, Manchester, and Petersburg; which, being tried and certified to the satisfaction of the said court of chancery, shall be the rule by which the said sterling shall be turned in tobacco, and five per centum being added thereto for profit according to the contract, shall be made the ground of the debit to the said Ross as well by the company as the said Anderson, to bear interest from the 1 may, 1780, and the accounts of interest and payments to be adjusted between the parties by order of the said court and a final decree made for the balance in tobacco, discarding from such payments the 1933l. 8s. 7d. sterling, and the estimated value thereof in tobacco, as well that made by the first valuers, as by the jury in the trial at law; leaving that article to be settled between the two companies; disallowing also any claim on either side for a supposed difference in the price in any tobacco payment, as being more or less than the price to be fixed by the jury as aforesaid, and on payment of the balances due the injunction to the judgment at law to be made perpetual."

A commentary upon this opinion and decree.

There is error in the said decree, that is, the decree of the 2 day of june, 1789.] that decree surely was not erroneous intirely, although it was reversed intirely; for in several parts it agreeth with the decree of the court of appeals, and the latter in the most important part wherein they differ will perhaps be found to differ with itself.

The parties having chosen certain persons to value the land purchased, none others could, without their mutual consent, be substituted to perform the same.] upon this principle the second decree set aside the valuation made pursuant to the first decree. but from this principle the court of appeals are supposed to have deviated in a subsequent part of their decree.

The power delegated to those persons was merely to value the land, and not to adjust accounts, or settle any other disputes, between the parties.] one of the reversed decrees set aside every thing which those persons did, and the other approved nothing more of what they did than that part which the correcting decree established, namely, the valuation of the land in sterling money.

20 *No time being fixed for the valuation to be made, or to which it should refer, in case of a fluctuation in the price of land or tobacco, it ought to be governed by circumstances at the time of making the valuation, and not at the time of the contract; and no objection arises from the situation of the country at the time of proceeding to the work, since it was then done by the mutual consent of parties, who equally risqued a change from subsequent accidents.] in a barter, the parties contemplate the values of the things which are the subjects of it, compared with some third subject for which they are more usually exchanged. in this case, where land was bartered for tobacco, the persons appointed by the parties to value the land in tobacco compared the values of both land and tobacco with sterling money, and declared the value of so much tobacco to be equal to the value of the land, because those articles, being each equal to the same quantity of sterling money, are equal to one another.

The value of all things vary at different times; but their variations are not isochronous. the values of land and the precious metals are generally less variable than the values of annual fruits of the earth, these fluctuating by accidents to which the others are not liable. time therefore is considera-

ble in every case where value of the things exchanged is the subject of enquiry; and more considerable where annual fruits of the earth are one of the things exchanged. that the valuation ought to relate to some time being admitted, the time which was in contemplation of the parties is supposed to be the time to which the valuation ought to relate, because that it should so relate is believed to be undeniable. this must be either the time of contract, or the time of payment, or the time of valuation. the second most probably was in contemplation of the parties, because one of them had bound himself to pay, and the other were intitled to receive, the tobacco, at that time: this was the 1 day of may, 1780, for from that day, if the tobacco were not paid before, the purchaser had agreed to pay interest. and that to this time should be preferred the third, that is the time of valuation, to assign a good reason is thought impossible.

The court of appeals say, at the time of proceeding to the work, it was done by mutual consent of parties, who equally risqued a change from subsequent accidents. but, first, the parties mutually consented that the time of valuation should be regarded, not because it was in itself considerable, but because one of them pretended, and as appeared afterwards only pretended, that he would receive the tobacco immediately, and the other expected that it would be demanded immediately; this is manifested by the act of the referees, who allowed the purchaser to set off for the tobacco paid before
21 the valuation more than *the numerical quantity, intending thereby to countervale the difference in prices at one time and the other. if David Ross, in may and june, 1780, had advanced to the sellers 672101 pounds of tobacco, the referees would have declared that quantity of tobacco to be the value of the land. for by them 60994 pounds of tobacco, paid in may and june, 1780, were equal to 87049, the 18 day of april, 1781; and 60994†26055=87049: 959205:: 60994: 672101 nearly. now let us suppose David Ross, before the referees, to have alleged himself to be a creditor of the other party for 672101 pounds of tobacco, paid in may and june before, and William Anderson to have objected, that to value the lands was the only matters submitted to the referees, not to adjust their accounts; and let us suppose the referees nevertheless, to have reported their estimate in this form: 'after viewing the lands, and taking other information for our direction, and maturely and deliberately considering the subject matter of dispute between the parties, we do value the said lands at 959205 pounds of tobacco, if the whole price agreed to be paid be now due; but David Ross alleging that, towards discharging the price, he had, in may and june last, paid 672101 pounds of tobacco; if that allegation be true, we do value the lands to no more than 672101 pounds of tobacco, because that quantity, paid in those two months, was equal in value to 959205 pounds of tobacco, to be paid now:' and let us also suppose them to have subjoined what followeth: 'and, according to that ratio, if, upon a settlement of accounts between the parties, the tobacco paid by David Ross in may and june, 1780, appear to be less than 672101 pounds, we reduce our estimate, or, which is the same thing, the sum of the payments, encreased in that ratio, shall be set off against the estimate; for example: if the sum of the payments to William Anderson in may and june, 1780, be 60994 pounds of tobacco, which he admitteth it to have been, then it shall set off 87049 pounds of tobacco against his proportion of the 959205 pounds of tobacco; for 672101 : 60994 :: 959205 : 87049; would the court of appeals have disapproved and set aside the estimate, because it related to the times of the payments? the commentator believes that they would not have set it aside, for that reason, if they could properly have discussed the question. and if they would not, their direction in the principal case that the jury in the estimate to be made by them should refer to the 18 day of april, 1781, instead of the times of payment, seems equally ill founded. and, secondly, at the time of valuation in april, 1781, William Anderson, being only an agent for Pleasants, Shore and company, was not authorized, as he pertina-
22 ciously urged before *the referees, to make a new agreement for his constituents, and he made no new agreement for himself, to risque a change in the values of land and tobacco from subsequent accidents.

What the valuers did in adjusting the accounts between the parties was, not only void in exceeding their powers, but improper in the exercise of what they assumed in their allowing credits to mr. Ross, &c.] for the same reasons these credits are disallowed by the reversed decrees.

Neither law nor custom to warrant the scaling of a tobacco payment made in discharge of a tobacco debt.] the payment, to which here is an allusion, not being scaled otherwise than by debiting the receiver with the true value in money of the tobacco paid, in discharge of a money debt, by the second reversed decree, this part of the correcting decree ministereth occasion to enquire, whether the debt in this case, which is confessed to have been originally a tobacco debt, after what hath happened, remained a tobacco debt?

Men chosen by sellers and purchaser to value land, sold in tobacco passed in 1779 and 1780, at the upper inspections on James and York rivers, first make the estimate in sterling money, and then compute how much tobacco, of those ages and inspections, is equal to that money, but perform the business in such a manner that the court of appeals annihilate the part relative to the conversion of the money into the tobacco, establishing the other part of the referees act, that is, the valuation in money.

When the conversion of money into the tobacco was annihilated, either no tobacco debt existed, more than a tobacco debt would have existed if the referees had not uttered or written one word about tobacco, or, if any tobacco debt did then exist, it must have been an incertain tobacco debt, to be reduced to certainty by the same referees in another valuation; for a debt is a contract, a contract derives its obligation from consent of parties; and the parties never consented to be bound that one should pay and the other receive the tobacco which any men, except those referees, should declare to be the value of the land sold. then after the valuation in tobacco was set aside, either no debt existing, or, if any debt existed, it being a money debt, if it be since a tobacco debt, its transubstantiation, unless it be a mystery, must be brought by the court of appeals, who directed the value of the money in tobacco to be determined by a jury; by what law or custom warranted is not easy to discover.

But if this be a tobacco debt, the prices of that commodity having varied so, that 100 pounds of it appear to have been agreed by the parties to be equal to 20 shil-
23 lings sterling at the *time of contract, and to have been thought by the referees less by nearly one third two or three months afterwards, and less by one half at the time of valuation; the court of appeals, prescribing the rule by which the conversion of the sterling money into the tobacco should be directed, namely the current and average price of tobacco in sterling money on the 18 day of april, 1781, that is, the time of valuation, manifestly scale a tobacco debt. now, when a tobacco debt is scaled, that either law or custom forbids the scaling of a tobacco payment made in discharge of that scaled tobacco debt some men will not admit to be sufficiently proved by a simple dictum.

What the arbitrators so did beyond their powers being void and set aside, it would follow, that the valuation should stand as an independent act pursuant to the power delegated, but since it appears that the valuers in estimating the sterling value of the lands in tobacco combined the idea of the adjustment they made of the accounts, without which they declare they could not have so estimated the price of tobacco, it is inequitable that the said estimated price of tobacco should bind the parties.] between this paragraph and any sentiment in the reversed decree no discrepancy appeareth.

Therefore the sterling value of the land then fixed by them, independent of the other circumstances, ought to stand as the basis of its value.] the difference between the second erroneous decree and its corrector is, by one the 47961. 0s. 6d. sterling, which the referees declared the land to be worth, ought to be considered as its true value, by the other the same sterling money ought to stand as the base of its value, upon which another fabric, that is, a second valuation of the money in tobacco, not by the referees, but by a jury, is to be constructed.

And there being no precedent of a court of equitys decreeing a payment in money, of any kind, in discharge of a specific contract, where the thing covenanted for may be had; that the sterling money ought to be turned into tobacco at what was the price of that commodity at the time of the valuation, which being a simple fact, independent of the value of the land, may and ought to be settled by a jury.] when a case like this shall be shewn, perhaps a precedent for the reversed decree may be shewn. the specific contract here was that a buyer should pay to the sellers the tobacco to which men chosen by those parties should value the land sold. the chosen men do value the land in tobacco. the court of appeals, saying to bind the parties by that valuation would be not equitable, set it aside, and decreed that the purchaser pay to the sellers, not the tobacco to which the men chosen by the parties value the
24 land, but the tobacco to *which men not chosen by the parties, namely, a jury, should value the land, for to value in tobacco 47961. 0s. 6d. sterling money is to value in tobacco the land, agreed to be equal in value to so much sterling money: that is, the parties having chosen certain persons to value the land purchased; others, without their mutual consent, were substituted to perform the same. is this consistent with the principle which is the basis of the reversing decree, stated in these terms, the parties having chosen certain persons to value the land purchased, none others could, without their mutual consent, be substituted to perform the same. trial of a fact by a jury is undoubtedly regular and constitutional; when the fact is put in issue by the parties, in the ordinary mode; but when the parties have referred the matter to men chosen by themselves, instead of a jury, for substituting a jury instead of those men to perform the whole business or part of it the only precedent perhaps is the reversing decree. and that the precedent is a good precedent in this case may be doubted; for by the second decree justice was certainly done to the parties, if 47961. 0s. 6d. were the value of the land in sterling money, which doth not appear to have been disputed: but that justice would be done by the reversing decree, which supposing parties to have been speculating on the risque of change in the value of land and tobacco from accidents, directed the money to be converted into that commodity, by a jury, and to be converted into that commodity, according to its value in april, 1781, when it was less by nearly one third, than it had been during a long period before, and less, in perhaps a greater proportion, than it was soon afterwards, and than it hath been ever since, and directed the tobacco, which according to the agreements, must have been inspected in 1779, or 1780, to be paid to the sellers, that justice would be done by such a decree, is believed to be incertain.

Therefore it is decreed that &c. and that an issue be directed to try what was the current and average price in sterling money, on the 18 day of april, 1781, of tobacco at the inspections of Pages, Richmond, Manchester, and Petersburg, which shall be the rule by which the sterling shall be turned into tobacco.] that no tobacco of those inspections was sold for sterling money on the 18 day of april, 1781, or for several days before or after, in a bill hereafter mentioned William Anderson stated to be true; and the contrary did not appear. then what could a jury have found to be the current and average price? if a jury had been charged; and had found, that no tobacco, of those inspections, had been sold on the 18 day of april, 1781, or for several days before or after, so that they could not say what was the current
25 *an average price of tobacco at that time, the court of chancery ought not to have awarded a new trial, because the jury would have found the truth confessedly; nor could the court of chancery have varied the issue, because by law its decree must have been formed after the prototype thereof, which was the decree of the court of appeals; nor hath any mode been yet discovered, by which that court can vary one of its own decrees: if so, must not the cause, which could not have a motion progressive or retrogade, have remained stationary? whosoever can shew what else would be done with it

———erit mihi magnus Apollo.

According to the decree of the court of appeals, an issue was directed by the high court of chancery. the parties waving that mode of trial referred the question intended to be tried by a jury to the determination of five merchants, who made their report. the defendant William Anderson moved that the report should be set aside, filing a bill for that purpose, with certain exhibits and affidavits. the court refused to set aside the report, seeing no cause to be dissatisfied therewith, and, being of opinion the parties were bound by the act of the referees, made a decree according to what the court of appeals prescribed, except that the curent and average price of the tobacco reported by the merchants, instead of being found by a jury, was the rule by which the money was turned into that commodity; and this last decree, from which William Anderson appealed, was affirmed.

FINAL DECREE upon the report.

The court, on the day of march, in the year of our lord one thousand seven hundred and ninety five, took into consideration the report of commissioners, made pursuant to the order, of the seventeenth day of may, in the year one thousand seven hundred and ninety three, with the exceptions thereunto. on which the result of the courts deliberation followeth.

The doctrine, that a purchaser of land may not, against his obligation, for payment of the price, discount money appearing due to him by the venders assigned obligation, as well as money appearing due to him from the vendor, by his own immediate contract, the assignees equitable right to the money having always existed, and his legal right to it having existed continually since he hath been permitted to maintain an action in his own name on the obligation, which permission was anterior to this transaction, is repugnant to the principles of justice,
26 as *well as to the words of the statute, passed in the year one thousand seven hundred and forty eight, chap. 27. sect. 6. of the edit. 1769, 'when any suit shall be commenced and prosecuted in any court for any debt due by judgment bond bill or otherwise the (a) defendent shall have liberty to make all the discount he can, and upon proof thereof the same shall be allowed.' the defendents, therefore, in the introduction to their exceptions, stating such a doctrine to have been authorized by a decision of the court of appeals, are believed to have misunderstood that decision. but although the plaintiff is entitled to a credit in account with the defendents Pleasants, Shore and company, for the three hundred and sixty pounds paid, with interest, to William Macon, in discharge of the obligations of those defendents, assigned to the plaintiff, and might have discounted so much against a money debt, this credit cannot be discounted against the defendents tobacco debt, because the comparative values of the two subjects are not ascertainable by any data to be discovered from the exhibits. some agreement between the parties is supposed to have appeared to the commissioners, authorizing them to set off the other articles, for which credits are allowed to the plaintiff in the same account with the defendents Pleasants, Shore and company, and which are also money articles, against the tobacco debt. such an agreement is supposed to have existed, because no exception appeareth to the allowance of the last mentioned articles. otherwise those articles ought not to have been entered in that account at all; and the decree ought to have been that the injunction be dissolved, as to two hundred and eighty eight thousand pounds of the tobacco recovered by the judgment of Pleasants, Shore and company, with interest; and be perpetual for the residue; and that those defendents pay to the plaintiff the said money credits, with interest. The latter part of which decree would not have been inconsistent, as is conceived, with the decree, pronounced by the court of appeals in this cause, the eighth day of december, in the year 1790. for that court is believed not to have intended by their decree to leave one party, exasperated perhaps by frequent altercation during a long course of litigation, and thereby become averse from conciliatory modes of adjustment, at liberty to indulge a vindictive spirit, and with an execution make havock of the other partys estate, who was, at the

(a) A plaintiff claiming a discount undoubtedly shall have like liberty.—Edition 1795.

same time, a creditor of his prosecutors on another account, without enabling him to shield himself from their oppression partly by his just credits.

27 *The court would have allowed to the plaintiff credit for the obligation of the defendants payable to Thomas Paschall, and assigned to the plaintiff, but is of opinion he is not intitled to that credit in this case, for reasons explained in the decree of this court, of the second day of june, in the year one thousand seven hundred and eighty nine, namely, 'before assignment of that obligation to the plaintiff, payment of the debts due thereby had been assumed by Ross, Shore and company, for value received by them,' and therefore the plaintiff, who, being a member of that house, either had notice, or was obliged at his peril to take notice, of the assumption, must be a creditor with them, who had agreed to discharge the defendents from it, for so much of the money due by this obligation as, upon a settlement of accounts between those two houses, shall remain due from the defendents to the other house.

For the one thousand and fifty-six pounds eleven shillings and eleven pence which had been due from the defendents to Isaac Gouverneur, a credit is not properly claimed in this case by the plaintiff, who allegeth himself to have paid the money; because, for satisfaction of this debt, the property of Ross, Shore and company had been attached, in the island of Sainthomas, and whosoever, by discharging the demand, redeemed their property, became a creditor in account with them, who must resort to the defendent for reimbursement, and therefore this article is a proper subject of examination in adjusting the accounts between those parties.

The mode of adjusting interest, approved by two of the commissioners in opposition to the third, in the accounts stated by them, annexed to the report, whereby they allow to the debitor interest upon the whole of the payments by him, is erroneous. the error may be developed thus: the debitor, allowed interest upon his payments, profiteth doubly by so much as countervaleth interest of the debt; once, by extinction of that interest, and then by being credited with interest upon the whole payment, including that part which extinguished the interest of the debt, and to which that extinction was equivalent; whilst the creditor receiveth his interest simply, and consequently so much less than he ought to receive as is equal to interest on that part of the payment which extinguished his own interest.

This may be exemplified in the two accounts subjoined, where one thousand pounds are stated to have been due from D to C, and payments to have been made at the times therein mentioned; in one, interest on the payments being credited only, and in the other interest being charged on that part of the interest which was extinguished by the payments:

28	*D in account with C	debitor	creditor
	1793, 31 december to	1000	
1794,	31 december interest	50	
	14 march by payment		202
	interest 292 days		8,08
1794,	16 may, payment		204
	interest 219 days		6,12
	7 august, payment		206
	interest 146 days		4,12
	19 october, payment		208
	interest 73 days		2,08
	31 december, payment		210
		1050	1050,4

here the creditor appeareth to have received 8 shillings more than the interest charged. but that these eight shillings are equal to the interest upon those parts of the payments which extinguish interest is thus shewn:

D in account with C			debitor	creditor
1793, 31 december, to			1000	
interest on so much of payments as extinguisheth interest on the debt, say				
1794, 14 march	£2.	292 days	,08	
16 may	4.	219 days	,12	
7 august	6.	146 days	,12	
19 october	8.	73 days	,08	
31 december interest on debt			50,	
14 march &c. by payment and interest.				1050,4
			£1050,4	£1050,4

here this method of stating an interest account, if the principle thereof were right, would be corrected, the benefits to both parties, of whom one would receive interest simply, and the other be discharged from interest simply, being reciprocal.

A mode of adjusting interest, indubitably less exceptionable than that whereof the error hath been developed, because differing from it only in being free from that error, is the mode by which a debtor, for a partial payment, is allowed a credit against so much of the principal debt as is equal to the remainder of the payment, after a deduction therefrom of its interest; according to which the credits of the plaintiff would stand thus, in the account with Pleasants, Shore and company:

1783, 16 of December	22164
which, with 4020 interest for 1324	
29 days, from 1 *day of may, 1780, discounted, are equal to 26184	
1784, 29 of april	32050
with 6411 interest for 1460 days, from 1 day of may, 1780, discounted, equal to 38461	
28 of august	35442
with 7668 interest for 1579 days, from 1 day of may, 1780, discounted, equal to 43110	
1788, 18 of june	57570
with 23406 interest for 2968 days, from 1 day of may, 1780, discounted, equal to 80976	

1789, 6 of june	34365
with 15655 interest for 3321 days, from 1 day of may, 1780, discounted, equal to 50000	
the sum of which, equal to	181591
being deducted from 283265, half the price of land, and 4961 for one fifth of the value of cattle —	288226
to those defendants would remain due	106635
to bear interest from the 1 day of may, 1780. and in the account with William Anderson,	
1780, 10 may,	3995
with 5 interest for ten days, from 1 day of may, 1780, discounted, equal to 4000	
16 of june	56639
with 355 interest for 46 days, from 1 day of may, 1780, discounted, equal to 56994,	
1781, 1 of april,	60574
with 2780 interest for 335 days, from 1 day of may, 1780, equal to 63354.	
1782, 11 december	13880
with 1120 interest for 589 days, from 1 day of may, 1780, equal to 15000	
the sum of which equal to	135088
being deducted from $\frac{566520}{4}$	141632
the plaintiff would then be a debtor to that defendent	6544
this, with interest to 28 of june, 1783,	178
was that day discharged by	13019
received by that defendent from the plaintiff, who thereby would become a creditor for the difference	7297
and, on the 11 day of june, 1789, a creditor for more, then received from him, by the same defendent.	11295

This mode of proportioning interest, in an account, after it had been some time considered, seemed to the court unex-
30 ceptionable. *for that C, to whom D, by one obligation, had been bound to pay 1000 pounds, with interest, was intitled to the same interest to which he would have been intitled, if D had been, by several obligations, bound to pay the 1000 pounds, divided into several parts; and, by parity of reason, intitled to the same interest to which he would have been intitled, if D and several other men had been bound, every one by a separate obligation, to pay part of the 1000 pounds, was a position conceived to be undeniable, and therefore taken for a postulatum.

Example: D, bound by one obligation, to pay C 1000 pounds, on or before the 31 day of December, 1793, paying, on the

1794,	14 day of march,	202 pounds
	26 may	204
	7 august	206
	19 october	208
	31 december	210

would have paid all the interest as well as all the principal to which C was intitled; in like manner as

D, bound to pay to C, on or before the 31 day of december, 1794, by every one of the five obligations, 200 pounds, by those payments which have discharged the interest, as well as the principals, to which C was intitled; or in like manner as

D, E, F, G, and H, who had been bound, every one by a separate obligation, to pay 200 pounds to C, on or before the 31 day of december, 1793, making similar payments respectively, would have discharged the interests, as well as principals, to which C was intitled.

Hence, the court, in such cases as this, was inclined to observe the following

RULE

To place the value of partial payment, after a defalcation of five per centum discount therefrom, to the credit of the debitor against the capital debt, so that upon the remainder of the capital the current of interest should not be interrupted.

This value, after the discount allowed, may be discovered by the following theorem; (b) if we put the rate per centum, or the interest of one hundred pounds for one year,=r; the months weeks or days in one year=t; the months weeks or days which any sum, a, is withheld by the debitor=n; the amount of that sum, in the said time, viz. principal and interest=b:

31 *Then it will be as t, the time in which the interest on 100 pounds is produced, is to n. the time of retention, so is $\frac{ar}{100}$, the interest in the former of those times, to $\frac{anr}{100}t$, that in the latter, which added to a, the principal, gives $a+\frac{nr}{100}t=b$, the whole amount.

Example: what credits ought the plaintiff to have for his partial payments 26184 &c. pounds of tobacco, paid 16 day of december, 1783, &c. against the capital debt 288226 pounds of tobacco, due and bearing interest from 1 day of may, 1780?

Here r being=5, t=365, n=1324 &c. and b=26184 &c. we have

$a=\frac{100 \times 26184 \times 365}{100 \times 365 + 1324 \times 5}=$	22164
$a=\frac{110 \times 38461 \times 365}{100 \times 365 + 1460 \times 5}=$	32050
$a=\frac{100 \times 43110 \times 365}{100 \times 365 + 1579 \times 5}=$	35443
$a=\frac{100 \times 80376 \times 365}{100 \times 365 + 2968 \times 5}=$	57569
$a=\frac{100 \times 50000 \times 365}{100 \times 365 + 3321 \times 5}=$	34365

the plaintiffs credits in the account with the defendants Pleasants, Shore and company; and $a=\frac{100 \times 4000 \times 365}{100 \times 305 + 10 \times 5}=3994$, &c. in account with the defendent William Anderson.

But the court, upon a revision of the subject, doth now condemn the rule formed in consequence of the position lately stated,

(b) Treatise of algebra by Simpson, Ward &c.—Edition 1795.

(c) perceiving the comparison of the case therein supposed, where D. and several others were bound by separate obligations, with the case, where D was bound, by one obligation, or by several obligations, to be inept, and, in this case, the inference not to be deducible from the position, because the inference allowed a debtor, on several accounts, to arrogate a right, which he hath not; namely, a right to direct a payment, at any time after it had been made, to be placed to his credit in any one of the accounts, although, by law, his election, which is acknowledged once to have existed, to assign the station of the credit, must be previous to the payment, or simultaneous with it, and accordingly must be explained to the receiver: for if the payment be tacit, the election, which the debitor had before, devolveth upon the creditor afterwards, in the case supposed in the position, when D paid 2021. on the 14 day of march, 2041. on the 26 day of may &c, he had a right to direct the application of the payments; but if the right
32 were not exercised *at the times of payment or before, C, afterwards, had the right to apply the payments first to discharge the interest which he might then lawfully receive: that he might lawfully receive interest on the whole 1000 pounds, at the time of the first payment, will be shewn hereafter; and consequently the position doth not warrant the inference.

This doctrine of elections is not an arbitrary, but a rational doctrine, and seemeth founded on these principles; whilst a man retaineth the money whereof he had fairly acquired the possession, it is his; he may squander it, melt it in a crucible, sink it in the ocean; in a word may do what he will with it. therefore if he deliver the money to another, even to a creditor, with instructions to apply it in this or that manner, the possession of the receiver is fiduciary, and he is bound to make the prescribed application, in so much, that if A, indebted to B and C, deliver money to B, to be paid to C, it is the property of C, and he may recover it from B. on the contrary, when a debitor delivereth money to his creditor, without instruction to apply it to his credit on this or that account, the property is immediately changed to the receiver; it is his; he may do what he will with it, and consequently may place it to the other partys credit in any account between them. the law, if it were otherwise, would be equitably beneficial to the debitor and detrimental to the creditor in many instances, and among them in that which is the subject of this disquisition, where a debitor, whilst he is enjoying a revenue from an estate, bought with money borrowed, or, which is the same thing, with tobacco, for which he bound himself to pay interest, would gradualy diminish, as he could conveniently diminish, the capital debt, which is a fund fruitfull of interest, and render the accumulated interest, from which withholding it he likewise deriveth a profit, a fund utterly barren, whilst it is witheld, to the creditor. so that to the latter here concur damnum emergens and lucrum cessans.

The court, therefore, to the first and second modes of adjusting interest upon which the foregoing strictures have been made, doth prefer the mode observed in this case by master commissioner Dunscomb, whereby so much of the payments as is equal to the interest being applied to the discharge thereof, the remainder unless the debitor at the time of payment of or before directed otherwise, is applied towards discharging the principal debt, or, for the sum of principal and interest upon it computed to the time of payment, the payment is subtracted, and upon the remainder of the principal debt, as a new capital interest is computed from the time of pay-
33 ment, but with this caution *that the new capital be not more than the former capital; so that if the payment be less than the interest due at the time of payment, the surplus of interest due must not augment the foenerating capital, because thereby the creditor would receive compound interest, or interest upon interest, which is generally supposed to be unlawfull.

(d) to the mode now recommended
34 *its illegality, in a case where the payment hath been made before the

(c) The rule, nevertheless, could be more righteous than any other, if, upon the interest, compounded, at the end of the year after it began to run, with the principal, interest were allowable.—Edition 1795.

(d) Compound interest, that is, interest which ariseth from principal debt, compounded with interest due for the use of that principal, during a certain time, is not prohibited by the statute to restrain the taking of excessive usury, in these terms; 'no person shall upon a contract take for loan of money &c. above the value of five pounds for the FORBEARANCE of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time.' for interest suffered to remain, after it had become due, in the debtors hands may be said, with no less propriety than principal, to be FORBORN. and the demand of compound interest is more reasonable in the case which frequently happeneth, where the debitor withholdeth both principal and interest so long as he can, maugre every effort of the creditor to extort them from him.

Nor is the taking of compound interest generally forbidden by the precepts of conscience.

A capital debt with interest yearly compounded may indeed be augmented two fold in 14 years and 75 days; for

'Let
- R—the amount of 1l. in one year, viz. principal and interest
- P—any sum put out at interest.
- n—the number of years for which it is lent
- a—its amount in that time.

'Therefore, since one pound, put out at interest, in the first year is increased to R, it will be as 1 to R, so is R, the sum forborn

end of a year from the term when the interest commenced, hath been objected. but the objection is founded in a misinterpretation of the act to restrain the taking of excessive usury, the words of which (acts of 1748, cap. 30, edit. 1769, sect. 2.) are 'no person shall take above the value of five pounds for the forbearance of ONE HUNDRED pounds for a YEAR, and so AFTER THAT RATE for a greater or lesser sum, or for a longer or SHORTER TIME,'
35 and which do not prohibit *him, who had lent 7300 pounds, to take every day one pound for interest, more than they prohibit him to take, at the end of the year, 365 pounds; the law not requiring a year, more than a day, to mature the lenders right to that interest, which is in the compound ratio of the capital and the time it is forborn. although a new bond daily taken by the lender for the daily interest perhaps would be deemed an usurious shift condemned by the third section of that act. interest taken or secured for a less time than a day would undoubtedly be criminal; fractions of a day, in legal supputations of time, which are generally rejected, being in no instance more exceptionable than in dealings
36 *between a griping usurer and a needy borrower. (e) a judgment in an action of debt on an obligation awards interest until payment, whether before or after expiration of the year: which would not be awarded if the receipt of interest computed upon the whole debt unto the time of payment were unlawfull, unless with that payment the period of a year coincided. that a creditor without the sentence of a judge, may lawfully receive that which the judge, the lex loquens, (à prosopopoeia confessed universally to be proper,) would award to him, is assumed for a true proposition. the creditor, who receives his interest half yearly, quarterly, monthly, weekly or daily, although he hath indeed a profit greater than he who doth not receive his interest before the years end, is not culpable, more than the landlord, who receives his rent half yearly or quarterly, the hireling who receives his wages monthly or weekly, and the like, is culpable.

Upon the whole matter, the court, allowing to the plaintiff a credit for the money paid by him to William Macon, instead of discounting the value thereof in tobacco, and having reformed the statement of interest in the account of the plaintiff with Pleasants, Shore and company, annexed on the report, so that it may correspond with the foregoing opinion, as followeth:

David Ross with Pleasants, Shore and company.

statement of interest upon payments to the 6 day of june 1789. 1780, 1 day of may, 283265 pounds of tobacco for half the land.

(e) Perhaps interest, accumulated in periods of less duration than a day, was in contemplation of Richard Price, when, in the introduction to his observations on reversionary payments &c. he wrote this note. 'a peny, put out to 5 per cent compound interest at our saviour's birth, would, by this time, have increased to more money than would be contained in 150 millions of globes, each equal to the earth in magnitude, and all solid gold.'—Edition 1795.

the second year, to R^2, the amount of one pound in two years; and therefore as one to R, so is R^2 the sum forborn the third year, to R^3, the amount in three years: whence it appears that R^n, or R raised to the power whose exponent is the number of years, will be the amount of one pound in those years. but as 1l. is to its amount R^n, so is P to (a) its amount, in the same time; whence we have $P \times R^n = a$.

'From which original equations, others may be derived, by help whereof the various questions, relating to compound interest, may be resolved.

'Thus because $P R^n$ is—a, there will
34 come out $P = \frac{a}{R^n}$, and *$R = \frac{1}{P^n}$, &c. or, by exhibiting the same equations in logarithms (which is the most easy for practice) we shall have

1°. log. a—log. P† n x log. R.
2°. log. P—log. a—n x log. R.
3°. log. R—log. a—log. P.

4°. $n = \frac{\log. a - \log. P}{\log. R}$

which four theorems, or equations, serve for the four cases in compound interest.' Simpsons algebra.

Example of the fourth theorem. in how long time will 27 pounds be doubled at five per cent.

In this case we have R—1,05, P—27, and a—54. whence $n = \frac{\log. 54 - \log. 27}{\log. 1.05}$—14 years and 75 days, the time required. for

The logarithm of 54 is 1.7323938, and the log. of 27 is 1.4313638. this being subtracted from that, and 3010300, the remainder, being divided by 0211893, the log. of 1,05, the quotient, 14,2066 is—14 years and 75 days.

The principal may be trebled in 22 years and 188 days, may be quadruple in 28 years and 150 days, &c. but a man, who had another way, instead of lending, employed his money, might have made greater profit, without practicing the arts of modern archspeculators.

What hath been here said is intended to be applied to the case where interest compounded with capital had been current a year. for an unconscionable lender might, every month, or week, or day, prevale upon the borrower to execute an obligation, compounding principal and interest. if it were daily executed, how the debt at the end of one year, would be exaggerated may be seen by this problem in W. Emersons treatise of algebra, b. II. sect. II. the principal being supposed to be 100 pounds, and the rate of interest 5 pounds.

4961	1-5 of cattle	
288226	interest from 1 may 1780 to 16 december 1783, 1324 days.	52275
	paid 16 december, 17835701.	26184
		26091
288226	interest from 16 december 1783 to 28 of august 1784, 255 days.	10068
		36159
	paid 28 august 1784 8511. 8 s.	43110
6951		6951
37	*281275 interest from 28 of august 1784, to 18 june, 1788, 1389 days.	53519
	assumed to pay 18 june, 1788, 9101, 19s. 2d.	80976
27457		27457
253818	interest from 18 june, 1788 to 6 june, 1789, 353 days.	12273
	paid 6 june, 1789, 5001.	50000
37727		37727
216091		

doth adjudge order and decree that the injunction obtained by the plaintiff to stay execution of the judgment recovered against him by the last named defendents on the 27 day of october, in the year 1784, be dissolved as to two hundred and sixteen thousand and ninety one pounds of tobacco, with interest thereupon to be computed from the 6 day of june, in the year 1789, and be perpetual as to the residue of the debt and interest recovered by that judgment. and that those defendents do pay unto the plaintiff three hundred and sixty pounds of current money of Virginia with interest thereupon to be computed from the 18 day of june, in the year 1782. and that the injunction obtained by the plaintiff to stay execution of the judgment against him recovered by the defendent William Anderson on the foresaid twenty seventh day of october, in the year 1784, be perpetual; and that the defendent William Anderson do pay unto the plaintiff fifteen thousand nine hundred and thirty pounds of tobacco, passed at the public inspections of Pages, Richmond, Manchester and Petersburg, or at some or one of them, with interest thereupon to be computed from the 11 day of june, in the year 1789; and that the parties bear their own costs, in this court the plaintiff paying one half of the allowance to the commissioner, and the defendents paying the other half thereof.

[The three foregoing cases are put first in order, because they were before the court, in whole or part, when it consisted of three chancellors.—Ed.] —Edition 1852.

Let { 1 r—interest of 1 l. for a year.
2 n—365, the parts of a year.

3 $\frac{r}{n}$—interest for 1 day.

4 $1 + \frac{r}{n}$—money due at one days end.

3, prob. 32* 5 $\overline{1 + \frac{r}{n}}|^{n}$—money due at the year's end.

by logs 6 $n \times \log. 1 + \frac{r}{n}$—log. amount for a year—0215694.

6, 7 1.0509—amount for a year.

6 x 100 8 105.09—amount of 100 l.

or 5, $\overline{1 + \frac{r}{n}}|^{n} = 1 + r + \frac{n.\ \overline{n-1}}{2\ nn} r\ r + \frac{n.\ \overline{n-1}.\ \overline{n-2}}{2.\ 3\ n^{3}} r^{3}$ &c.

the amount for a year.

Let 1 p—principal, t—time, r—interest of 1 l. R—1 x r the amount of 1 l. and its interest. s—sum of money due at the end of that time.

per quest. 2 $1 + r$ or R—money due at 1 years end.

by proportion. { 3 $1 : R :: R : RR$—money due at 2 years end.
4 $1 : R :: RR : R^{3}$—money due at 3 years end.
5 R^{t}—money due at t years end.
6 $1 : R^{t} :: p : R^{t}$—the amount of p for the time t.

1, 6 7 $p.\ R^{t} = s$.

cor. 1. $p = \frac{s}{R^{t}}$

cor. 2. $R^{t} = \frac{s}{p}$, or $t = \frac{\log. s - \log. p.}{\log R.}$

cor. 3. $R. = \sqrt[t]{\frac{s}{p}}$, or $\log. R = \frac{\log. s - \log. p.}{t}$

Emerson's algebra.

*The principal, time, and rate of interest being given, to find the amount at the end of that time, at compound interest. —Note in Edition of 1795.

*BETWEEN 38

EDMUND PENDLETON and Peter Lyons, surviving administrators of John Robinson, with his testament annexed, *plaintiffs*,

AND

ELIZABETH WHITING, executrix of Peter Beverley Whiting, and Warner Lewis and John Seawell, executors of Thomas Whiting, *defendants*.

March, 1791.

1. **Executors—Settlement of Accounts—Statute of Limitations***—W. being indebted to R. made R. one of his executors and guardian of his children in 1755. R. however, attended very little to the duties of executor; and the devisees having got possession of the estate, R. endeavored to have a settlement of the administration, that he might receive the balance due him. R. died in 1766. After that and as late as 1784, the parties interested expressed a willingness to have the accounts settled; and an order of Court was made for the purpose; but the defendants, refusing to proceed therewith, R.'s administrators filed their bill for a settlement, &c. The defendants plead the stat. of limitation; which was held to be a bar.
2. **Trusts and Trustees—Requiring Account from Cestuis Que Trust—Lapse of Time.**—The doctrine that, as a trustee is not discharged by length of time from the obligation of accounting for his transactions and administration in and about the subject committed to him, so a like privilege ought to attend a remedy of the trustee requiring an account from the *cestuis que trust*, is fallacious.
3. **Executors—Failure to Consent to Devisees Taking Possession of Estate—Retainer.**—Even if R.'s remedy had been suspended by his being executor as well as creditor, (which the court doth not admit,) the suspension ceased with his death; and if as executor he did not assent to the devisees taking possession, as is alleged, he could have maintained a suit for the estate; and also as guardian; besides his right to sue for his own debt in equity, or to retain for it as executor.
4. **Same—Settlement of Accounts—Case at Bar.**—There was nothing in the promises or acts of the defendants as to a settlement of accounts, to prevent the bar of the statute. Some of them had in writing referred to a settlement of R.'s estate; and one had written to one of the plaintiffs desiring and proposing a settlement.

THE plaintiffs, in their bill stated that an intimacy and friendship having been between John Robinson and Beverly Whiting, the former, not only advanced to the latter monies at different times, but, being treasurer of Virginia, did, at his request, allow to sheriffs and inspectors money due to them from Beverley Whiting, charging them to him in account, and giving him sundry credits. a copy of this account, number 1, supported by vouchers, is annexed to the bill, whereby a balance, including interest, of 418l. 16s. 10d. appeared to be due to John Robinson from Beverly Whiting, when the latter died, in 1755, Beverley Whiting appointed his brothers Thomas Whiting and Francis Whiting, with John Robinson, executors of his 39 testament, *and appointed John Robinson Guardian to his sons, which trust the testator hoped he would vouchsafe to take upon him, as a testimonial of the last favour he could bestow upon the testator. the bill stated that Robinson was induced to accept the trust of executor and guardian, by the promise of Thomas Whiting, (for Francis Whiting would not intermeddle in the matter,) that he would manage the plantations and other affairs of the estate, and attend to the education of the children, and recur to John Robinson for advice when it should be necessary. of this promise no proof is exhibited. The bill stated that John Robinson did not concern himself in the affairs of Beverley Whiting, otherwise than in settling with sheriffs, and other public collectors for levies due from the estate, and in paying some debts, all which advances are entered in the account, number 2, annexed in the bill for which vouchers are also exhibited. The plaintiffs however admit, from information, that John Robinson had drawn orders on an overseer, at one of Beverley Whitings plantations, for corn, for the amount whereof, when it could be ascertained, the plaintiffs were willing to give credit. the bill stated that Thomas Whiting shipped the crops of his brothers estate, and imported goods for his family, and therefore accounts of the disposition of those crops could not reasonably be required from the plaintiffs, whose testator transacted no business relative to the estate otherwise than as before mentioned.

The bill further stated that Peter Beverley Whiting and John Whiting, who were sons of Beverley Whiting, and to whom he had devised his estate, after, by the profits of it, kept together, his debts should be discharged, having attained their full ages, and somehow got possession of their respective estates, John Robinson was desirous of having the accounts of the administration settled, that he might receive the considerable balance due to him, and procured several times and places to be appointed for meeting with Thomas Whiting and the sons for that purpose, but they did not meet, and he died in may, 1766.

The bill further stated, that the plaintiffs, to whom with another since dead, the administration of John Robinson's estate with his testament annexed was committed, employed George Brooke to adjust the accounts of the estate and collect the money due to it, delivering into his hands the books and papers for that purpose, until his death, in the year 178 , during which time, from the confidence reposed in that agent, the plaintiffs doubted not that he had collected the debt, or secured it by bond or a judgment. they had not discovered that a settlement had been made or a speciality taken. however they be- 40 lieved *and hoped to prove, that George Brooke furnished copies of the accounts, numbers 1, and 2, to Peter Bever-

*See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

ley Whiting, (John being dead insolvent,) and shewed him the vouchers for the same, which were found carefully wrapped up with the accounts, and that Peter Beverley Whiting had no objection to that account, but did not pay or give a specialty for it, until he should have a general account of the administration of his fathers estate settled, which he knew was only to be expected from his uncle Thomas Whiting, but which he hoped might be forwarded by the assistance of George Brooke, if payment to the plaintiffs were delayed. in part proof of these suggestions, the plaintiffs stated, that one John Hobday, who had been an overseer for Beverley Whiting, and after his death in his estate, had a demand, on that account, of 351. 16s. 6d. besides interest from june 1758, and, being indebted to the estate of John Robinson, insisted that George Brooke should allow his demand, for which he alleged John Robinson to have been liable, out of his debt; and thereupon Peter Beverley Whiting, that he might induce George Brooke to give the proposed credit, signed the note following: the money that is due from my fathers estate, to mr. John Hobday i will pay, whenever my fathers estate is settled with the speakers. Peter Beverley Whiting, june the 10, 1767. from whence the plaintiffs inferred that Peter Beverley Whiting knew an account to be then subsisting between his father and John Robinson, and that he meaned to have a fair settlement thereof at a future day; and that he also knew he should be indebted on that account would appear, as the plaintiffs alleged, from an order drawn by him on Leroy Hipkins, dated the 7 day of november, 1771, in these words: sir, please to pay to the administrators of John Robinson esquire 351. 16s. 6d. and you'll oblige, sir, your humble servant, Peter Beverley Whiting.

The plaintiffs further stated, from information, that George Brooke, Peter Beverley Whiting, and Thomas Whiting had obtained an order of Gloucester county court, appointing commissioners to examine and settle the respective accounts of John Robinson and Thomas Whiting with the estate of Beverley Whiting, but the order was not performed through the failure of Thomas Whiting to attend the commissioners at their meetings, until the late war, which interrupted business of this kind.

The plaintiffs further stated, that, in consequence of an inquiry made by their agent, after the death of George Brooke, into the state of this business, the plaintiff Edmund Pendleton received from the defendant Elizabeth Whiting a letter, dated 16 day of august, 1783, of which a part quoted in the bill is in the words following: i have informed colo Whitings executors, that i intend, next court, to petition for a settlement of the estate,
41 *which they say they are willing to have done; and i doubt not you are equally so. you will probably wonder why you were not applied to ere now. the reason, sir, was, that the speaker was said to die insolvent. the report of this account will only bring on a settlement a few months sooner than was intended; for i was always determined to pursue the measures our friend would have taken, had it not pleased the almighty to take him from us.

In answer to this letter, the plaintiff Edmund Pendleton wrote a letter to the defendent Elizabeth Whiting, pointing out the mode in which the accounts between the parties might be conveniently adjusted; he afterwards wrote another letter to her, desiring to know what she had done, or meant to do, in the business.

But the plaintiffs stated that the defendent Elizabeth Whiting, combining with the other defendents, who are the executors of Thomas Whiting, refused to proceed in the settlement of accounts between the parties, although, at her instance, in january, 1784, an order was made by Gloucester county court, appointing commissioners for that purpose, saying that as she was advised, the demand of the plaintiffs was barred by the statute for limitation of actions. whereas the plaintiffs charged, that, John Robinson and Thomas Whiting acting as trustees, no length of time would bar their being accountable to the children for the trust, and, equality being the equity of this court, the remedy in such case ought to be mutual. and that in this light Peter Beverley Whiting understood it, was said to be plane, who from the letter and notes before mentioned, as well as the orders of court for settlement of the accounts, never meaned to avale himself of the length of time, but to have a fair and just settlement, and to pay or receive the balance as it should happen to be due; on which notes and orders, as well as the letter of, an order obtained by, the defendant Elizabeth Whiting, the plaintiffs relied, to obviate the act for limitation of actions, if it should be insisted on.

And the plaintiffs, alledging themselves to be relievable in a court of equity only, because their testator was one of the executors of Beverley Whiting, from whom and whose estate the debt was due, and that estate must be there persued for satisfaction, prayed that the defendants might be decreed to account, and to pay to the plaintiffs so much money as ought to be charged on Peter Beverley Whitings proportion of his fathers estate, the plaintiffs submitting to lose so much as ought to be charged on the estate of John Whiting, the insolvent son.

The defendant Elizabeth Whiting pleaded the statute for limitation of actions. She likewise put in an answer, to state the substance wherêof here will appear to be unnecessary.

42 *The other defendants also put in an answer, containing nothing important, and relied upon the statute for limitation of actions.

The plaintiffs replied to the plea of the defendant Elizabeth Whiting, as followeth,

that for so much of their said demand as accrued during the life time of the said Beverley Whiting, in as much as the said John Robinson was executor of the will of the said Beverley, and all suits for the recovery of the said demand thereby suspended, the act of limitations is not pleadable, in bar of the said demand, by the rules of law or equity; and although the said John Robinson might have retained satisfaction for his said demand, yet the said plaintiffs do aver, and will maintain and prove, that he was prevented from so doing by the two sons Peter Beverley Whiting and John Whiting having respectively taken possession of their estates (consisting of lands, slaves, and stocks, not in the daily view of the said John Robinson), without his privity or consent, thereby subjecting themselves to the payment of the said demand, which they frequently promised to pay, and thereby gained the forbearance of the said John Robinson. and the said complainants further insist, that as it appears, of the defendents own shewing, and by the records of the county court of Gloucester, that the said Peter Beverley Whiting in his life time, and the defendent since his death, have severally applied for and obtained, from the said county court, orders that the executors of the will of the said Beverley Whiting should make up an account of their administration, the said defendent can not now, by the rules of equity, be allowed to plead the act of limitation in bar of such account, nor avoid payment of any balance which, upon such account, may appear to be due to the testator of the complainants, which is the end and scope of their bill.

On the second day of march, 1791, the court delivered the following

OPINION,

That the demand of the plaintiffs is, in its nature, prescriptible; for the doctrine stated in the bill, that as a trustee, that is, one to whom the management of an affair is confided for the benefit of another, is not discharged, by length of time, from the obligation of accounting for his transactions and administration in and about the subject committed to him, so a like privilege ought to attend a remedy of the former requiring an account from the latter, is supposed to be fallacious, because
43 the possession *of what the one receiveth is fiduciary,—is the possession of him, for whom he acteth, and whom he representeth, in that instance, and therefore never begineth to work a prescription; but the same cannot be praedicated of the others possession, which is, on the contrary, for himself, and adversary to all others: thus, although an executor cannot by length of time bar the right of the legatary, yet possession delivered to the legatary, or suffered to be taken and kept by him, without caution to return the thing bequeathed, in the event of future recoveries of debts may, as is apprehended, in process of time, extinguish the right as well of the executor, as of any other man, who neglecting to vindicate the right within the period limited by law for asserting it, is presumed to have either abandoned it, or received satisfaction for it; the latter of which presumptions is the stronger in this case of an executor and guardian, who, having power to retain and appropriate so much of his constituents estate, or the profits of it, as was equal to his demand, did actually convert to his own use a part thereof, without giving credit for it, and, for anything shewn to the contrary, may have applied more of it in the same manner,—who left no account of a bill (a) for two hundred pounds sterling paid to John Robinson, supposed to be the testator of the plaintiffs, by John Hanbury and company of London, with which the executors of Beverley Whiting were charged;—and who doth not appear, and is not pretended, to have rendered, or even kept, any account whatever of his executorship, or guardianship, the account number 2, to which the bill referreth, seeming, according to the state of it there, to have been formed from papers found by rummaging in a great mass since his death; for the promise of Thomas Whiting, by which the said John Robinson is alleged in the bill to have been induced to accept the trust, if the promise had been proved, could not have dispensed with his obligations to fulfil the trust, after he had accepted it; nor do his attention to the duties of his public office or his services in the execution of it appear, by any thing disclosed in this case, to have been the one so sedulous that he could never advert to the duties of this private office, or the other so beneficial to the community that their merit can atone for the neglect of a trust accepted as the last favor he could bestow on a dying friend.

Neither doth the court admit the proposition assumed in the replication, that the said John Robinson being an executor, as well as a creditor of Beverley Whiting, all suits for the recovery of the plaintiffs demand were thereby suspended, to be true nor if it were true, to be effectual to
44 prevent the operation of *the statute for limitation of actions; for an executor who had not assented to a legacy, which the plaintiffs deny the said John Robinson to have done, may maintain an action in a court of common law, even against the legatary, for recovering the thing bequeathed, and then may retain for his debt, or may prosecute a suit in the court of equity to recover his debt in the first instance; but, if the said John Robinson could not have maintained a suit, as executor, he might have maintained a suit, to recover possession of the estate as (b) guardian in either court.

And if the executorship obstructed the

(a) This appeareth by exhibits annexed to the answer of Elizabeth Whiting.—Edition 1795.

(b) This is inaccurate. The sons were not intitled to the possession of their estates before the debts were paid. in the mean time therefore the executors might have retained or recover the possession.—Edition 1795.

prosecution of suits by him, the obstruction, ceasing with his death, did not impede the operation of the statute afterwards.

Nor is the fact avered in the replication, that the said John Robinson was prevented from retaining satisfaction for his demand by the two sons Peter Beverly Whiting and John Whiting having taken possession of their estates, without his privity or consent, thereby subjecting themselves to the payment of the said demand, which they frequently promised to pay, verified by the testimony, or presumable after so many years, as to Peter Beverley Whiting, to charge whose estate is one principal object of this suit, the demand as to his brother being waved.

The court is also of opinion that neither the note signed by Peter Beverley Whiting, the 10 day of June, 1767, nor the order drawn by him, the 7 day of november, 1771, on Leroy Hipkins, nor the letter dated the 16 day of August, 1783, from the defendent Elizabeth Whiting to the plaintiff Edmund Pendleton, nor the order of Gloucester county court, made on the motion of the defendent Elizabeth Whiting, the first day of January, 1784, upon which the plaintiffs rely to obviate the statute for limitation of actions, ought to have that effect.

Not the first, because, if a consent or an obligation to account be contained in the terms of that note, the right of action originating thereby would have been barred by the time elapsed between the date of it, and the day when this suit was commenced, nor doth Peter Beverley Whiting appear, of the defendents own shewing, as the replication stateth, or otherwise, to have applied for, and obtained from the county court of Gloucester, an order or orders, that the said executors of the said Beverley Whiting should make up an account of their administration, the defendent, by her answer, having confessed that she remembered to have only heard of orders, from the motion of Peter Beverley Whiting, to have his fathers estate settled, nor is any such order now among the exhibits.

45 *Not the second, because, if that could be so interpreted, as to contain a consent or obligation to account, it is also superannuated.

Not the third, because in one paragraph of that letter the writer of it declareth her opinion to be, that the length of time is sufficient to set aside all clames of the sort of that made by the plaintiffs, and, this being connected with the paragraph quoted in the bill, upon which the plaintiffs rely to prove her submission to a settlement of the executors account of administration of Beverley Whitings estate, if a commentary be made on both of them together, the fairer interpretation is, that she did not, by the latter, relinquish the defense, which in the former she thought a good defense, and that in favor to executors, of whose negligence, infidelity, and delinquency the letter is replete with accusation; and if the defense and settlement be incompatible, she ought to be allowed her election to abide by the former, which she declared, as is confessed, before the commencement of the suit, and determined by her plea afterwards. because no part of the letter discovereth, although she had been informed indeed of some account against the estate of Beverley Whiting, that she knew the nature or amount of the plaintiffs demand, or suspected that her husband was indebted to them, the contrary of which last may be inferred, as well from her forwardness to bring on a settlement, which, if the demand be established, would terminate in aggravated distress to herself and her family, as from that member of the paragraph quoted in the bill, wherein the speakers (Robinsons) insolvency is mentioned, as the cause of delaying an application to him to whom the letter was addressed, his solvency or insolvency being unimportant to her, otherwise than as some part of that reparation, for the losses her husband had sustained through the misconduct of his fathers executors, which was desperate in the latter event, she hoped might be obtained in the other: and if thus uninformed, and ignorant, and unapprized of the extent of the proposed settlement, she had explicitly and unconditionally promised to enter into it, the spirit of equity dictates rather absolution from such a promise than exaction of its performance. and because the writer of the letter had no power thereby to bind the estate of her husband for payment of that with which if he had been then living, he would not, by any thing now appearing, have been made chargeable; for that an executor or administrator, by his contract, should create an obligation in the testator or intestate, who had not delegated a special authority for that purpose, seems preposterous. and

Not the fourth, as well for the reason last assigned in the next preceding section, as because the plaintiffs were not a

46 *party to the order, and were purposely omitted by the defendent Elizabeth Whiting, saying, as they confess in the bill, she was advised their demand was barred by the act of limitations; so that the plaintiffs relying upon this order, taken with that saying, to obviate the act of limitation, seem to rely upon this, that when she reserved the power to plead the act, she relinquished the power to plead the act.

And, upon the whole matter, the court reviewing and frequently pondering the subjects of the foregoing disquisition, and observing that this bill requireth an account relating to the administration of an estate from one who was never bound, nor doth represent any who were bound, originally, if at all, to render it, and that this requisition is made by representatives of an executor and guardian, who was bound to render accounts of his administration and management of the same estate in both those characters, but confessedly never did render, and doth not appear to have even kept, an account of them in either, and by whose defaults in those instances, and possibly in other instances, no settlement of

those accounts, free from injustice to one or other of the parties, can be made now, when those who transacted the matter proposed to be examined are dead; when the evidence, by which some debits, now seeming indisputable, might have been controverted, and credits omitted might have been justified, in an earlier discussion, hath vanished by time, frequently producing such changes, that the same thing which appeareth in one form to day, may have worn a different form some years before; when documents, pertinent to this business may have been mislaid, lost, or destroyed, some of them not impossibly by the means of that executor and guardian, who had a right to the possession of them; and when the same causes would prevent a recovery of satisfaction for the injury, which, according to the letter often mentioned before, Peter Beverley Whiting complained, he had suffered by the malversation of his fathers executors; the court is of opinion this is one of those cases, in which the statute for limitation of actions, a law believed by most men esteemed well learned in jurisprudence to be congruous with the principles of natural law, and to be sanctified by public utility, may be honestly and conscientiously pleaded; and therefore the court allowing the plea of the defendent Elizabeth Whiting, and, being of opinion, that a demand barred by the statute for limitation of actions, existeth not afterwards, so that the plaintiffs could not recover their demand against the other defendents, if they were indebted to Peter Beverley Whiting,

Dismissed the bill, with costs.

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*BETWEEN 47

JOHN HOLCOMB OVERSTREET, *plaintiff*,

AND

RICHARD RANDOLPH, and David Meade Randolph, executors of Richard Randolph, and William Griffin, *defendents*.

Aug., 1789.

1. **Bonds—Fraud—Assignment—Bona Fide Holder.***—An obligor unfairly dealt with in the purchase of a slave may be discharged from his obligation against the seller; but not against an assignee, for value, without notice of the unfairness.
2. Objections to this opinion, and the chancellor's answers thereto.

THE plaintiff had executed an obligation for payment, to Richard Randolph, the testator, of three hundred pounds, the price for a negro slave sold. the seller had acted so unfairly in the bargain that, if he and the buyer only had been interested, the latter ought to have been discharged from the obligation. but the court, on the 5th day of august, 1789, delivered an opinion, that the plaintiff was not intitled to relief against the obligation in the hands of the assignee, the defendent William Griffin, who having paid a valuable consideration for it, without knowledge of unfairness in the sale of the negro, and being impowered, by statute, made in 1748, (ch. 27 of the edit. in 1769, sect. 7,) to commence and prosecute an action in his own name, had a legal right to the money acknowledged by the obligation to be due, and whose equity was not less than the obligors equity. in consequence of which opinion the bill of the plaintiff, which was partly for an injunction to stay execution of a judgment recovered in an action upon the obligation by the assignee, was dismissed, as to that defendent.

Against this opinion, when the same question hath been several times since discussed in other cases, were objected,

1, That it exalteth a derivative right over the primitive right, implying that the obligee may transfer a right which he hath not, or a greater right than he hath, to the assignee.

2, That the opinion supposeth the assignees equity not to be less than the obligors equity, the truth of which was not admitted.

3, That the doctrine, inculcated in the opinion, will encourage fraud and produce more inconvenience than the contrary doctrine. obligees, conscious that, that by their malversation, they were so obnoxious as that demands, in their own names, were not sustainable, will assign the obligations, and, becoming insolvent, which is said to have happened in the principal case, or removing to parts unknown, prevent or render ineffectual recourse to them by injured obligors, more reasonable would be to put the assignee in the same condition in which the obligee *is; for the assignee, before he accepts the assignment, might, by injury, be informed if the obligor admitted or denied the money to be justly due, whereas the latter can seldom or never give timely notice to the former of exceptions to the demand. 48

4, That, by equity of the statute, which authorised commencement and prosecutions of actions in the names of assignees, directing discounts, before notice of assignment, to be allowed, obligations in the hands of assignees ought to be liable to objections which might be urged against them, if they had remained in the hands of the obligees.

ANSWERS:

To the first objection. the opinion is not such a paradox as the objector supposed. if the obligation be such that the action upon it, brought by the obligee himself, would not be barred by any legal plea, the court of law could not hinder him from recovering a judgment and suing forth execution, although he should appear to have practised fraud in obtaining the obligation. the court of equity can restrain him, by injunction, from enjoying the benefit of his judgment, upon this principle; that

*But see appendix 433: also monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801: monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

he who had injured the obligor, by foul dealing, should make reparation for it. the obligee, when he assigns the obligation, transferreth simply his right to the money thereby acknowledged to be due; but doth not transfer, cannot transfer, thereby, his duty to make that reparation, (a) nor can be said to transfer a right which he hath not, although it be a right from enjoying which the court of equity may restrain him. but such a power cannot be warrantably exercised by that court against the assignee, if he were innocent of the fraud, because it would be manifestly forcing one man to make reparation for injury done by another man. and accordingly a court of equity doth never deprive the purchaser of a legal title, although unfairly acquired by the seller, if the purchaser were not an accomplice in or privy to the unfairness. consequently the assignee, who is not a particeps criminis, either by his own act or by acceptance of a title known by him to have been unfairly acquired, hath the same right to the money, acknowledged by the obligation to be due, as if it had been made payable to himself, with this difference only, that the assignee must allow discounts to which the obligor was intitled against the obligee, the nature of which discounts will be explained in answer to the fourth objection.

The obligor, if, before discovering
49 the unfairness in the sale, *he had paid the money to the seller, might have recovered it from him.

But could the obligor, before the discovery, paying the money to the assignee, have recovered it from the latter?

This indeed is only stating the case and propounding the question over again, with a circumstance which ought not to vary the determination, but which will exhibit more plausibly this defense, which the assignee might urge against the demand from him by the obligor of reparation for a wrong done by the obligee: i have received what was confessedly due to me, and received it from thee, who didst acknowledge thyself to be debitor for it;—i trusted the obligee on thy credit;—if thou hadst not enabled him to turn thee over a debitor to me, i might not have dealed with him,—might have required caution from him,—or might have recovered a judgment against him, before he became insolvent; finally i have done thee no wrong.

The same defence urged by the assignee, before receipt of the money, ought, as is conceived, to prevale; for the following aphorism is believed to be a just rule; of two innocent men, in which predicament are obligor and assignee in the principal case, the loss, which one must bear, ought to rest on him, by whose act it was occasioned; because, without that act, the loss would have been prevented. in this case, the act which occasioned the loss was granting the obligation.

(a) Some, perhaps, would rather say transfer his SUABILILY.—Note in edition of 1795.

To the second objection. The reason of the opinion, namely, that the assignees equity is not less than the obligors equity, is still believed to be correct. for although where the equity of one party and the equity of another are homogeneous, their quantities may be compared together, and their difference, if they be not equal, may be determined as accurately, perhaps, as quantities, which are the subjects of geomerical calculation: yet the equity of an obligor, injured by the fraud of the obligee, and the equity of an assignee of the obligation, for valuable consideration, without notice, injured by loss of his debt, being so unlike, that they can not be compared together, in order to shew which is the greater, must be supposed equal.

To the third objection. If the law be, as it is supposed to be, in favor of the assignee, the court of equity hath no power, in consideration of inconveniences, to change the law. that the inconveniences would be less, if the law were determined to be otherwise, is not granted; because that it can be proved is not believed. moreover the obligor in almost every case may, as is supposed, be secured against danger from an assignment: for recent and diligent prosecution of a bill in equity, for relief
against fraud in obtaining the obli-
50 gation, will put a *posterior assignee in the predicament of a lite pendente purchaser.

To the fourth objection. 1, the section of the statute, to which the objector alluded, is confined, by the terms of it, to such discounts as are admissible on trial of an issue, in an action at common law; but the plaintiffs demand of a reparation, in this case, is not of that nature. if damages, which may be recovered, by way of reparation, for a fraud, can properly be discounted against the debt due by obligation, damages, which may be recovered for any other injury, committed by the obligee, may be discounted in like manner; which hath never been pretended. 2, the legislature, by allowing the action to be commenced and prosecuted in the name of the assignee, is supposed to have intended to put him in the same state as the indorsee of a bill of exchange, against whom the drawer would not be intitled to such relief as he might have obtained against the payee. 3, a proviso in a statute restrains the enacting words from operating upon the case described in the proviso, but upon no other; and accordingly, the proviso being in the nature of an exception, the maxim is exceptio probat regulam, or the enacting words apply to every case but that which is exempted from them by the exception, and consequently the proviso, by the argumentum a pari ratione, or even a fortiori, cannot be extended by equity; the proviso is a measure limiting the exent of the enacting words, and, from the nature of the thing, should no more be applied to any case, to which the words of it have not adapted it, than it should be variable, in its reach, and especialy in this case, where

the proviso warns the assignee, that the risque which he runs is, not that the debt was never due, but that it hath been paid, its original justice being supposed.

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NOTE.—The cases referred to by the Chancellor (p. 47) as those in which the same question hath been since discussed, may have been Norton v. Rose, and Picket v. Morris. 2 Wash. 233 and 255, in which the Court of Appeals, overruling the Chancellor, held "That an assignee of a bond, or obligation, takes the same subject to all the equity of the obligor; and that the obligor ought to be allowed to set off and discount against the debt when claimed by the assignee any equitable demand respecting said debt, which he had a right to claim from the original obligee." See also, as some of the cases pari materia, Mayo v. Giles adm'r. 1 Munf. 533; Stockton v. Cook. 3 Munf. 68; McNeil et als. v. Baird. 6 Munf. 316; Broaddus et als. v. Rosson, et ux. and Moore et als. v. Holcombe et al. 3 Leigh 12, and 597; Feazle v. Dillard, et al. 5 Leigh 39; 6 Leigh 230; Washington v. Pollard, 5 Grat. 532.—Note in edition 1852.

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*BETWEEN 51

JAMES MAZE, *plaintiff*,

AND

WILLIAM HAMILTON and Andrew Hamilton, *defendents*.

Oct., 1789.

1. **Surveys—Pre-emption by Settlement** *—Priority of right to land and pre-emption, by settlement, sustained by his chancellor; but denied by Court of Appeals, as to the pre-emption, against a survey prior to 1776, under an order of Council.
2. **Same—Same—Case at Bar.**—M. claimed land and pre-emption by virtue of settlement in 1764. H. claimed same land, and the commissioners affirmed his claim. M. entered a *caveat* and appealed to the General Court, which in 1782 reversed the sentence, and rejected a motion for an appeal. In 1783 the Court of Appeals awarded a writ of error but quashed it, on the ground of the judgment of the General Court in such a case was final. Prior to this, in the same year, the Court of Appeals had, (under the act of 1779, § 10.) decreed in favor of the claims of under orders of council, of the *Greenbrier and Loyal Cos.* The surveyor of the Gr. Co. in 1775 surveyed the land in controversy, but in blank, owing to the contest between M. and H. H. afterwards procured said survey to be filled up to him, and then obtained a grant embracing the said land. M. filed a bill in the H. C. C., seeking to vacate H.'s patent for his fraud in procuring it, &c. The chancellor sustained the judgment of the General Court as final; and decreed in favor of M. both as to the land and the pre-emption; upon his paying £3 for every 100 acres to the Gr. Co. Reversed by Court of appeals, as to the pre-emption.
3. Comments of the Chancellor.

THE subject of controversey in this case was 400 acres of land, in the county of Greenbrier, with a right of preemption. the plaintiff claimed by virtue of settlement in 1764. the defendents claimed by virtue of both a settlement and a survey, alleging the survey, when they first pretended to derive a title by it, to have been made in 1774, altho the survey to which they alluded appeareth to have been made in june, 1775, by an order of council, granted to the Greenbrier company in 1751.

Before the special court of commissioners, constituted by the act of general assembly, passed in the may session of 1779, the plaintiff exhibited his clame, and the defendents opposed it.

The commissioners, by their sentence, the 14 day of january, 1780, affirmed the clame of the defendents, certifying Andrew Hamilton to be entitled to the 400 acres of land, by right of settlement, before the 1 day of january, 1778, being part of a survey of 1100 acres, made for him, in the year 1774, also to have the right of preemption for 500 acres adjoining the settlement.

This sentence, from which the plaintiff appealed, entering a caveat against emanation of a grant in consequence of it,
52 was *reversed the 9 day of october, 1782, by the general court, who ordered that a grant issue to the plaintiff for the said 400 acres of land, in right of settlement, and for 1000 acres more, in right of preemption, to which no other person had any legal right or clame.

A motion to that court for an appeal from this judgment was denied. the court of appeals, on the 30th day of april, 1783, awarded a writ of error to the judgment; 29 day of october, following quashed the writ of error, declaring their opinion to be, that they had no jurisdiction over judgments, rendered by the general court, on caveats sued forth in that court against the judgments of district commissioners; the next day set aside the cassation; and finally, on the first day of november following, reinstated it,*

The survey, under which the defendents clamed, is certified to have been made by Samuel Lewis, surveyor of the county, who at that time was an agent of the greenbrier company.

Upon the petition of Andrew Lewis, also an agent of the greenbrier company, the court of appeals to whom it was addressed, on the 2 day of may, 1783, entered this opinion decree and order: the several claims of Thomas Walker, esquire, on behalf of himself and the other members of the loyal company, and of Thomas Nelson, esquire, on behalf of himself and the other members of the greenbrier company, to grants of all the lands surveyed under several orders of council, bearing date the 12 of July, 1749, the 29, of october, 1751, the 14 of june, 1753, and the 16 of december, 1773, came on to be heard yesterday and this day, and thereupon the arguments of counsil for the clamants, and of the attorney general for the commonwealth, having been fully heard and considered, it is the opinion of the court, and accordingly decreed and ordered, that all surveys, made by a county surveyor, or his deputy properly qualified according to law, previous to

*The principal case is cited in Gaskins v. Com., 1 Call 202; Burnsides v. Reid, 2 Wash. 48, 49; Williams v. Jacob, Wythe 148.

*[That is, re-instated the cassation; or quashed the writ. See Maze v. Hamilton, 4 Call. 35.—Ed.] Note in edition of 1852.

the year 1776, and certified to have been made, by virtue of the orders of council to the loyal and greenbrier companies, or either of them, ought to be confirmed; and that the register be directed to issue patents upon all such surveys as shall be returned and so certified.* this act of the court
53 of appeals was *authorized, if authorized at all by the 10th section of the statute before mentioned, which is to this purpose, all claims for lands upon surveys under orders of council, or entries in the council books, shall by the clamers be laid before the court of appeals, at a time appointed by the act; and shall be heard and determined in a summary way, without pléadings in writing, upon such evidence as in the opinion of the court the nature of the case may require; and no clame shall be valid, but such only as shall be heard and established by the said court of appeals, and, on their certificate, that any such clame hath been established, the register is required to issue a warrant or grant thereupon; and the attorney general is required to attend, on behalf of the commonwealth.†

A grant of the 1100 acres in the surveyors certificate to Andrew Hamilton passed the seal the 5 day of november, 1783; and the plaintiff, who was thereby deprived of that, to which his title was asserted by the judgment of the general court, for the land recovered by that judgment was included in the grant, filed a bill in the high court of chancery, complaining of the fraud, in procuring such a grant, and seeking redress.

The defendents, in their answer, relied upon the matters which were discussed before the general court, on hearing the appeal from the sentence of the court of commissioners, and relied upon no other matters. The clames of the defendents to part of the 400 acres purchased from John Tackett, said to have been a joint settler of them with the plaintiff, and to the whole purchased from the companys agent, and certified by him to have been surveyed for the defendent Andrew Hamilton, are not indeed said to have been discussed, and do not otherwise appear to have been particularly noticed, in the judgment of the general court; but that the former of them must have been considered by that court is manifest by this paper, certified by the proper officer to have been produced and read at the trial: i do hereby assign all my right and title in and to a settlement and improvement made by me known by
54 the name of Maze cabin, *first improven by myself and James Maze, to Andrew Hamilton, witness my hand and seal, this first day of january, 1780, John Tackett, seal, teste James Macorcle; and that the other clame by survey, which was mentioned in terms in the very sentence, the rectitude whereof was the subject of disquisition, was likewise considered by the general court, no other cause to doubt appeareth but the mistake of a year in the date of the survey.

When the cause came on to be heard before the court of equity in october, 1789, the judgment of the general court, the 9 day of october, 1782, having reversed the judgment of the court of commissioners, so far as that judgment related to the 400 acres of land lying in the county of Greenbrier, called the cabin place, and any right of preemption of the defendents, belonging thereto; and the said judgment of the general court having awarded that a grant should issue to the plaintiff for the said 400 acres of land, in the right of settlement, and for 1000 acres, in right of preemption, to which no other person hath any legal right or clame, complying with the terms of the law, in such cases provided; which judgment of the general court the court of appeals have judicialy disaffirmed their power to reverse, by their order, the 1 day of november, in the year 1783, quashing the writ of error brought for that purpose; the high court of chancery delivered this

OPINION,

That by the said judgment of the general court, the right clamed by the defendents, under the survey certified by Samuel Lewis, the 19 day of june, in the year 1775, to have been made by him for the defendent Andrew Hamilton, so far as that survey includes any land to which the right of the plaintiff is asserted by the judgment, was annulled: that the decree and order of the court of appeals, the 2 day of may, in the year 1783, on hearing the several clames of Thomas Walker, and Thomas Nelson, on behalf of themselves, and the loyal and greenbrier companies, if it contravene, which however is contestable, the judgment of the general court, ought not to bar the plaintiff; not only because he was no party to the order and decree, but because the judgment of the general court, whose authority in that particular instance is supreme, and therefore equal to the authority of the court of appeals in general, is prior in time to the said decree and order, and consequently will prevale against them;

*[See this order in the case of the Greenbrier and Loyal Co's., 4 Call. 32. That case decides; that the Indian war in 1754, and the subsequent acts of the kingly government preventing the settlement of the lands lying within the boundaries claimed by the Loyal and Greenbrier Co.'s, were sufficient excuses for those companies, for not completing their surveys, and obtaining patents for the lands within the periods prescribed by the orders of council under which they were claimed. And shews that Waste lands, before the revolution, were taken up by order of council, in general cases: and by warrant from the governor, for military services. An entry in the council books, if followed by an order of council, gave priority of grant. The report contains also forms of the orders in council. 4 Call, 21.—Ed.]—Note in edition 1852.

†[This section may be found in 10 Hen. Stat. 48; and why may it not have been intended to give jurisdiction to the Court of Appeals, solely in cases between claimants of land, (whether companies or individuals,) under orders of council or entries in the council books, and the commonwealth? In such cases it would be proper for the Attorney General to appear in behalf of the commonwealth. In contests between individuals, each would have his own counsel: and would not be asserting any claim against the commonwealth.—Ed.]—Note in edition of 1855.

and that the subsequent conduct of the defendent Andrew Hamilton, which was not sanctified by the said decree and order, in proceeding to obtain a grant from 55 the register *of the land office, and in tempting thereby to frustrate and elude the judgment of the general court, was a fraud; against which the plaintiff ought to be relieved; and pronounced this

DECREE,

That the defendents be injoined from obstructing the plaintiff in proceeding to carry the said judgment of the general court into execution, *and do, at his cost, convey to him the inhertance of the 1100 acres, mentioned in the said survey, and granted to the defendent Andrew Hamilton, by letters patent, the 5 day of november, in the year 1783, or so much thereof as shall be included within the bounds of the land to be surveyed for him, in pursuance of the said judgment; and do also pay unto him his costs expended in prosecuting this suit; but the plaintiff is understood to be accountable, to the greenbrier company, for so much of the land, as he shall take out of the defendents survey, in the proportion of three pounds for every hundred acres. and liberty is reserved to the parties to resort to this court, for its further direction, as to any matter relating to the subject of this decree.

The author of this decree, some time after it was signed, thought it not correct in asserting the plaintiffs right to more than 400 of the 1100 acres of land, because the residue might be appropriated by the survey, in 1775, the settlers right of preemption being given not before 1779, and being different from the right of settlement, which latter the legislature, by their act of that year, recognize in terms implying a preexistence of the right. but, upon further revision, he is inclined to approve that part as it is, for if the right by settlement ought to prevale against a survey posterior to the settlement, to prove which will be attempted hereafter, that its appendage, or shadow as one called it, the right of preemption, should accompany it seemeth a natural consequence. and he confesseth another part of the decree which admitteth the plaintiff to be accountable to the greenbrier company for three pounds for every hundred acres of the land recovered by him to be wrong, quacunque via data: for if the settlement right be prevalent against the right by survey, the settler is intitled to a grant upon payment of the fiscal composition only; and if the right by settlement prevale not against the other, the plaintiff, not being intitled to the 56 grant, *can not be bound to pay any money for it. and no other error in the decree is yet discerned.

But, on the 20 day of june, 1791, the court of appeals, before whom the decree was impeached, declared it in general terms† to be erroneous, and, reversing it, made the following

DECREE AND ORDER,

That a survey be made of the 400 acres of land for the settlement, to lie South of a line, to be run from a spring opposite to Christopher Wachubs, as the same shall appear to have been made by agreement between the appellee and John Hackett in the proceedings mentioned, so as to include the cabin and settlement, and which may be laid down as either party shall direct, to enable the court of chancery to decide between them on the propriety or reasonableness of the location; that the appellant Andrews patent of 1100 acres be also surveyed and laid down, to shew how far the same doth interfere with the said 400 acres, which being adjusted by the court of chancery, that the said appellant be decreed to convey to the appellee the inheritance of so much of the said 400 acres as shall be found to lie within the bounds of the said appellants patent. with warranty against himself, and all persons claiming under him, and deliver him possession thereof, upon the appellees paying to him, at the rate of three pounds per hundred acres, for the quantity so to be conveyed; and as to the residue of the said 1100 acres, that the bill be dismissed. but the appellee is, 57 nevertheless, *to be at liberty to procede to survey the said 1000 acres of land for his preemption, if he can find land to satisfy the same without interfering with the said patent or other prior clame.

The decree, in the terms of it, affordeth, scanty matter, but certain propositions reported, from good authority, to have been the foundation of it afford abundant matter, for

REMARKS.

I. The court of appeals are believed to

*[Courts of equity will set aside or suspend patents, for the ends of justice. As to some of the principles on which they will do so, see the late cases of Goodwin v. McCluer, 3 Grat., 291; and Hagan and als. v. Wardens, Id., 315. See also French v. Loyal Company, 5 Leigh 627, and cases there cited.—Ed.]—Note in edition of 1852.

†[The opinion of the court on this appeal was delivered by President Pendleton and rules as follows: Orders of council before the revolution in favor of companies for large tracts of unappropriated land were valid: and surveys under them were secured by the act of 1779. (10th Hen. Stat. at large, 35-50:) and the Court of Appeals had exclusive jurisdiction in such cases. The Greenbrier Company was of that description: and their surveys before the date of independence good. A settler upon such a survey was, by the 7th section of the act of 1779, entitled to only 300 acres, but upon a caveat to the survey, the General Court might, under circumstances, have allowed him 400 acres; when the survey was made for a wrong-doer to the settler. A right of settlement was allowed to be taken out of the survey but a pre-emption was not. Therefore, where a judgment of the General Court directed the settlement and pre-emption both to be taken out of the survey, and a bill in chancery was brought to enforce the judgment and set aside a patent upon the survey, the defendent might resist the pre-emption, but not the settlement. A patent obtained for the whole survey after the judgment of the General Court, was fraudulent as to the settlement; and the patentee was decreed to convey that part of the survey to the settler. A party who can caveat ought to do so; but circumstances may excuse it. Hamilton v. Maze, 4 Call, 196.—Ed.]—Note in edition of 1852.

have assumed in this suit, the object of which was to remove an obstruction to the execution of a judgment of the general court, a power to correct that judgment,* which they had renounced the power to correct, in a writ of error. by the act of their constitution, they are impowered to affirm or reverse decrees judgements and sentences intirely, or, if they do not affirm or reverse them intirely, may give such decree, judgment or sentence as the court, whose error is sought to be corrected, ought to have given. but they can only correct the decree judgment or sentence which is brought before them by appeal or writ of error. in this case the general court adjudge and order that a grant of 400 acres of land shall issue to the plaintiff. the defendents bring this judgment before the court of appeals by writ of error. then was the time to affirm, reverse, or reform the judgment. the court of appeals do neither; because they have no jurisdiction of the matter, or because, in other words, they have no power to reverse or reform that judgment.

Notwithstanding this, what is done? a few days after the writ of error was quashed, Andrew Hamilton, on the survey of 1100 acres, procures a grant to himself of the land, which the general court had adjudged and ordered to be granted to the plaintiff. this grant was obtained by a deception practised upon the register. for that officer, if he had known that the land granted to Andrew Hamilton included the land which, by a judgment of the general court, irreversible by the court of appeals, he had before been ordered to grant to the plaintiff. ought not to have issued, and therefore probably would not have issued such a grant to Andrew Hamilton. to be relieved against this fraud, the plaintiff brought this suit. the high court of chancery put the plaintiff in the state in
58 which *he would have been, if the fraud had not been practised. the court of appeals, reversing that decree, reform the general courts judgment; for of the 400 acres, to the whole of which that asserts the plaintiffs title, he is allowed only so much as is on one side of a dividing line, and for that he is to pay three pounds by the hundred acres.

The propriety of reforming, in an original suit, a judgment which was incorrigible in a writ of error, and the consistency of this decision with that of november, 1783, by the court of appeals, have not been shewn, as is believed.

But let the case be now considered in the same manner as if the right of the defendents, by the survey, or which is the same thing, the right of the greenbrier company, had not been discussed before the court of commissioners or the general court.

II. The court of appeals are reported to have assented, whether unanimously, or by a majority only, hath not transpired, to this proposition, that the companys right to this survey stands established by the decision of that court in may, 1783, unalterably by any tribunal; so that the plaintiff, claiming by right of settlement, cannot call in question the validity of the survey, and right of the company, or of the defendents, who in this instance represent the company, before any court.

The truth of this proposition cannot be admitted; because, first, the plaintiff was not a party to the proceeding, then before the court of appeals, and the decision between any two parties cannot in law or equity conclude the right of another who deriveth it not from either of them;† secondly, this act of the court of appeals which is called a decision, is a manifest delegation to the register of the land office of a power committed by the statute to the court itself. and altho that court is indeed supreme, and its decisions not alterable elsewhere, in cases where before it are brought the sentences of inferior tribunals, to be approved or corrected finally; yet when a matter is referred to the court of appeals in the first instance, as was the present case, where the judges of it do not act in their appellate character, that their determination is definitive, so that the justice of it cannot be revised even by themselves, perhaps may be disputed, as it undoubtedly might have been disputed, if the determination had been referred to the men who compose that court, designated by their names. and this, without dero-
59 gation *from their power, since by them the matter, brought up by writ of error or appeal, may be ultimately adjusted.

III. The court of appeals are reported to have denied that any right, by settlement on unappropriated land, existed before the recognition of such a right by the statute of 1779, so that between the plaintiffs right, by settlement, which was not before that act, and the defendants right, by survey, which was four years before it, a competition for priority could not be.

This doctrine shall be here examined.

Between the kings proclamation, in 1763, and the governors order in council of december, 1773, all other people as well as mere settlers, were restrained from obtaining grants of land on the western waters. this restraint is conceived to have been unlawful. lands, before they were granted, were indeed called the kings lands, but he was only the dispenser of them to others, being unable to appropriate, by his single act, one acre to his own use, and, on the contrary, being bound to grant them to those, who were proceeding, in the course prescribed by law, to acquire exclusive

*[The Court of Appeals did not understand it so. See 4 Call. 207. 8, 9. As to the jurisdiction of the General Court. see 4 Call, 33: and as to that of the Court of Appeals see Id. 24. and ch. rev. 94 and 96: and 10 Hen. stat. 42. 50, as to all the jurisdictions.—Ed.]—Note in edition of 1852.

†[The Court of Appeals held that neither the company. nor Hamilton was bound by the former proceedings. The company. because it was not a party thereto. and H. because he could not then have used the title he derived from the company, as he had not paid the purchase money. 4 Call., 208. —Ed.]—Note in edition of 1852.

ownership of them, and who if not obstructed in that course, would have been complete proprietors. those who affirm the legal territorial dominion to have been other than that which is now defined, if they attempt to maintain it by adjudications of english courts, or even of american courts before the late revolution, or by acts of english governors, are warned, that the authority of those documents in this question is denied.

In the mean time, these propositions are assumed, because they are believed to be undeniable: 1 that every man had power to enter with the surveyor for any land not exceeding a certain quantity, and not having been appropriated, and had a right to a royal grant of the land. This power and right have not perhaps been asserted by legislative acts in direct terms, because such an assertion seemed unnecessary; but the existence of the power and right is supposed and implied by the act passed in 1748, chap 14, of the edition in 1769, sect. 2, and by several other acts; and such a supposition and implication in such a case as this are conceived to be equivalent to an assertion in positive terms. the 2 proposition is, that the kings proclamation restraining the exercise of the power, and interrupting the enjoyment of the right, was void, and his withholding the grants was contrary to his duty. if these premises be true; he, who, being illegally restrained from using the means of appropriating a thing unoccupied, takes possession of it, and is hindered from procuring a sanction of the possession in solemn form, by another who ought to supply the form, 60 such a possessor *is affirmed to have an equitable right to the thing possessed; affirmed with the more confidence because it coincides with the sentiments of the legislature declared in the act now the subject of consideration; and coincides too with the primitive natural right which resumes its vigor when its correspondent civil right is denied. that the plaintiff had this equitable title, after the judgment of the general court, supporting it as a settlement right, is incontestable. whether the time of settlement were the epocha of the title will be enquired in considering the next proposition to which the court of appeals are reported to have assented, and that unanimously. it is

IV. That a right claimed by settlement, cannot, in any case, be opposed to a right, claimed by survey, authorised by order of council.

In examining this proposition the following questions are propounded. 1, what is a right by survey? 2, what is a right by settlement? 3, at what time a right by settlement originated? and 4, to what time a right by survey ought to have a relation? which questions will be solved by the true exposition of the statute of may session 1779.

1. What is a right by survey? the words of the first section, after extermination of those which are unimportant in this disquisition, are, all surveys of waste and unappropriated lands, upon the western waters, made before the 1 day of january, 1778, by the proper officer and founded on orders of council, shall be and are declared valid. from this section alone can the survey, by which the defendants clame, derive validity; for by the third section, orders of council, except so far as they had been carried into execution by actual surveys in manner before mentioned, that is, by surveys of waste and unappropriated lands, &c., are declared void. if the lands surveyed for the defendents were waste and unappropriated, the survey, in which all the other characters requisite by the act are admitted to be verified, was valid, and the right of the defendents, undeniable; but if the land was wholy or partialy appropriated, or, to apply it to the present case, appropriated by settlement, the survey was wholy or partialy invalid.

2. What then is a right by settlement? in the preamble to the fourth section, the waste and unappropriated lands, upon which people had settled, are called property acquired by them. a thing appropriated, and a thing whereof one hath acquired the property, are convertible terms. if they be convertible terms, the lands on which people had settled were appropriated, and consequently a survey of them, by authority of an order of council, after that appropriation, was not valid by the 61 first section. *but this appropriation by settlement is said not to have been an appropriation before it was recognized by the act of 1779, and therefore was posterior to the survey in 1775, at which time, consequently, the land was waste and unappropriated. this introduceth the

3. question, at what time a right or appropriation by settlement originated? that it originated at the time of settlement is believed to be demonstrable from the phraseology and reason of the act. the preamble to the fourth section is in these words: whereas great numbers of people have settled in the country upon the western waters, upon waste and unappropriated lands for which they have been hitherto prevented from suing out patents or obtaining legal titles by the king of Great-britains proclamations or instructions to his governors, or by the late change of government, and the present war having delayed, until now, the opening of a land office, and the establishment of any certain terms for granting lands, and it is just that those settling under such circumstances should have some reasonable allowance for the charge and risk they have incurred, and that the property, so acquired, should be secured to them. and the enacting words are these: that all persons who, at any time before the 1 day of january, in the year 1778, have really and bona fide settled themselves or their families, or at his, her, or their charge, have settled others upon any waste or unappropriated lands on the said western waters, to which no other person hath any

legal right or clame, shall be allowed for every family so settled, 400 acres of land, or such smaller quantity as the party chooses, to include such settlement. and where any such settler hath had any survey made for him or her, under any order of the former government, since the 26 day of october, in the year 1763, in consideration of such settlement for less than 400 acres of land, such settler, his or her heirs, may clame and be allowed as much adjoining waste and unappropriated land, as together with the lands so surveyed will make up the quantity of 400 acres. now 1, the reasonable allowance, which the preamble declares that the settlers ought justly to have, was a remuneration of services performed at their charge and risk, in protecting the frontier, deemed meritorious by the law makers. the merit was in the settlement, and therefore is necessarily covetous with the settlement. the right to remuneration is the correlative of the merit, and therefore of the same age with it, and consequently must begin with the settlement too. 2, the act declares the land settled by them to be their property, acquired by them, and acquired at their charge and risk. the act therefore did not create the property, or bring into being a right which existed not before. it acknowledged
62 the property *or right indeed, but acknowledged it to be a pre-existent property or right, pointing out a mode by which the owners might sue out grants, which they had been theretofore prevented, without their own default, from suing out, in order to secure their legal titles; planely intending to put the settlers in the state in which they would have been, if the royal proclamation had not inhibited the surveyors from receiving and making entries. The property or right of the settlers was consequently acquired, not by the act, but before it, and if before it, must have begun with the settlement, which was the mean of acquiring it. that the law-makers intended to put settlers in the same state, as to the antiquity of their titles, with those who claimed by surveys, or by entries, or orders of council, before the act, is manifest by the 6 section, enacting, that persons suing out grants, upon surveys theretofore made, under entries with surveyors, or under orders of council, for which rights had not formerly been lodged in the secretarys office, and also those, suing out grants for lands, upon the western waters, allowed to them in consideration of their settlements, or under former entries with the county surveyor, for lands upon the eastern waters, should be subject to payment of the usual composition money, under the former government, and to no other charge or imposition, save the common office fees. the right of a settler, if it originated with the settlement, was a complete right at that time, although, not formaly declared to be legitimate before the statute in 1779, for an act sanctified by a subsequent ratification is as legal and as much an act of the time when it was commenced, as if an authority to do the act had been prior to it.

An argument, urged against the preceding exposition of the 4 section, hath been drawn from a verbal criticism on a part of it. the criticism is stated thus: the legislature, on purpose to prevent the construction, by which the settlement right would be made to exist before the act which recognized it, to the words, waste or unappropriated lands, add the words, to which no other person hath any legal right or clame, that is, hath in 1779, not had at the time of settlement, any legal right or clame. upon which two or three observations will be made. 1, if the words, waste and unappropriated lands, mean lands to which none have right or clame, and he who affirmeth them to mean any thing else is required to say what that meaning is, then to the words, waste and unappropriated lands, the addition of, to which no other person hath any legal right or clame, is a tautology, for the meaning of the sentence, without them, would have been the same as it is with them. 2, unless the word, hath, import that he, who hath
63 a right to day, could not *have the same right before, which the critic probably will not venture to say, how will this prove, that he who had a right in 1779, when the act was made, might not have the same right in 1764 when the settlement was made? and 3, let the words be read, as the critic would have them understood, thus: people who have settled on waste or unappropriated lands, to which no other person, now, in 1779, hath, not at the time of settlement had, any legal right or clame, shall be allowed, for every family, 400 acres. now to whom do the words, hath, and had, refer? to the people who settled? no man will answer this affirmatively; and if they refer to other person, the criticism, instead of oppuning, aids the right by settlement, postponing to it a subsequent survey.

Another argument, urged against the preceding exposition of the 4 section hath been drawn from the preamble to the 7 section, in these words: whereas upon lands surveyed for sundry companies several people have settled, &c. and from the enacting part in these words: all persons so settled shall have their titles confirmed upon payment of the price for which the companies or their agents had publicly offered the lands for sale, whence was inferred, that settlers upon lands surveyed for the companies, after the settlements, as well as before, could entitle themselves no otherwise than by purchasing from the companies. but this section planely designates settlers upon lands surveyed before the settlements only, as is manifested from the diction. the words, upon lands surveyed for sundry companies, many people have settled, &c. to include settlers before the surveys must be paraphrased thus: upon lands which have been surveyed for sundry companies many people had settled before the lands were surveyed. but

1, the more natural, the only true, explication of the terms is, upon lands which had been surveyed many people have settled since the lands were surveyed; so that the surveying must have preceded the settling. if a man should say, into the house built for me one entered, or on the horse brought for me one rode; would any hearer understand that the building of the house, or the bringing of the horse, was posterior to the entry into the one, or the riding of the other? is this less preposterous than the exposition of this 7 section, by which it would comprehend settlers on lands before they were surveyed for the companies? 2, by the enacting part of this section, the companies were bound to confirm the titles of settlers upon lands surveyed, and not before the settlements notoriously reserved by the companies for their own use. but how could lands, not surveyed before they were settled, be notoriously reserved before the settlement by the companies for
64 their own use? also by the *enacting words the settlers were to pay interest on the consideration money from the times of settlement. would this be just, and can one suppose it to have been intended, where the survey was after the settlement? in this case the survey was more than ten years after the settlement.

If the appropriation by settlement be an appropriation at the time of settlement, which is believed to be proven incontestably by the words of the statute; the settlement of the plaintiff having been in 1764, the land was not waste and unappropriated in 1775, when the survey for the defendents was made; consequently the survey was not valid.

But perhaps the order of council, in 1751, may be said to have appropriated the land, and therefore to have prevented the efficacy of the plaintiffs settlement posterior to it: which leads to the

4th question, to what time a right by survey ought to have a relation, that is, in this case, whether the survey shall have the same effect as if it had been an act of the time when the order which authorized it was granted? in other words, the question is, whether the order of council appropriated from the date of it all the lands within its limits?

By this order, which is not among the exhibits, otherwise than as the substance of it is stated in the forementioned petition of Andrew Lewis from which is extracted what followeth, leave was granted to the greenbrier company to take up 100000 acres of land, lying on Greenbrier river, northwest and west of the Cowpasture and Newfoundland; and a time was limited, within which the company was required to pay the rights, and to procure the surveys to be made.

This order, with others, except so far as it had been carried into execution by actual surveys before the first day of january, 1778, was declared void by the third section of the act of 1779. if that act had not passed, an order, the terms whereof are so vague and indefinite, perhaps would not have withstood a legal inquisition into its validity, even if the interest of others individually were not opposed to it.

But the order, if its terms import, or if it be expounded so as to purport, a grant of authority to this company to seise parcels of land, for which other men had entered, or on which other men had settled, before particular locations by the order, indicated by actual surveys, would so far have been an invasion of the peoples rights in general, for reasons explained before. and if that be true, the survey, by which the defendents clamed, cannot have a relation to the order, by authority of which it was made, for the law suffers not a relation to work a wrong.

V. From the propositions of the
65 court of appeals, an ordinary *judge would have expected a dismission of the plaintiffs bill intirely. but that court, on the contrary, have made a decree partly in his favor,

The judge of the H. C. C. hath been informed of the considerations, on which this part of the correcting decree was formed; but he will say nothing of them more than that they are not suggested by any part of the act of 1779; and that this act, and two or three others, without those considerations, supply sufficient light for deciding the present question.

The judge of the H. C. C. who is bound to adopt the decrees of the court of appeals, for he must register them, and enforce execution of them, when he is performing this duty, in such an instance as the present, where the sentence for which he is compelled to substitute another, was the result of conviction, imagines his reluctance must have in it something like the poignancy which Galileo suffered, when, having maintained the truth of the copernican in opposition to the ptolemaic system, he was compelled, by those who could compel him, to abjure that heresy.

After the foregoing remarks were closed, the writer of them was favored with this

'ARRANGEMENT OF JURISDICTIONS

for ascertaining clames under the act of 1779, to shew that, though the rules of grammar may not be trangressed, by construing the words, 'prior clame,' in the settlement clause, not as prior to 1779, but as prior to the settlement in question, yet such construction does not consist with the words and spirit of the whole law, taken together.

'The first clause establishes all surveys regularly made under entries, orders of council particularly defined, or the kings proclamation.

'Those under orders of council were to be laid before, and decided upon, by the court of appeals; and with them no other tribunal could intermeddle.

'Surveys under entries, or the proclamation, patents were to issue on of course, unless a caveat was entered in the registers office, which was to be heard in the general court, and with these the commissioners in

the country had nothing to do, either to aid, or destroy them.

'The commissioners were to act upon mere settlement clames, not opposed by actual surveys confirmed before, and between contending clamants upon the waste lands of the commonwealth, to decide by priority of settlement; another branch of duty was assigned them, to enquire between con-
66 tending clames *of settlements under the companies, not to judge of the validity of the companies survey, for that was referred to the court of appeals, but to decide who, by priority of settlement, had a right to a grant from the company, on paying the purchase.

'This being the general arrangement; can those lands be said under the settlement clause, to be waste and unappropriated in 1779, and liable to be granted by the commissioners, which had been before regularly surveyed, and that survey before confirmed by the same act, unless impeached before another tribunal? and will not the words, 'to which no other person hath a prior legal clame or title,' include an exemption of surveys so confirmed? i am sure the interpretation is more natural, more proper, as making the act consistent with itself, and i believe at least as grammatical as the other.'

COMMENTARY.

Though the rules of grammar may not be transgressed, by construing the words, 'prior clame,' &c. yet such construction does not consist, &c.] until the inconsistency be particularized, one, who doth not yet see it, can only say, that the words of the settlement clause (that is the fourth section) of the act understood in the proper sense of them, seem to breathe no sentiment, which doth not harmonize with every other sentence in the law taken together.

The first clause establishes all surveys regularly made, &c.] the first section of the act declareth all surveys of WASTE and UNAPPROPRIATED lands, made, &c. good and valid. this quotation therefore leaves the question, whether the land surveyed in this case was appropriated by a settlement before the survey? undecided, otherwise than by a simple affirmation, that it established all surveys, without distinction, that is, by taking for granted what is denied; a kind of argument which one party in this controversy useth as if it were not a sophism.

Those under orders of council were to be laid before, and decided upon by, the court of appeals;] by the decree, as it is called, of the 2 day of may, 1783, directing the register to issue patents upon all such surveys AS SHALL BE RETURNED, or by any other words in that act of the court of appeals, doth this survey, or any other survey, appear to have been laid before that court, and. if not laid before them, to have been established, that is legaly established?

And with them no other tribunal could intermeddle.] by the seventh section of the act, people, who had settled upon unpatented lands, surveyed for compa-
67 nies, except only such lands *as, before the settlement of the same, were notoriously reserved by the companies, for their own use, shall have their titles confirmed by the members of such companies. this decree of the 2 day of may, 1783, did not decide the question between the settlers and companies in such cases. It could not decide the question in cases where the surveys were returned after the decree, upon which alone it seemeth to operate. if then no other tribunal could intermeddle with this matter, the settlers must lose their rights, although they were able to prove their settlements before the reservations, yea, although no reservations had been.

Surveys under entries, or the proclamation, patents were to issue on of course, unless a caveat, &c.] this is certainly correct, but unimportant.

The commissioners were to act upon mere settlement clames, not opposed by actual surveys confirmed before, and between contending clamants upon the waste lands of the commonwealth, to decide by priority of settlement; another branch of duty was assigned them, to enquire between contending clames of settlements under the companies, not to judge of the validity of the companies survey, for that was referred to the court of appeals, but to decide who, by priority of settlement, had a right to a grant from the company, on paying the purchase.] instead of this farrago of text and gloss let the unsophisticated words of the act be substituted. they are, 'the commissioners have power to hear and determine titles, clamed in consideration of settlements, to lands, to which no person hath any other legal title, and the rights of persons claming preemption, as also the rights of persons claming unpatented lands, surveyed for companies, and settled,'

This being the general arrangement;] what then? let us try whether it will shew what it was stated to shew. the argument intended by the arrangement may be exhibited thus: by the eighth section of the act, jurisdiction being given to commissioners to hear and determine the rights of people claiming in virtue of settlements; by the same section, and by some other acts, jurisdiction being given to the general court to hear and determine the rights of people, who had entered caveats against emanations of grants upon surveys returned; and by the tenth section of the act of 1779, jurisdiction being given to the court of appeals to hear and determine clames laid before them for lands upon surveys under orders of council, to the discussion of which clames the attorney general was required to attend, on behalf of the commonwealth; this being the general arrangement of jurisdictions, it shews, that, though the rules of grammar may not be transgressed, by construing the words *'prior clame' in the
68 settlement clause, not as prior to 1779, but as prior to the settlement in question, yet such construction does not consist with the words and spirit of the whole law taken

together. this perhaps may pass for demonstration with those who have sagacity to discern a concatenation of the arrangement with what is said to be shewn by it.

Can those lands be said under the settlement clause to be waste and unappropriated* in 1779?] this is nothing more than a repetition of the principal question, namely, whether the lands in controversy, by the words of the fourth section of the act of 1779, were, notwithstanding the settlement thereon by the plaintiff in 1764, waste and unappropriated, so that the survey thereof for the defendents was good and valid by the first section of the act?

And liable to be granted by the commissioners,] if the plaintiff had, by his settlement, acquired a property in the land, as hath been attempted to be proved, he ought not to be deprived of that property, because the commissioners had no power to award it to him.

Which had before been regularly surveyed,] if the land was appropriated by the settlement, the posterior survey of it was not a legal survey, so far as it included the settled land.

And that survey before confirmed by the same act, unless impeached, &c.] a survey, if it were not of waste and unappropriated lands, was not before confirmed by the same act.

And will not the words 'to which no other person hath a prior legal clame or title' include an exemption of the surveys so confirmed?] this is the fourth petitio principii occurring in less than twice four lines, to which the answer is, the words recited do not include an exemption of surveys, if the lands surveyed were not waste and unappropriated, because those surveys were not confirmed by the act.

I am sure the interpretation is more natural, more proper, &c.] the interpretation here meant is that, by which a survey of lands is good and valid, although the land had been settled before the 69 *survey, and the other interpretation is that by which such a survey is not good and valid. confidence cannot determine which interpretation is more natural, more proper, more consistent with the act, and more consistent with the principles of justice. however, as much confidence is on the side of the latter interpretation as is on the side of the former.†

[*As to what are "waste and unappropriated lands," see French v. Loyal company, 5 Leigh 627; which held, that "a survey made for the Loyal Company, or its assignee, under orders of the colonial council, though recognized by the stat. of 1779 for settling the rights of claimers to unpatented lands, and held valid by the Court of Appeals, not being carried into grant, does not vest any title in the company, or its assignee: and land so surveyed for the company is still waste and unappropriated within the meaning of the land laws, subject to location, survey and grant, and such grant passes the legal title to the junior locator, though equity may relieve the company against it for fraud practised by him in procuring the grant." Were not the lands, then, "waste and unappropriated" when Maze was allowed his preemption out of them, by the judgment of the general court?—Ed.]—Note in edition of 1852.

†[This case came again under review by the Court of Appeals, in Reid v. Burnsides, 2 Wash. 47-8, where Carrington, J., for the court, said: "notwithstanding the criticisms that have been passed upon that decision, (Maze v. Hamilton, 4 Call,) this court upon a revision of that case consider it to have been determined in strict conformity with the law and agreeably to the principles of equity." This was said prior to the publication of the foregoing commentary; so that the chancellor must have given earlier expressions to his objections to "that decision;" and after several not inattentive perusals of it, the above "criticisms" and others with which they could be easily fortified, appear very difficult to be answered. See Reid v. Burnsides, in this volume.—Ed.]—Note in edition of 1852.

BETWEEN

DAVID ROSS, *plaintiff*,

AND

BENJAMIN PYNES, *defendent*,

Oct., 1789.

Slander of Title—New Trial*—Certificate of Court against Verdict—Effect in Appellate Court.—Action by P. v. R. for slandering his title to slaves exposed to public sale, by which their sale was injured. On second trial, on demurrer to evidence,—the jury found £1000 conditionally v. R.,—the District Court adjourned the case to the H. C. C. with a certificate that they thought the weight of evidence in favor of R. and the verdict was not satisfactory. But H. C. C. and Court of Appeals sustained the verdict and refused a new trial.†

IN an action on the case by the defendent against the plaintiff for slandering the title of the former to certain slaves by him exposed to public sale, upon trial of the general issue, the jury found a verdict for him, assessing his damages to 500 pounds.

The plaintiff brought a bill to be relieved against the verdict, praying an injunction, which was granted until further order, and afterwards, when the answer was filed, dissolved upon a motion.

At the hearing, in May, 1788, the court ordered another trial of the issue; the plaintiff paying all the costs at law, and entering into bond, with surety, in the penalty of five hundred pounds, on condition to be void, if he should perform the future order of the court. at the same time the 70 court gave leave *to the defendent to amend his declaration as to the number of slaves the title of which was supposed to have been slandered.

On the second trial, which was before the district court holden at King and queen courthouse, the evidence was to this purpose: Edward Graves deposed that Ross treated with Pynes, at his own house, for the purchase of his slaves. they agreed upon the price, but the one offering to pay it by bills of exchange, and the other declaring that he must have money, which

*New Trial.—The principal case is cited in Branch v. Burnley, 1 Call 158; Terrell v. Dick, 1 Call 553. See also, *foot-note* to Ross v. Pynes (sequel of this case), 3 Call 568.

For the decision of the court of appeals in this case, see 3 Call 568.

†[This case, reported in 3 Call 568, decides that "a Court of Equity will not grant a new trial merely because the Judges certify that the weight of evidence was contrary to the verdict."—Ed.]—Note in edition of 1852.

alone his creditors, for payment of whose demands he was obliged to sell his slaves, would accept, they parted, and Ross said he would meet Pynes at the place and time appointed for the sale, with the money. the witness understood it to be a bargain.

Benjamin Temple deposed, that he was empowered by Ross to purchase the slaves of Pynes, taken in execution, which Ross said he had been attempting to purchase, adding that he had heard there was some defect in the title, but the witness might disregard it, and notwithstanding purchase at the stipulated prices. the witness, in his way to the place of sale, saw a letter, shewn to him by John Davis, from Ross, which related to his agency in the purchase of slaves generally, and signified a desire that, the same should be continued. the sale was begun, and some of the slaves were sold to one Markham. soon afterwards a report, that the title of the slaves was not good, produced altercation between Markham and Pynes, the former refusing to take the slaves bought by him, without bond and security, which the other was not able to give, for warranting the title. The sale by auction, before a second lot was bought, ceased, and the bystanders dispersed. John Davis, to whom the report was traced, being required to shew his authority for it, produced the letter, dated the 7 day of december, 1767, the words of which are herein after inserted, and which was publicly read. the slaves were sold next day privately for much less money than would have been produced by the sale of them publicly, as the witness, forming his calculation by the sale to Markham, believed. (a)

The part of the letter mentioned by Benjamin Temple, which relates to the subject is in these words:

'I expect mr. Temple, the sheriff of King and queen will be over with 11 negroes belonging to Benjamin Pynes of that
71 *county. he proposed to sell them at the Ridge on tuesday. i saw them when down the country, and offered him 330 pounds for the whole. there were four fellows, two wenches and five boys and girls. i have wrote a line to Temple, that i will still give Pynes the same. if he comes over you may try to bargain with him, and give him an order on me at Williamsburg for the money. i imagine Pynes will send the same negroes that i saw, viz. Tom, and his wife and daughter; Adam, his wife, and four children, and two other fellows, Sauny and however one of them has a sore on his chin, and the other is a little old and a cooper. if you think the negroes look well, you need not stand on five or ten pounds more: there have been some disputes raised about the title. they say Mann Page sets up a clame to them. but i believe there is but little danger, be up as soon as possible. am in haste, sir, your's David Ross, 7 of december, 1767. To Mr. John Davis at Henrico court.'

To this evidence the plaintiff demurred. the defendent joined in demurrer. and the jury being directed by the court, if they should find any damages, to find them conditionally, assessed the damages of the defendent, if the law arising on the demurrer to evidence be for him, to one thousand pounds.

The district court did not give judgment on the demurrer, but certified it, with the verdict, to this court, and also certified it, as the opinion of the judges of the said district court, that the weight of testimony on trial of the issue was on the part of Ross, and therefore that the verdict was not satisfactory to that court. by the latter part of which certificate the judges are supposed to have meaned that the evidence was not sufficient to support the issue on the part of Pynes.

The cause coming on, the 12 day of october, 1789, to be again heard on the bill, answer, exhibits, examinations of witnesses, and transcript of proceedings before the district court, among which examinations is that of John Davis, not stated in the demurrer, explaning the manner in which the letter to him from the plaintiff came to be made public, and stating several circumstances, in order to exculpate the author of that letter, the court delivered this

OPINION,

That the loss to the defendent in the sale of his slaves must be attributed to the plaintiff, his letter addressed to John Davis being the only apparent origin of the
72 report which occasioned *that loss; and that the plaintiff, although he is believed not to have designed any injury, ought to make reparation; (b)

And the measure of that reparation observed in the first verdict having been more than approved* by the second;

(a) The residue of the testimony of this witness, and the whole testimony of some others, and also the certificate of a sale by Pynes of his land tending to prove the quantom of the damages sustained by Pynes, being unimportant as to the principal question now only considerable, namely, whether Ross ought to make reparation for the damages, are omitted.—Note in edition of 1795.

(b) No proof that any other man ever pretended to clame a title to the slaves exposed to sale by the defendent appeared. hence the report that such a clame existed was supposed by the defendent's counsil to be a figment of the plaintiff. in which case his obligation to compensate the other party's loss is unquestionable. if the report were true, but the pretended title groundless, the plaintiff, by circulating the report, was no less culpable than if he had been the author of it. the letter committed to Davis a matter of information or pretended information, concerning the title of slaves, confessed by the writer to be unimportant to himself. for he impowered his agent to purchase the slaves, disregarding any report of defect in the title;—unimportant to himself, if his motives, were not to depreciate the slaves, which would have been worse. his only motive then, if not that, must have been to warn his agent not to decline bidding, alarmed by the report if he should hear it. so far the plaintiff was justifiable. his fault was in not guarding against the consequences of the report published by his agent, and by him only. this want of caution rendered him justly obnoxious to compensation. with the rule of the roman law, culpam autem esse, quod, cum a diligente provideri, poterit, non esset provisum Dig lib IX. tit. II. l. XXXI. the common law is believed to concur.—Note in edition of 1795.

*[i. e. The damages by the second verdict were greater than by the first. The chancellor set it, for £500, aside. See 3 Call 573, which says: "The in-

The court therefore dismissed the bill with costs:

And this decree of dismission, from which the plaintiff appealed, was affirmed the 8 day of december, 1790.

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*BETWEEN 73

JAMES HILL, *plaintiff*,

AND

ROGER GREGORY, executor of Fendall Southerland, *defendent*,

AND BETWEEN

CARTER BRAXTON, *plaintiff*,

AND

ROGER GREGORY, executor of Fendall Southerland, *defendent*.

Oct., 1790.

1. **Debtor and Creditor—Application of Payments.**—If a debtor who owes money on several accounts, do not at the times of making payments, or before, direct in which of those accounts they shall be credited, the creditor may enter the credit in either account he pleases.

2. **Same—Same—Intention of Debtor—Case at Bar.**—*B.* indebted to *S.* on a protested bill of Exchange and also on a bond, assigned to him some securities, which were accepted as if they had been payments in money of the principal and interest due by said securities. *B.* claimed credit therefor against the bill of Exchange: *S.* claimed the right to apply them first to the bond, which the H. C. C. allowed him to do, *B.* not having directed otherwise. The Court of Appeals, "without contravening the rule giving creditors the right of application of payments to either of different debts due at the time," held, that the said securities should "from the combined circumstances of the case be applied to the protested bill; since it is evident the payer so intended it; and that if the receiver did not assent thereto, yet he did not make such recent and proper application of them otherwise as ought to control the choice of the payer."

3. **Same—Set-Off—Scale of Depreciation—Case at Bar.**—*B.* indebted to *S.* by bond in 1776, sold *S.* merchandise in 1777-8 and 80. The H. C. C. held that said goods ought to be set off against said bond, only at their true value, as ascertained by the statutory scale of depreciation; not as a measure of legal obligation; but one as just as any that then occurred. The Court of Appeals held the legal scale not a just and proper rule for 1777 and 1778; and allowed the goods to the end of 1778 to be set off at their nominal value against the principal and interest of the bond; and so much of the residue of the goods as would pay the interest on the balance due to *S.* also to be set off at their nominal value; but subjected the residue of said goods to the legal scale of 1780;—of 60 to 1.

4. **Same—Application of Payments—Judgment—Injunction.**—*S.* recovered judgments against *B.* and *H.* on the protested bill; but they obtained injunctions against his Executor. *H.* was one of *B's* endorsers; and the amount for which he was responsible depended upon whether *B's* payments were applied to the protested bill, or to the bond aforesaid. *H.* gained greatly by the Appeal.

5. Remarks of the Chancellor on the decision of the Court of Appeals. See it in 1 Wash. 128.

74 *THE facts considerable in these cases are omitted here, because they are stated, partly in the two following decrees, and partly in the remarks on the last.

At the hearing, the 27 day of october, 1790, the high court of chancery delivered this

OPINION,

That the goods and merchandize, sold and delivered by the plaintiff Carter Braxton to the said Fendall Southerland, between the years one thousand seven hundred and seventy six, and one thousand seven hundred and eighty one, ought not to be discounted, at the money prices then charged, against a debt contracted before the commencement of that period; but ought to be discounted at their true value, which, in this case, may be nearly perhaps ascertained by reducing those prices according to the scale for proportioning the depretiation of paper money; that the payments made to the said Fendall Southerland, by the plaintiff Carter Braxton, not appearing to have been directed by him, at the times of payment or before, to be entered to his credit in that account wherein he is made a debitor for the bill of exchange, the said Fendall Southerland might enter them to the credit of the plaintiff Carter Braxton in any other account subsisting between those parties; and that for the principal money, damages, and charges, due by the protested bill of exchange, in consequence of the settlement thereof made the twenty eighth day of february, in the year one thousand seven hundred and seventy six, the said Fendall Southerland was intitled to no more than seven hundred and seventy eight pounds seven shillings and four pence, o' current money of Virginia, with interest thereon, at the rate of five per centum per annum, from the first day of June thence next following. and pronounced this

DECREE,

That the defendent be perpetually injoined from proceeding further on the judgment of the general court recovered by his testator, the said Fendall Southerland, against the plaintiff James Hill, except as to two hundred and twenty five pounds eighteen shillings five pence and three farthings, of current money of Virginia, appearing by the account, stated according to the principles of this decree from the accounts annexed to the report, to have been due to the said Fendall Southerland the seventh day of december, in the year one thousand seven hundred and eighty four, with interest thereupon from that time; and except also as to the costs in the action at common law: 75 *and that the plaintiffs do

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crease of damages in the second verdict might be produced by sudden passion, which, in this case, it was proper for the chancellor to moderate, and to take that sum which two juries had affirmed."—Ed.]—Note in edition of 1852.

pay one half, and the defendents do pay the other half, of the costs allowed to the commissioner.

The opinion and decree of the court of appeals the 29 day of october 1792:

The court is of opinion, that the application of the appellants to a court of equity for relief in this case was proper, notwithstanding they might have defended themselves at law not only because the omission of such defence proceeded from mistake or accident, but on the ground of original jurisdiction, to establish the agreement between the parties, made on the twenty eighth day of february, 1776, and to be relieved against the unconscionable and oppressive use made of the judgment, by directing the execution to be levied for one thousand and forty three pounds nineteen shillings and one penny three farthings, when it appears that the utmost of the said Southerlands clame thereon was not more than two hundred and twenty five pounds eighteen shillings and five pence three farthings, with interest from the seventh day of december, 1784, and therefore that there is no error in so much of the said decree as sustains the suit for relief; but that there is error in the relief afforded, not only in the adjustment of the quantum, but in the application of it, as between the appellants, therefore it is decreed and ordered, that the decree aforesaid be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here, and this court, proceeding to make such decree as the said high court of chancery ought to have made, is of opinion, that (without contravening the rule giving creditors the right of application of payments made indefinitely to either of different debts due at the time) from the combined circumstances in this case, the whole of Butlers and Hilliards bonds, amounting to nine hundred and thirty five pounds fifteen shillings and one penny, ought to be applied to the credit of the protested bill, since it is evident that the payer so intended it; and that if the receiver did not assent thereto, yet he did not make such a recent and proper application of it otherwise, as ought to controul the choice of the payer; and therefore that the application ought to stand as stated in the first account of the master commissioner. on viewing this account however a doubt arose, whether the mode of stating interest was a proper one, whereupon one of the judges, declaring himself affected, in his character of an administrator by a decision of the question, retired from the discussion; and the court, discovering it to be of small importance in its operation in the present case, chose to pass it over on the ground of the master's report not having been excepted to, or the. point argued in court; with this caution to avoid an inference
76 *of approbation, rather than by a decision either way to establish a precedent which in other cases might be important, and it appearing by the said state, that the sum of thirty four pounds seventeen shillings and nine pence farthing only, was due on the protested bill, on the seventh day of december, 1784, and the court being of opinion, that the appellant Hill is not concerned with the other parts of the dispute, unless he could have derived an additional credit therefrom: therefore it is decreed and ordered, that, upon payment of the said thirty four pounds seventeen shillings and nine pence farthing, and interest from the time last mentioned till payment, and the costs of the judgment at law, the said appellant retaining thereout his costs in chancery and this court, the injunction stand and be perpetual, but on failure in such payment that the injunction be dissolved as to, and that the appellee be at liberty to sue out execution for, so much as he is intitled to by this decree, the court then proceeded to consider the remaining parts of the dispute, as between the appellee and the appellant Braxton, and is of opinion, that an account for goods, not delivered or accepted as a payment, nor liquidated between the parties, ought not to be taken as a payment in paper, so as to stand at the nominal value, according to the strict words of the act of assembly, but viewed in the light of a set off, and to be adjusted, especially in equity, upon just principles; that in this proceeding the court is of opinion, that the legal scale, so far as it operates in the years 1777 and 1778, is not a just rule in itself, not corresponding with the general opinion of the citizens at the time as to depretiation; nor does the scale at any period give a proper rule for fixing the price of imported goods, which was influenced by the expense and risque of importation, as well as by the depretiation of the paper; that therefore the account of the appellant Braxton for goods delivered, to the end of the year 1778, ought, at the nominal value, to be set off against the principal and interest of Claibornes bond and Southerlands account; and that so much of the residue of his account, as will pay off the interest of the balance remaining due to Southerland, ought also to be set off at the nominal sum; but that the residue of the amount of the said account ought to be subject to the legal scale, for may, 1780, of sixty for one, and at that reduced rate set off against the principal of Southerlands debt; a precedent for such distinction, between principal and interest having, as is supposed, been furnished in this court. the court proceeding to correct the account of the master commissioner, upon these principles, find a balance due from the said Braxton to the said Southerland, of seventy pounds and four pence on the thirtieth day of april, 1783. and as the said Braxton, by applying
77 to a *court of equity for an account has subjected himself, though plaintiff, to a decree for the balance found due from him, it is decreed and ordered, that he pay to the appellee the said sum of seventy pounds and four pence, with interest from the said thirtieth day of april, 1783, till

payment, retaining thereout his costs in chancery and this court.*

78 *REMARKS:

The doctrine contained in this proemium to the latter decree, that the application of the appellants to a court of equity for relief in this case was proper, notwithstanding they might have defended themselves at law, not only because the omission of such defence proceeded from mistake or accident, but on the ground of original jurisdiction to establish an agreement between the parties. and to be relieved against the unconscionable and oppressive use made by one of them of a judgment he had recovered against another of them, was not controverted in the present case, nor is recollected to have been controverted for almost two centuries before it in any other case, and is thought not to have required at this day grave discussion and the sanction of a solemn decision.

The words, there is no error in so much of the said decree (that is, the decree of the high court of chancery) as sustains the suit for relief, seem an approbation of something done by the judge of that court in sustaining the suit for relief: but if by any effort of him the suit for relief was sustained, the effort must have been like the vis inertiae, for he was inert in sustaining the suit for relief as the ground, whereon the capitol stands, is inert in sustaining that edifice.

Whether in the reversed decree error
79 be in the relief afforded, *not only in the adjustment of the quantum, but in the application of it, will now be inquired.

The case as to the error in the application of relief afforded was:

Carter Braxton, indebted to Fendall Southerland on account of a protested bill of exchange, and also on account of a bond, having assigned to him some securities, which were accepted for the same value as if they had been payments in money of the principal debts with interest due by the securities, clamed a credit for these payments in the account of the bill of exchange.

Fendall Southerland claimed the right to apply the payments, first to the credit of the debt on account of the bond, and the surplus, for they exceeded it, to the credit of the debt on the other account.

The H. C. C. in delivering its opinion did not enounce the rule of law, which governs cases of this kind, in the form of an axiom, but exemplified it in these terms: that the payments made to the said Fendal Southerland, by the plaintiff Carter Braxton, not appearing to have been directed by

*[The main difference in this case between the Chancellor and the Court of Appeals seems to be as to the facts: how far B. had, or not, authorised a particular application of his payments; or how far S. had, or not, indicated that he understood what application thereof had been intended. The Chancellor proceeded upon the idea that B. had left S. at liberty what application thereof to make. The Court of Appeals, however had a different one. These are the facts derived from 1 Wash. 128.

B. and the endorsers on the protested bill having fixed with S. the sum due by said bill, in current money, sent by S. to the Clerk of King William Court, where suit on the bill was pending, a note agreeing to confess judgment for the amount due, —£778. This was in 1776; but S. held up this note till 1784; when, without notice to any of the parties, he procured a judgment to be entered up for £361, the balance then due him, per his own statement. B. reversed this judgment. S. then brought suit v. H. alone and obtained judgment in 1787, for £1400

H. obtained an injunction, alleging that the bill had been nearly, if not wholly, paid by B., and that through mistake of his counsel, office judgment had been obtained and confirmed against him. S. answered and the H. C. C. directed B. to be made a co-plaintiff. B's bill stated same facts set forth by H. and that he had, in bonds, (in 1783,) which were to be applied to the protested bill paid £935, and that S. owed him on account, which should also have been applied to that debt. S. denied that B. had directed any application of said bonds to said protested bill; and said that he had applied £661 of those bonds to said bill; and part of the residue, by B's particular directions, to B's bond, in which C. was surety; and the balance to a private debt of B The Reporter says that there was no evidence that B. directed the application of any payment to the credit of the judgment on the protested bill. It was proved that immediately after the payment, he sent a message to his endorsers that he had discharged the judgment; but this was not delivered in the presence of S. Sometime after the bonds were received by S. he had declared that he should lose money by taking them; but it did not appear whether this was before or after the judgment was entered up in 1784. As late as 1786, S. enclosed to B., B. & C's bond and some accounts, which B. received without objection; and sometime afterwards S. had said that he had been advised to give up those papers to B. and rest on the protested bill.

From these facts, the two courts had to decide, how the bonds paid to S. by B. should be applied. The Chancellor has spoken for himself. Pendleton, Pres., said for the Court of Appeals:

"The rules, respecting the application of payments, are not disputed; but the question is, how they are to apply, under the circumstances of the present case? How Mr. Braxton intended it, appears from his declaration to Mr. Butler, made recently after the payment. It was natural that he should apply them to the relief of his friends, who stood bound as his securities: and in the choice between them, he might have motives for preferring the endorsers of his bill: and accordingly, when these bonds were paid in 1783, Mr. Braxton sent a message to the indorsers, that he had made this payment on account of the bill. This message was not delivered in the presence of, nor was it communicated to, Mr. Southerland, so as to fix his assent to that application. But the appellants suppose, that his assent is to be inferred, 1st. from Southerland's declaration, (which is proved,) that he should lose by taking those bonds—and 2dly, from Mr. Southerland's application to Mr. Claiborne 1784 (which is also proved,) warning him of his danger, and preparing him for the expected payment: and tho', he afterwards said, that he believed this bond might be paid, yet he refused to give it up, and never did so,' till 1786, when the judgment was reversed; then by the advice of his counsel, he sent it with other papers to Mr. Braxton.

"Although, if the debtor neglect to make the application at the time of payment, the election is then cast upon the creditor, yet it is incumbent upon the latter, in such a case, to make a recent application, by entries in his books or papers, and not to keep parties and securities in suspense, changing their situation from time to time, as his interest, governed by events, might dictate.—The endorsers were made easy by the message from Mr. Braxton, "that the payment was applied to their relief," and might in consequence of it, have declined asking for counter security. On the other hand, Claiborne was not deceived, because it does not appear, that he considered his debt as discharged by those bonds.

"Besides, it is more probable, that so large a payment would be applied to the credit of a still larger liquidated debt, than that it should be split, and placed part of it to the credit of a small bond account, and the residue to this large bond.

"Upon the whole, we are of opinion, that the payment should be applied to the bill." 1 Wash, 132-33. —Ed.] —Note in edition of 1852.

him, at the times of payment, or before, to be entered to his credit in that account wherein he is made a debitor for the bill of Exchange, the said Fendall Southerland might enter them to the credit of the plaintiff Carter Braxton in any other account subsisting between those parties.

The argument included in this opinion is an enthymema, an imperfect syllogism, in which one of the propositions was suppressed, because being supposed to be known by men of jurisprudence, and not more contestable among such men, than a self-evident truth is contestable among other men, it was understood.

If the argument be cast in the figure of a perfect syllogism, the major proposition would be: by law, if a debitor, who oweth money on several accounts, making payments, do not, at the times of payments, or before, direct in which of those accounts the payments shall be entered to his credit, the creditor may enter the payments to the credit of the debitor in any other account subsisting between those parties.

The minor proposition would be: but Carter Braxton, who owed money on several accounts, viz. on account of a bill of exchange protested, and on account of a bond, making payments, did not, at the times of payments, or before, direct that to his credit on account of the protested bill of exchange the payments should be entered.

And the conclusion would be: therefore the creditor, Fendall Southerland, might enter the payments to the credit of the debitor, Carter Braxton, on account of the bond.

80 *With this conclusion the reversed decree accorded.

It is said to be erroneous, and if it be so, it must be erroneous, either because the major proposition is false: or because the minor proposition is false: for if those premisses be true, the conclusion is unavoidable; and the decree, according with it, cannot be erroneous.

Those who condemned the decree of error have not denied the major proposition, but instead of denying are supposed to have admitted it; for

Their words are· this court is opinion that (without contravening the rule giving creditors the right of application of payments made indefinitely to either of different debts due at the time) from the combined circumstances in this case, the whole of Butlers and Hilliards bonds ought to be applied to the credit of the protested bill, upon which is observable, 1 the existence of some rule, giving creditors the right to apply payments made indefinitely to either of different debts due at the time, is in terms admitted; 2 they do not state here, or in any other place, what that rule is; and 3 the particle 'the' connected with 'rule,' the rule, must allude not to ANY rule, but either to some rule in their contemplation, unknown to others, or to some rule stated or understood in the opinion, which was at that time the subject of their animadversion.

That the allusion was to some rule in their contemplation, locked up in their breasts, or deposited among their arcana (a) they surely would not wish men to believe; and if that were not the rule to which they alluded, the rule must be that which was stated or understood in the opinion of the H. C. C.; that rule, the explication whereof is the major proposition, and which they say do not contravene, and, if not contravene, certainly not deny, and consequently they admit the major proposition, that by law, if a debitor who oweth money on several accounts, making payments, do not, &c.

If this major proposition be true, the decree of this court was not erroneous, unless the minor proposition be false; so that whether it be so or not, or, in other words, whether Carter Braxton did, at the times of the payments or before, direct that to his credit, on account of the bill of exchange, the payments should be entered? is the only remaining question in this part of the case.

This is a question of fact and consequently depending on evidence; but without making observations on the evidence, the facts shall be admitted to be as they

81 are stated to be by the *court of appeals, with this caution, nevertheless, that this admission is not to include an admission that the operation of law upon those facts is as that court hath affirmed it to be, for that cannot be admitted.

Then the question is reduced to this whether those facts, considered separately or conjunctly, evince, of themselves, or by operation of law, Carter Braxton's direction to apply the payments to his credit on account of the bill of exchange?

1. The court of appeals say, he, Carter Braxton, so intended; to which an obvious answer is, an intention is not a direction, unless at the time of payment or before the intention had been communicated to the receiver. these circumstances indeed combined would have been a complete direction; but a prior or concurrent communication, one of the essentials, is not alleged or pretended to be proved.

2. The court of appeals next words are, and that if the receiver (Fendall Southerland) did not assent thereto, yet he did not make such a recent and proper application of it, otherwise, as ought to control the choice of the payer.

The method of answering this sentence most conveniently seems to be by commenting on the several members of it.

If the receiver did not assent thereto.] assent to what? to the intention of Carter Braxton to apply the payment to the credit of the protested bill; now Carter Braxton, at the time of making the payment, or be-

(a) If among them such a rule be, a PRECEDENT for it would probably have been FURNISHED.--Note in edition of 1795.

fore, not having communicated his intention to Fendall Southerland, how could he know it? and if he did not know on what subject Carter Braxton was meditating, or what he intended, how could Fendall Southerland assent to it? seems a question not of easy solution.

He did not make such a recent and proper application of it as ought to controul the choice of the payer.] on these words the best comment will be an explanation of the principles, on which the legal doctrine of those elections, which are the subject of the present disquisition, are supposed to be founded.

It seems not an arbitrary, but rational doctrine, founded on these principles: whilst a man retaineth the money, whereof he had legally acquired the possession, the money being his own property, is subject to his uncontrouled power; he may conceal it, before the face of his creditor may squander it, melt it in a crucible, sink it in the ocean; in a word may do with it what he will; therefore when he delivereth it, even to a creditor, with an instruction to apply it in a particular manner, the receivers possession is fiduciary, and he is bound to make the prescribed application. e. g. if A, indebted to B. and C, deliver money to B. directing him to pay it to C, the 82 money in the hands of *B. is the property of C. for the same reason, if A be indebted to B on two or more several accounts, the money delivered by A to B, with direction to place it to the credit of A in this or that account, is received by B under a trust, in which is implied, if not in terms declared, an obligation to place the money accordingly.

On the other hand when the debitor delivereth the money, which before was his property, to the creditor, without instruction to apply it to the credit of this or that account, the property is changed immediately to the receiver, who, so soon as it is in his possession, is complete owner of it; it is his own money: if it be his own money by what law is he bound to make a recent application of it, or an application which is called a proper application, or by what law restrained from exercising the same power over it which he can exercise over any other part of his own property?

Hence the election of the one, the payer, is prior to or concomitant with the payment, the election of the other, the receiver, is posterior to the payment.

Controul the choice of the payer.] the meaning of these words as they are here combined with the context cannot be developed. If the choice of Carter Braxton, or his power to direct the application of the credit, determined by the payment without that direction, at the time or before, which is thought to be admitted, or to be proven, if not admitted, that such a choice, a choice no longer existing after the payment, was controulable, the supposed possibility of which is implied in the words, yet he did not make such a recent and proper application of it, otherwise, as ought to controul the choice of the payer, seems incomprehensible.

The argument of the court of appeals then, which is the subject of the preceding commentary, amounts to this: these circumstances, namely, the intention of Carter Braxton, that the payment made by him should be applied to his credit in a particular account, and Fendall Southerlands not making, after the payment, such a recent and proper application of it to Carter Braxtons credit in another account as ought to controul the choice, which he had before the payment, to direct the credit to be applied to which account he pleased, but which choice doth not appear to have been communicated to Fendall Southerland; that is, the circumstance of an undisclosed intention or choice of one party, and the circumstance of a neglect in the other, to do something recently and properly, in opposition to that undisclosed intention or choice, are circumstances, which, combined together, produce the de- 83 struction of a creditors right *to apply payments indefinitely made to either of different debts due at the time, or are equivalent to a direction by the debitor that the payments should be applied to his credit in a particular account! now the art of combining the secret thought of one man's mind with the doing of nothing by another man, so as to produce this effect, is believed not to have been before discovered.

Algebraists indeed, in resolving problems by equations, frequently use zero or nothing, and are much assisted by it; but they do not pretend that any quantity is augmented or diminished by adding to it or subtracting from it nothing; on the contrary W. Emerson, who in a dispute with the monthly reviewers was a zealous stickler and struggled vehemently for his nothings, admitted, that 0+9=9, or 9 combined with 0 is no more than 9. but according to this decree, Carter Braxtons undisclosed intention, which of itself doth not produce a certain effect, combined with 0, doth produce that effect.

The facts deserving attention in the other part of the case, where the decree of the H. C. C. is declared to be erroneous, that is, in the quantum of relief which it afforded, are those:

Carter Braxton, having in february, 1776, executed a bond for payment of 122l. 11s. 9¼. to F. Southerland, sells to him in september of 1777, in june, september, and december of 1778, and in may of 1780, sundry merchandises, charging for them the current paper money prices of those times, and now clameth credit for them accordingly against the bond, which they with interest almost double; whereas the prices reduced by the scale with interest would be less than twenty nine pounds. the account is as follows;

		£	s.	d.	£
1777 sept.	10 bushel salt				8
1778 june.	2 pair cards				7
sept.	a loaf sugar 9-1 at 12s.	5	8	9	
	2 lb twine		12		
	2 tumblers		12		
	2 ditto		18		
	1 ivory comb		18		
	thread		11	9	
	46 lb. tarred rope at 4s	9	4		
	98 lb. sein twine at 6s.	29	8		
	15 lb. sugar	4	10		
	4 lb. coffee	1	4		
					53 6 6
	1778 dec. 10½ bushels salt at 70s.				36 15
84	*1880 may. 59 lb. iron sent by Harrys flatt at 80s.				142 10
					247 11 6

F. Southerland objected against the allowance of such a credit, except so much of it as was equal to a small account of his own against C. Braxton for merchandise, sold to him and charged in a like manner, insisting that the credit for the residue of the goods ought not to excede the true value of them, against a bond for money, due before the commencement of depretiation.

The H. C. C. sustained the objection, being of opinion the goods ought to be discounted at the true value, and for ascertaining the value referred to the statutory scale of depretiation; not because it was thought a measure of legal obligation in the case of goods sold, but because, at that time, no other measure, which seemed more just, occurred, as the language of the opinion indicates. another mode more regular, for ascertaining the value of goods in such a case as this, will be mentioned hereafter.

The court of appeals accommodate the controversy thus: they allow part of C. Braxtons account to be set off, at the nominal value, against the bond, and F. Southerlands account; they allow part of the residue to set off some interest due to Southerland, at the nominal sum; and they allow the remainder, reduced by the scale, to be set off against the principal of F. Southerland's account.

This accommodation is the result of certain propositions, stated in their opinion, which is the foundation of the reversing decree. this opinion will be examined, in order to inquire whether from such premises such conclusions are deducible.

The first paragraph of the opinion is, an account for goods not delivered or accepted as payment, nor liquidated between the parties, ought not to be taken as payment in paper, so as to stand at the nominal value, according to the strict words of the act of assembly, but viewed in the light of a set off, and to be adjusted, especially in equity, upon just principles.

Out of this paragraph, so far as the present question is affected by it, might have been exterminated the words, 1 not delivered or accepted as a payment, 2 nor liquidated between the parties, and 3 especially in equity, but let them remain.

The next paragraph of the opinion is, the legal scale, so far as it operates in the years 1777 and 1778, is not a just rule in itself, not corresponding with the gen-
85 eral opinion of the citizens at *the time, as to depreciation; nor does the scale. at any period, give a proper rule for fixing the price of imported goods, which was influenced by the expense and risque of importation as well as by the depretiation of the paper.

Immediately after which occur these conclusions, introduced with the word therefore, 1 that the account of the appellant Braxton for goods delivered to the end of the year 1778 ought, at the nominal value, to be set off against the principal and interest of Claibornes bond (that is C. Braxtons bond in which Claiborne was his surety) and Southerlands account; 2 and that so much of the residue of his account as will pay off the interest of the balance, remaining due to Southerland, ought also to be set off, at the nominal sum, but 3 that the residue of the amount of the said account ought to be subject to the legal scale for may, 1780, of sixty for one, and at that reduced rate set off against the principal of Southerlands debt: to which is subjoined, a precedent for such distinction between the principal and interest having, as is supposed, been furnished in this court.

The two paragraphs contain four distinct propositions; but between any one of them and the conclusions, or any one of the conclusions, or between the propositions and all or any of the conclusions, doth not occur one single instance of a middle term, (b) to connect the extremes together. this middle term shall be supplied occasionaly.

The first general proposition: an account for goods not delivered or accepted as payment, nor liquidated between the parties, ought not to be taken as a payment in paper, so as to stand at the nominal value, according to the strict words of the act of assembly.

Middle-term; but Carter Braxtons account is an account for goods, not delivered or accepted as a payment, nor liquidated between him and F. Southerland.

One would expect this conclusion: therefore C. Braxtons account for goods ought not to be taken as a payment in paper, so as to stand at the nominal value, according to the strict words of the act of assembly.

But what is the conclusion of the court of appeals? either none at all, or one or two of all these three; 1 therefore the account of the appellant Braxton, for goods delivered to the end of the year 1778, ought at the nominal value to be set off against the principal and interest of Claibornes
86 bond and Southerlands *account,

(b) In syllogismo fit reductio propositionum ad principia per propositiones medias. haec autem sive inveniendi sive probandi forma in scientiis popularibus (veluti ethicis, politicis, legibus, et huiusmodi) locum habet. Fr. Bacon de augmentis scientiarum, lib. V. cap. II.—Note in edition of 1795.

2 and that so much of the residue of his account as will pay off the interest of the balance remaining due to Southerland, ought also to be set off at the nominal sum, 3 that the residue of the amount of the said account ought to be subject to the legal scale for may, 1780, of sixty for one, and at that reduced rate set off against the principal of Southerlands debt.

By what form of ratiocination can one or two or all of these conclusions be deduced from that proposition? if neither, why was it stated?

II Proposition: an account for goods ought to be viewed in the light of a set off and to be adjusted, especially in equity, upon just principles.

Middle-term; but Carter Braxtons account is an account for goods.

The rational conclusion is; therefore Carter Braxtons account ought to be viewed in the light of a set off, and to be adjusted, especially in equity, upon just principles.

The conclusion in the reversing decree is therefore the account, &c.

A man, of ordinary understanding, must see the chasm between the second proposition and these conclusions, and that the chasm ought to be supplied by an intermediate proposition in some such form as this; to set off an account for goods, sold during the period of depretiation, at the nominal value, that is at the prices charged in the account, against a debt, contracted before the commencement of depretiation, is to adjust an account for goods, especially in equity, upon just principles.

If such an intermediate proposition had been stated, it is denied to be true; yet without it, or some others tending to affect the same thing, that the conclusions, at least the first and second conclusions, can be connected with the second proposition, is likewise denied: and in the first denial an appeal is made to all men who have adequate ideas of justice; and in the other denial an appeal is made to all men who are not destitute of the reasoning faculty, and are accustomed to exercise it, if they be not in the habit of obsequious submission to judgements, than which they have been taught to think their own less correct.

III Proposition is, the legal scale, so far as it operates in the years 1777, and 1778, is not a just rule in itself, not corresponding with the general opinion of the citizens at the time as to depretiation.

Before the enquiry what conclusion is deducible from this proposition, a commentary upon its terms may not be improper.

The legal scale, so far as it operates in the years 1777, and 1778, is not a just rule.] the scale in this case was legaly ob-
87 ligatory, *or not legaly obligatory; if the latter, it ought to be totaly rejected; if the former, the statute, which authorised it, having declared, that it should be a rule for determining the value of certain things, during a period of five years, when the court of appeals will not allow it to operate during two of those years, 1777, and 1778, as they do not in their first and second conclusions, but allow it to operate in a subsequent year 1780, as they do in their third conclusion; is this exercising the power properly belonging to the judiciary department?

The scale is not a just rule in itself.] A rule may be unjust by allowing either too much or too little. whether its injustice be in its excess or defect we are not told here, nor told any where else, unless it may be said to be in the next proposition, or in the first and second conclusions. if we look for this information in the next proposition, that indeed may be said to imply, but not directly to affirm, that the scale valued goods imported less than was just; and to look into a conclusion for that which ought to be predicated in the premisses, is not a logical mode of investigation, and is unsatisfactory to a candid inquirer, as well as preposterous; for a conclusion ought to be a deduction from what was asserted in the premises for its support, not, like the spider, to contain in its own bowels that which it is to spin for its support.

Not corresponding with the general opinion of the citizens at the time as to depretiation.] let us suppose Carter Braxton to have sold to J. S. an ivory comb the last day of december, 1778, and another of the same value, in 1780, charging 18 shillings for each; according to this opinion of the court of appeals, they would have allowed him to set off, against a bond given to J. S. three or five years before, one of these combs at 18 shillings, and the other at 18 pence, and would have called this, in their language, an adjustment on just principles. Carter Braxton possibly might have thought it so, but that any citizen besides the judges of appeal might have thought so, the commentator doth not know. he doth not even recollect what he thought about depretiation at that time his self—possibly he was asleep when the year 1778 ended and its successor began its revolutions—be that as it may, he inclines to believe that he thought or dreamed that depretiation, if he thought or dreamed at all about it, was the same on the new years day of 1779, as it was the day before.

But supposing the third proposition to be unexceptionable, the legal scale, so far as it operates in the years 1777 and 1778, is not a just rule in itself, not corresponding with the general opinion of the citizens, at the time as to depretiation, the ra-
88 tional *conclusion from it is, therefore reject the scale, because, so far as it operates in the years 1777 and 1778, it is not a just rule, not corresponding with the general opinion of the citizens at the time, as to depretiation, and substitute some other rule which, so far as it operates in the years 1777 and 1778, is a just rule, corresponding with the general opinion of the citizens at the time, as to depretiation. the conclusions of the court of appeals are therefore the account, &c.

But to connect these conclusions with

that proposition must be admitted, or proved, this middle proposition: for estimating the value of goods, sold in the years 1777 and 1778, in order to set off a debt, contracted before the commencement of depretiation, the rule, just in itself, and corresponding with the general opinion of the citizens at the time, as to depretiation, is the nominal value, that is the prices charged by the seller in his account of the goods.

That the court of appeals have proved the truth of this intermediate proposition is not admitted, nor will the truth of it be admitted, before they or others prove, that one peny weight of gold, 22 carrats fine, is equal in value to five or more peny weights of gold, of the same degree of fineness.

IV Proposition: nor does the scale, at any period, give a proper rule for fixing the price of imported goods, which was influenced by the expense and risque of importation, as well as by the depretiation of the paper.

This proposition is the same as the last, appearing in another garb, which betrayeth a weakness of argument undiscovered in that.

The supposed difference is, that the goods mentioned now are imported, the price of which was influenced by the expense and risque of importation. then the seller augmented his retailing price accordingly; and consequently the difference vanisheth.

The weakness of argument is thus betrayed; depretiation of the paper is acknowledged to be one cause, and was in truth the sole cause, which influenced that price of goods, about which the question is; for in the true value the expense and risque of importation is included.

But if depretiation were only one of the causes, ought the seller alone to experience the beneficial effects of it? if the seller, who was a debtor, had the advantage of depretiation, by augmenting the price of his goods, ought not the creditor to have a reciprocal advantage, in augmenting the value of his debt, which is set off by those goods? would this contravene the rule qui sentiat onus sentire debet et com-
89 modum; or equality *is equity? a man, who in 1776 had bought from another a flock of sheep, agreeing to pay for them in kind on the first day of january, 1779, must have returned an equal number, and of equal value, although at the date of contract he could have bought the sheep for 1⅓ dollar each, but at the time of restitution could not buy them for less than 10 dollars each; because the value of sheep remained the same, although that of the money had varied: and no reason can be assigned, where money was to be paid for the sheep, why the money when paid should not be made equal in value to what it was when the sheep were delivered, supposing the act of general assembly, as the court of appeals suppose it, not applicable to the present question.

The court of appeals, about the middle of their decree, seemed cautious of establishing precedents, no doubt that inferior judges might not be misled by them. near the end of it, after dividing an account, of 14 articles, into three unequal parts, and with one of those setting off some of the principal and interest of a debt, and with another setting off some of the interest of what remained of the same debt, both these parts at the nominal value during the time of depretiation, and with the third part, subjected to the scale of depretiation, setting off some of the aforesaid debt, at the reduced value; after these various valuations and applications of articles in the account, they add these words, 'a precedent for such distinction between principal and interest having, AS IS SUPPOSED, been furnished in this court,' leaving the existence of such a precedent incertain.

That such a precedent, which is only supposed, did not exist being possible; and the decree in the principal case not restraining inferior courts from deciding questions of this kind in another mode, the H. C. C. will probably refer the decision of such as may occur there hereafter to juries, directing issues to be made up for that purpose.

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*BETWEEN 90

FREDERICK WILLIAM HEARNE and Anne his wife, *plaintiffs*,

AND

THOMAS ROANE, John Roane, James Upshaw, and William Latane, executors of William Roane, *defendents*.

Oct., 1790.

1. **Dower*—Provision in Lieu of—Construction—Case at Bar.**—By marriage settlement, the wife, at the death of her husband, was to have one-third of all the negroes whereof the husband died possessed, in lieu of dower; and if she survived and had no child by him, she was to have all the negroes which came by her, in her absolute right. She did survive and had no child by him. HELD, that she was entitled to the dower slaves in addition to her own before the marriage.
2. **Same—Same—Same—Same.**—She is not precluded by a different division and assignment in the county court to which she was no party.
3. **Same—Same—Same—Same.**—Being entitled to the rents and profits of the slaves withheld from her, they will be set off against a purchase made by her at the sale of her husband's effects; an injunction granted her and an account ordered accordingly.
4. **Marriage Settlements†—Construction—Case at Bar.**—She was also to have a "carriage and horses belonging to it." This embraces only the two, that have *ordinarily* drawn it, and not the four driven to it.

THE plaintiff Anne was the widow of William Roane, the testator of the defend-

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***Dower.**—See monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

†**Marriage Settlements.**—See monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

ents. before their intermarriage, on the 24 day of october, 1782, they had executed an agreement, the articles of which were to this purpose: 'first, that the parties, during their coverture, shall hold, possess and enjoy all such rights and privileges as belong to them, in as ample manner as if the agreement had not been made. secondly, if he should die before her, that she shall immediately hold and possess, during her life, the dwelling house, outhouses, orchard, and appertinences, with 800 acres of land, and one third part of a grist mill, all which are in the county of Essex, in lieu of her dower in his lands to which she would otherwise have been intitled: and she shall, immediately after his death, possess twenty good negroes, including a full proportion of house servants, such as she may choose, and if the twenty negroes should not amount in value to a full third part of the negroes whereof he shall die possessed,* then she shall have as many more as will amount to a full third part of all the negroes, which are to be in lieu of dower of his slaves, and subject to the same laws and regulations. thirdly, if she 91 survive him, *and have no child living at the time of his or her death, that the negroes, which should come into his estate by the intermarriage, with their increase, shall be vested in her in such absolute manner that she may dispose of them, or otherwise they shall descend to her heirs. but if he, with her consent, should sell any of the negroes which came by her, his estate should not be accountable for them. fourthly, at his death, that she shall have the best riding carriage, and horses belonging to it, which shall not be brought into account at the division of the presonal estate. and lastly, that she shall be intitled to a third part of his personal estate in the same manner as if the agreement had not been made.'

William Roane, about a fortnight after the marriage contract, by deeds of gift,† conveyed several of his slaves, with lands, to his sons Spencer Roane and Thomas Roane.

William Roane died in november or december, 1785, without a child by the plaintiff Anne, having made his testament, wherein he declared his desire to be, 'that in addition to that part of his household furniture, to which his wife would be intitled by her marriage, his executors should allow and assign to her so much more as they should judge necessary for her use, to be possessed during her widowhood, but returned if she should marry.'

At a sale of the personal estate of William Roane by his executors, the plaintiff Anne bought sundry articles amounting to 3681. 17s. 9½, for which the defendents in an action at common law recovered a judgment.

In obedience to an order of Essex county court, dated in january, 1786, and a decree, as it is called in the exhibit, of that court, in the following month, commissioners thereby appointed, after laying off and assigning to the plaintiff Anne that part of the slaves of William Roane to which, as the commissioners state, she was intitled by marriage-contract, divided the residue among his children.

The whole number of negroes said to be thus assigned to the plaintiff were nineteen, of which some had been the slaves of the plaintiff at the time of the marriage, and among these was accounted one who had died in the life time of William Roane.

The plaintiffs, by their bill, clamed dower, over and above the wifes proper slaves at the time of the intermarriage with William Roane, and an allowance for two, sold by the defendents, 92 *of the four carriage horses, insisting they were intitled to four, and prayed an injunction to the judgement for the money recovered on account of the goods bought by the plaintiff Anne.

The defendents insisted that the marriage articles, upon which the plaintiffs relied for asserting, did oppugn, the demand of dower; that only two, instead of four, horses belonged to the carriage; and that the whole of William Roanes personal estate, with the articles bought by the plaintiff Anne, was not equal to the debts due from him.

The cause came on to be heard, in october, 1790, when the court delivered this

OPINION,

That in the slaves, to the possession of which the plaintiff Anne, by the marriage contract between her former husband, William Roane, the testator, and herself, was intitled, in lieu of dower, those which were her property, at the time of her intermarriage, ought not to have been included, because the slaves, which by the contract, she should have and enjoy in the event of her surviving him, whether having a child by him or not, are supposed to be his proper slaves, since a power to settle them on her, in lieu of dower, or otherwise, implieth a property in him at the time of the contract, or at the time of his death; whereas the slaves which the plaintiff Anne had, at the time of the contract and intermarriage, were not his property, but were her property, and remained her property, when he died without having a child by her, and were not subject to the laws and regulations of dower slaves; that the plaintiffs ought not to be precluded, by the order and decree of Essex county court and the division and assignment made in obedience thereunto, from recovering now so many of the slaves as the plaintiff Anne was entitled to more than what were then assigned to her, because she was not a party in the

*[At his death, W. R. was possessed of only 40 slaves of his own; but this estimate was made upon 70 slaves of which he was possessed at the time of the gifts to his sons. 1 Wash. 51.—Ed.]—Note in edition of 1852.

†[These gifts were prior to the execution of the marriage contract, though subsequent to its date. The date was 24 Oct. The execution 14 Nov. 1782. Hence the charge of fraud in those gifts. See Chancellor's "Opinion," p. 73; and 1 Wash. 48.—Ed.]—Note in edition of 1852.

suit, if it can be called a suit,* wherein that order and decree were made; nor doth her present demand appear to have been discussed at that time; that whether the gifts by the testator to his sons Spencer and Thomas be fraudulent as to the plaintiff Anne? is a question not proper to be decided in this case, as it is now brought, on, the donees not being parties; and that the plaintiff Anne was intitled to the two horses only, which she hath received, because only that pair, having ordi-
93 narily drawn the carriage, to *which the horses were said to 'belong,' are understood to have been designated. and made this

DECREE,

That of the surviving slaves which were in possession of the testator William Roane, at the time of his death, exclusive of the unprofitable from old age and infirmity, and also exclusive as well of the plaintiffs now proper slaves, and the nine formerly received by the plaintiff Anne, as those given by the deeds of gift to the testators sons Spencer and Thomas, although they might have been in his possession at his death, eleven, or so many more as, with those nine, will be equal to one third part, be assigned to the plaintiffs, together with the children of any females among those so to be assigned, born since the testators death, the value of which slaves so to be assigned shall be in like proportion to the value of the stock, whence they are to be taken, as one of the numbers is to the other; and that the defendents account with the plaintiffs for the profits of the slaves to be assigned from the end of the year in which the testator died; and the court doth award an injunction to the judgment of the defendents against the plaintiffs in the action at common law, until the account of administration of the testators estate, now directed to be stated and reported, shall discover whether a surplus thereof remain, the plaintiffs share of which may discharge, or be discounted out of, that debt.

This decree, from which the defendents appealed, was affirmed in november, 1791.†

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*BETWEEN 94
BENJAMIN PENDLETON and JAMES PENDLETON, *plaintiffs*,
AND
JOHN HOOMES, *defendent*.

Oct., 1790.

Wills—Construction—Gift to Class—Lapse.—1785. A testator gives "all the residuum of his estate to be equally divided between the children of his uncle and his cousin, and their heirs forever, share and share alike." Between the date of the will and the testator's death, one of the children of the uncle dies. Held her share does not lapse, so that the heir at law takes it, as if by intestacy; but the surviving legatees, or their assignees share it as if the deceased child had never existed.

JOSEPH HOOMES made his testament, the 15 day of february, 1782, wherein after sundry devises and bequests, are these words: 'i give all the residuum of my estate to be equaly divided between the children of my uncle Benjamin Hoomes and my cousin John Hoomes, to them and their heirs forever, share and share alike.'

The testator died in april, 1785.

When the testament was made, Benjamin Hoomes had six children, of whom Martha, the mother of the plaintiffs, died about six months before the testator, her father then living.

If the share, to which Martha in the event of her surviving the testator would have been intitled, be lapsed, the defendent who was heir of the testator, succeeded to the heritable parts of the residuary subject; if not, the residuum was divisible in the same manner as it would have been if she had never existed, and the plaintiffs, to whom the surviving children of Benjamin Hoomes have resigned and conveyed their five sixth parts of so much as would have been the share of their sister Martha, if she had been a surviving child, are intitled to those proportions, that is, five sixth part of one seventh part of the residuum, to recover which this bill was brought against the defendent, who was executor, as well as heir, of the testator.

By the court:

The terms in the testament of Joseph Hoomes, designating those to whom, with the defendent, the testator devised the residue of his estate, namely, 'the children of my uncle Benjamin Hoomes,' being predicable not less truly of the children only who should be living at the time when the testator should die, than of the children who were living when he made his testament, and neither of those expositions appearing to be decisively favoured by other clauses in the testament, the court doth prefer the former, because by that the declared inten-
tion of the testator, 'to give all the
95 residuum of his estate,' and *that it should 'be equaly divided among the children of his uncle Benjamin Hoomes, and his cousin John Hoomes, so as that they should share it alike,' seems accomplished, in every event, as it would have been by the latter exposition; whereas by this, in the event, which hath happened, of Martha's death before the testator, that intention, if some decisions of the english courts be orthodox, would be contravened; for part of the residuum would not be given, and the defendent, instead of sharing alike with the children of Benjamin Hoomes, that is, taking so much as each one of them, would take one seventh part more.

Decree for the plaintiffs in october, 1790.

*[It was an ex parte motion by the Executors, for the appointment of commissioners to value, assign and divide the slaves. 1 Wash. 48 and 51.—Ed.]—Note in edition of 1852.

†This appeal is reported in 1 Washington, 47.—Note in edition of 1852.

BETWEEN
JAMES SOUTHALL, *plaintiff*,
AND
JOHN M'KEAND, John Powell, John Mayo and Charles Carter, *defendents*.

Land Lottery—Prize—What It Includes.—In Byrd's lottery, one of the prizes was described as McKeand's tenement, to which had been attached more than half an acre of land; and also as No. 327 by the survey made by said Byrd, and to which only half an acre was attached. Said survey, had been opposed and once defeated by the tenants; but was made and publicly hung up in the building where the lottery was drawn. S. drew the prize. Byrd afterward sold land adjoining said tenement to McKeand and he to others. S., over 14 years after the lottery, brought his bill claiming all that had ever been attachéd to the said tenement, as included in his prize. HELD by the H. C. C.

1. **Same—Same—Same.**—That a survey and plan of the lands was a necessary part of the scheme; and that S. took by and for his prize only the half acre lot No. 327. But the Court of Appeals, held that he was entitled to all that had been attached to McKeand's tenement, and gave him a decree against McKeand's estate;—dismissing the bill as to the defendants who were purchasers from him without notice. 1 Wash. 336.

2. **Issue Out of Chancery—Certificate of Court That Verdict against Evidence—New Trial.**—The jury who tried the issue of boundary directed in the case, found for the defendants. But the Court certified that the weight of evidence was in favor of the plaintiff S. The H. C. of Chancery concurring with the jury sustained the verdict; but the Court of Appeals took up the case upon its original merits, and reversed it.

3. **Revival of Suit—Should Be against Heirs Specifically.**—McK. having died, the suit should be revived against his heirs and representatives specifically, and not merely in their general character, without naming them.

4. Commentary of the Chancellor.

96 *5. The value of the land recovered should be fixed at the time that McK. sold to a purchaser without notice; and interest allowed from that time.

IN 1767, William Byrd, by advertisements, in the gazette, published his intention to dispose, by lottery, twenty nine improved tenements, of which one, called John M'Keands, valued at one hundred and forty four pounds, was demised to that tenent at the yearly rent of twelve pounds, and eight hundred and ten unimproved parcels of land, whereof one hundred contained one hundred acres each, others half an acre each, and some were islands. the estates lay at and near the falls of James river.

Before the lottery was drawn, William Byrd was preparing to survey the lands, designing to mark the boundaries of the tenements, and half acres, and so to delineate them as that they might form a town on each side of the river, with convenient streets for passage.

Some of the tenents opposed the execution of this design, alleging it would derange their tenements, and threatening, if William Byrd persisted in it, to return the tickets which they had taken to sell for him.

Whether John M'Keand, the holder of the tenement called by his name, joined in the opposition doth not appear. that he did not join is most probable, because he neither occupied nor clamed more ground that the area of his dwelling house.

The survey was not then prosecuted, if begun.

Some time afterwards, whether the tenents who had been adverse to the mensuration and delineation were now reconciled to it, or whether they knew not of it, or connived at it, William Byrd procured the lands to be surveyed, laying off for John M'Keands tenement half an acre, and plans of the towns to be drawn, which were hung up, exposed to public view, in one part of the old capitol in Williamsburg, and remained so exposed during the time the managers superintended the drawing of the lotery, in another part of the same house, in november, 1768.

A ticket owned by the plaintiff won the prize marked 327, which by recurrence to the plan appeared to be John M'Keands tenement.

How much land, more or less than half an acre, was contained in this tenement, before he was a tenent of it, does not appear. he did not cultivate any part of it as hath been observed——if all the parts occupied by the precedent tenents, with some other ground not actually cultivated but situated so that it could not have been excluded, were included in one figure, the area would be more than half an acre ——but such a figure would not coincide with any street, or with the lines of 97 *coterminous grounds drawn prizes by other adventurers—must have been an irregular polygon, inconvenient to the fortunate adventurer himself, as well as to his neighbours—moreover, if the tenement had been surveyed in such a manner as to include the grounds only which had been actually occupied by any one tenent, before John M'Keand, that it would have exceded half an acre doth not appear—neither doth the part which had not been actually occupied, but which is included in the survey, appear to be less than the occupied part, which is excluded—finally, the plaintiff entitled confessedly to John M'Keands tenement, for which a rent of twelve pounds was annually paid, actualy possesseth, for his prize, all the tenement which John M'Keand ever occupied or ever clamed, and for which he paid that rent, and almost half an acre more.

Nevertheless, the plaintiff, 14 years and a half so many months, after the lotery was drawn, and almost as long after the land now clamed by him, for part of John M'Keands tenement, was possessed and improved by other men, and had been transferred for valuable consideration oftener than once, brought a bill, in the county court of Henrico in chancery, to vindicate

his title, and to compel the defendent Charles Carter, in whom the legal estate rested, to convey it to the plaintiff.

The defendents John M'Keand and John Mayo, at that time the only interested defendents, answered the bill; and many witnesses were examined. their testimony was chiefly to prove the situation of the ground in dispute which had been cultivated by three men, Letcher, Woodson, and Gunn, tenents who had lived in the house which, in 1767, and for the two next preceding years, was the dwelling house of John M'Keand, before it was called his tenement,—that a horse-rack was on the land in dispute, on the pins of which people, who frequented this place where a tavern was then kept, and those who came to a public tobacco inspection, called Byrds warehouse, in the neighbourhood used to hitch the bridle reins of their horses—that a cockpit was dug by Gunn, whilst he kept the tavern, on part of the land in dispute—to prove that a tree stood somewhere or other, upon the warehouse ground, or the ground in dispute, or between them, where the inspectors used to prize tobacco,—to prove the situation of the place which the people, bringing tobacco to the warehouse, used for a way—to prove that the plaintiff gave notice of his title to M'Keand when he bought the land in dispute from William Byrd, and that he had, some time before the war, applied to counsil to assert his title.

The county court dismissed the bill.

The high court of chancery, which
98 the plaintiff appealed, *directed an issue to be tried, in order to determine the boundaries of John M'Keands tenement, and a survey of the land in controversy to be made and reported to the court before which the issue should be tried, and also directed the copied plan of Richmond, to which the plaintiff excepted, to be admitted in evidence at the trial.

The jury who tried the issue by their verdi t found the boundary of the tenement to be that which agreed with the survey and plan of the town of Richmond, which was in effect a verdict in favour of the defendents.

The court, before which the issue was tried, certified the weight of evidence to be in favor of the plaintiff, and that the only evidence offered at the trial was the written testimony (that is the testimony which was before the court of chancery) and the oral testimony of James Vaughan and James Price, whose written examinations were likewise before the court of chancery, and who are not alleged to have deposed any thing more when they were examined viva voce.

The high court of chancery, on the first day of march, 1791, delivered the following opinion and decree:

'The court is of opinion, that a survey and plan of the parcels of land, to be prizes in the lotery, from which this controversy arose, was a necessary part of that scheme, as well for laying off the ground in convenient figures, as for indicating the situations, ascertaining the quantities, and defining the boundaries of them; that the survey and plan thereof, made for those purposes, was not fraudulent as to any purchasers of tickets; especially as probably all those tenements, exceeding half acres, the holders of which objected to divisions of them, were laid off intire; as, at the time of drawing the lottery, the plan, suspended in a public place, was exposed to the view of all who would look upon it, and as, for any thing shewn to the contrary, all parties, until the lotery was drawn, yea all parties except the appellant, even afterwards, acquiesced in that plan, as an authoritative terrier; that the tenements, denominated in the scheme Byrds and M'Keands, which are contiguous, laid off by the plan in parallelograms, were so much more commodious than the figures, into which an inclusion of the ground clamed by the appellant in the latter tenement any way would throw them, that the court believes the adventurers, if they could have been consulted before the drawing of the lotery, would have approved that mode of laying them off; that the ground cultivated or occupied by any holder of M'Keands tenement, doth not appear to have exceded much, if at all, at any time, in quantity,
or, before the buildings erected on it,
99 in value, the ground assigned *to that tenement by the plan; that the plan ought to bind the appellant, because by that alone he can clame, not only the lot which was drawn a prize against the ticket numbered 1158, (a) and so much of what is called M'Keands tenement in the plan as lieth between the southern end of the house in which he dwelled, and the said lot adjoining to it, no part of which interjacent ground appeareth to have been cultivated or otherwise occupied by M'Keand or any tenent, before him, but even M'Keands tenement, however bounded, since by the figures 326, (b) on the paper drawn against the appellants ticket numbered 5187, referring to the plan in which those figures are found, that ticket is shewn to be fortunate. and the original plan having been probably destroyed, the copy, among the exhibits, mentioned in the examination of James Lyle, is sufficiently proved to be correct, by the testimony, by the appearance of the thing itself, and by its congruity with the printed list of fortunate numbers, exhibited by the appellant, which was taken from the plan: (c) and therefore the court, approving the said verdict, which findeth the line B G in the surveyors plot to be the boundary,

(a) Marked 326 bought by the plaintiff from Tayloe and Thornton.—Note in edition of 1795.

(b) It ought to be 327.—Note in edition of 1795.

(c) The original plan being archetype both of the list exhibited by the plaintiff, and of the copied plan exhibited by the defendents, the agreement of these together, which is exact in all their parts wherein they can be compared, and those parts are many, and pertinent to the present question, demonstrates the fidelity of the later; for the original plan and the plan said to be copied from it, if they both agree with the list, must agree between themselves.—Note in edition of 1795.

dividing Byrds inspection and M'Keands tenement, rejecting a motion, made last term and repeated in this, for a new trial of the issue, and being of opinion that the appellant is not intitled in equity to the land clamed by him, doth adjudge order and decree that the decree of the county court, by which was decreed and ordered that the bill of the appellant be dismissed, and that he pay to the appellees their costs, be affirmed, as it is hereby affirmed, and that the appellant do pay to the appellees the costs expended by them in their defense, including the costs of the trial before the district court.'

The court of appeals, before whom the case was carried, on the 6 day of november, 1794, delivered the following

OPINION AND DECREE.

'The court, having maturely considered the transcript of the record, and the arguments of the counsil, is of opinion, that the verdict in the district court ought not to be considered as settling the bounds of the ground in dispute, since the same
100 is certified *by the judge to have been given against the weight of evidence; but that the decision ought to be made upon the proofs and exhibits in the cause; that, under the scheme published by William Byrd, esquire, the adventurers in the lotery had a right to expect, in the prize called M'Keands tenement, all the ground that had been occupied, as part thereof, which occupation ought rather to be collected from that of former tenents, who kept a public tavern on the tenement, which drew the attention of the public thereto, than from that of M'Keand, a private single man, who had not occasion to occupy the whole, and that the occupation of such former tenents extended so as to include the ground in dispute; that the survey made by Benjamin Watkins, at the instance of the said Byrd, after the publication of the scheme, by which the bounds of the tenement are supposed to be narrowed, ought not to effect the interest of the appellant, since neither he nor M'Keand, the tenent at the time, appear to have been present, so as to imply the consent of either, that the occupied bounds should be changed; nor is such implied consent in the appellant to be inferred from the exposure of that plan in the room where the lotery was drawn, even if he had read it, which does not appear; since he could not from thence discover whether the tenement was described therein according to the occupied bounds or not; and therefore it is unnecessary to decide how far the copies from that plan ought to be admitted as evidence; that the appellant, being thus intitled to the ground in dispute, and M'Keand a purchaser with full notice of that title, if the appellant had prosecuted his clame immediately, and M'Keand had proceded in improving the ground, he would probably have lost both together; but since the appellant did not prosecute any suit til after great improvements had been made, under the idea, as is to be presumed, that the clame was abandoned, it would be unreasonable for the appellant to take advantage of his own delay, to avail himself of those improvements; and therefore his clame ought to be reduced to the value of the ground, as it stood at the time M'Keand purchased, for which value the tenement would have been considered as charged so long as it continued in M'Keands possession, and to have been so charged in the hands of a purchaser with notice; but since it appears the appellee Mayo holds under his father, who was a purchaser without notice, the ground in his hands is discharged; and that there is no error in so much of the decree of the county court, nor in so much of the decree of the high court of chancery in affirmance thereof, as dismisses the appellants bill, as to that appellee, with costs; but that there is error in the said decree, so far as the bill is dismissed as to the said M'Keand, who
101 was answerable to the appellant *for the value of the ground, as before mentioned; therefore it is decreed and ordered, that so much of the said decrees as relates to the appellee Mayo be affirmed, that the appellant pay him his costs by him about his defense in this behalf expended; that the residue of the said decrees be reversed and annulled, and that the appellants costs in this court be paid him by the executors or administrators of the said M'Keand, out of his estate, if so much thereof they have in their hands. the court would have proceeded to make such decree as the said court of chancery should have pronounced, to wit, that an issue should be made up, by direction of the said court of chancery, and tried by a jury, to ascertain what was the value of the ground in dispute, on the 26 day of july, 1779, independent of any improvement made thereon subsequent to the 8 day of october, 1769, which being ascertained should be paid to the appellant out of M'Keands estate, with interest on such value from the 26 day of july, 1779, together with the appellants costs in chancery and the county court; but the said M'Keand having died pending the appeal in this court, although the same hath been revived by consent of parties as to his heirs and representatives in their general character, without naming them, it is judged necessary they should respectively be made specific parties, that they may discover a state of the said M'Keands assets real and personal, in case there should not be sufficient of the latter to satisfy this demand; therefore the cause is remanded to the high court of chancery, for the suit to be revived there against his executors or administrators, as well as the heirs or devisees of his real estate, and further proceedings to be had therein, in order to such final decree.'

COMMENTARY.

The verdict in the district court ought not to be considered as settling the bounds of the ground in dispute, since the same is certified by the judge to have been given against the weight of evidence;] if the

judge of the high court of chancery have the same evidence before him which was before the district court, as was the case here, and shall happen to differ in opinion with the judge of that court, as was likewise the case here, being of opinion that the weight of evidence was in favour of the defendents, to evince the rectitude of which opinion will be attempted anon, what ought the judge of the court of chancery to do? ought he, disregarding the verdict, and not only resigning but contradicting his own opinion, to form such a decree as will accord with the sentiments of the district judge? ought he to award another trial? and that toties quoties? if, upon
102 *another trial, before a different judge, he and the jury should change sides, or if the court should certify the evidence to have been in equilibrio, so that it would justify a verdict in favour of either party, of which one example is extant; what course ought the court of chancery to pursue?* to these questions a fit answer perhaps occurs in the next words:

But that the decision ought to be made upon the proofs and exhibits in the cause.] be it so.

That under the scheme, published by William Byrd, the adventurers in the lotery had a right to expect, in the prize called M'Keands tenement, all the ground that had been occupied, as part thereof;] these terms, notwithstanding the seeming plentitude of their sense, are so defective that, until an ellipsis be supplied, a fair reasoner might neither yield nor withold his assent to the truth of the proposition, which they now exhibit. the ellipsis is of the occupier, so that whether he were Letcher, or Woodson, or Gun, or M'Keand, or whether the occupiers were all the three former, or any two or one of them, is uncertain. if it be supplied so that the proposition be read thus: 'under the scheme, published by William Byrd, the adventurers in the lotery had a right to expect in the prize, called M'Keands tenement, all the ground that had been occupied by Letcher, Woodson and Gun, or any two or one of them, whilst they were tenents of the house which John M'Keand afterwards held,' the truth of the proposition is denied. 1, because the exhibit, to which the reversing decree refereth to prove the truth of the proposition, will be hereafter shewn to prove the contrary. 2, because the occupations of the land in dispute are not proved to have been so uniform and permanent as that the said occupied land could be truly said either in the technical or popular sense to be appertinent to the house in which John M'Keand afterwards dwelled. 3, whether the cultivating tenants had any kind of title to the ground which they cultivated doth not appear. that they were intitled to what is called a curtilage may rationaly be supposed; but this term is believed to comprehend only those accommodations which are convenient to mere indwellers, such as a way, a yard, and some others.

Again; the word 'thereof' is put for 'M'Keands tenement.' if then these terms be put in the place of their repre-
103 sentative *'thereof,' the proposition will be read thus: 'under the scheme, the adventurers had a right to except, in the prize, called M'Keands tenement, all the ground that Letcher, Woodson and Gun had occupied, as parts of M'Keands tenement;' that is, the adventurers had a right to expect, in the prize, called M'Keands tenement, in 1767, all the ground that Letcher, Woodson and Gun, several years before it was M'Keands tenement, had occupied, as part of M'Keands tenement.

If the proposition be read thus: 'under the scheme, published by William Byrd, the adventurers in the lotery had a right to expect in the prize, called M'Keands tenement, all the ground that had been occupied by John M'Keand, as part thereof,' the truth of the proposition is admitted—then let us appeal to the scheme, the exhibit to which the reversing decree refereth to prove the other sense—'i will dispose,' says William Byrd, 'by lotery, twenty nine improved lots, among them, John M'Keands tenement, for which he payeth me twelve pounds annual rent.' now the tenement for which John M'Keand paid twelve pounds annual rent, was a house, and nothing but a house. the whole description of that prize, offered to the adventurers by the scheme, therefore, was verified in the house, without the ground: so that William Byrd, by annexing ground to the house, gave more than the adventurers had a right to expect.——besides no proof is exhibited of the rents paid by the predecessors of John M'Keand. that occupying ground, as well as the house, they paid more rent than he paid, who occupied one of the subjects only, is presumable. if it be presumable, and if the description of the prize offered to the adventurers, by the appellation of John M'Keands tenement demised for the annual rent of twelve pounds, be more than completely verified, as it certainly is, no reason can be assigned for extending that description, as the reversing decree hath extended it, according to which it must be understood as if it had been in these, or some such terms: 'the tenement formerly Letchers, afterwards Woodsons, lately Guns, now John M'Keands, worth 144 pounds, and rented at 12 pounds,' an interpolation which seemeth unjustifiable, and the more unjustifiable if the value of the house with the occupied land exceded one hundred and forty four pounds, or if the annual rent thereof exceded twelve pounds.

Which occupation ought rather to be collected from that of former tenents, who kept a public tavern on the tenement, which

*[The Court of Appeals only say: "The verdict in the District Court ought not to stand upon the certificate of the judges that the weight of evidence was against it: since it is unusual for the Chancellor to be satisfied with such a verdict: and though the Chancellor was to judge whether his conscience was satisfied, this Court exercising their legal discretion on the same subject, see no reason to depart from the general rule, and therefore, take up the case upon its original merits." [1 Wash. 337.—Ed.]—Note in edition of 1852.

drew the attention of the public thereto, than from that of M'Keand a private single man who had no occasion to occupy the whole.] that is, which occupation by Letcher, Woodson and Gun of ground near the house in which they lived before
104 John *M'Keand, ought rather to be collected from the occupation of those tenements, than from the occupation of M'Keand, who occupied no part of the ground, except that on which the house stood. undoubtedly.

And that the occupation of such former tenents extended so as to include the ground in dispute:] if the occupation of former tenents did extend so far, this will not prove the plaintiffs title to the ground in dispute, unless his title be proved to all the ground which those former tenents occupied.

That the survey made by Benjamin Watkins, at the instance, of the said Byrd, after the publication of the scheme by which the bounds of the tenement are supposed to be narrowed, ought not to effect the interest of the appellant, since neither he nor M'Keand, the tenent, at the time, appears to have been present so as to imply the consent of either that the occupied bounds should be changed;] without a survey and plan or map, how could the lotery, that is, such a lotery as was proposed by William Byrd, and expected by the adventurers, have been drawn? how could any man know whether a prize were an improved tenement, or one hundred acres, or half an acre of bare land, or whether it were on this or that side of the river, or whether it were on neither? must not the fortunate adventurers have divided among them the prizes equaly, which was never designed, or have divided them by another lotery, inconsistently with the original proposal, according to which the destiny of every ticket ought to have been decided by a single sortilege?

A survey and map then, if without them the lotery could not have been drawn in the manner proposed, were necessary; as in the reversed decree are stated to have been. if they were necessary, to give them efficacy, consent of the ticket holders, if their consent could not have been obtained, was unnecessary. for that an act, the performance whereof was necessary, shall not be valid, without the intervention of something which is impossible, is denied; the terms of the proposition implicating this absurdity, that what must be done shall be a nullity after it is done.

And the impossibility to obtain the consent in question, that is, the consent of all the holders of tickets, for the consent of every other was necessary, if the consent of the plaintiff were necessary, will perhaps be confessed by every candid man, who adverts to the number of people interested in ten thousand tickets, the dispersed places of their residence, the number of those who sold the tickets, not fewer than ten having been first nominated for that office, the multifarious transfers of tickets, the sales of tickets after the survey, and among
105 them possibly the *plaintiffs ticket, and other impediments to procuring the consent too many to be enumerated easily.

If William Byrd had indeed narrowed the bounds of the tenements, in such a manner that they did not contain the quantities of ground, for which tenents paid the rents published in the advertisement, he would undoubtedly have done wrong. that he narrowed the bounds of John M'Keands tenement perhaps must not be now denied. but if he narrowed the bounds, that he did it ignorantly and without design to injure any man is most probable; because the ground, of which the abscission is supposed, was not, by the survey and map, made a separate lot, by which being proprietor of the soil, he might have been a gainer, but, instead of being included in John M'Keands tenement, was included in Byrds warehouse tenement, by which he could not have been a gainer, otherwise than as a fortunate adventurer. he was indeed that fortunate adventurer. but, at the time of the survey, that the ticket, against which Byrds warehouse tenement was drawn a prize, would be left upon William Byrds hands or would be fortunate, could not be known. if any other man, instead of William Byrd, had drawn the warehouse tenement, the plaintiff, as is supposed, could not have recovered the ground in dispute, but, if he were injured by the survey, must have clamed a reparation from William Byrd. and that is thought to be the only remedy to which the plaintiff was intitled, if he were intitled to any remedy, in the principal case.

By the words 'the survey ought not to affect the interest of the appellant, since neither he nor M'Keand, the tenent at the time, appears to have been present, so as to imply the consent of either, that the occupied bounds should be changed, those who used them are supposed to have implicitly conceded, that the survey, if either the plaintiff or M'Keand had been present, so that his consent might have been implied, would have affected the interest of the plaintiff. the concession is supposed, because it is believed to be unavoidable. that the survey then, made with consent of John M'Keand, would have affected the interest of the plaintiff, that is, would have bound the plaintiff to abide by the survey, being granted; if such an obligation could not have been wrought by such a consent, the obligation, which is admitted to exist with the consent, exists without it, for the absence of that, which, if present, would not produce or preserve a thing, cannot prevent or terminate its existence. now the consent of John M'Keand to the survey could not have bound James Southall to abide by the survey, unless James Southall had authorised M'Keand to consent to it, or
106 derived the right, *which he endeavoured to assert, from John M'Keand; neither of which is pretended. however, that the consent of John M'Keand to the survey should be doubted seemed impossible before the reversing decree because,

1, no reason for his dissent is assignable; 2, he hath been claiming under the survey, and endeavouring to prove the validity of it, ever since it was made, and doth not appear to have objected to it at any time.

Nor is such implied consent in the appellant to be infered from the exposure of that plan in the room where the lotery was drawn, even if he had read it, which does not appear,] if, because he doth not appear to have read the plan, the evidence of his consent to the survey be defective, it seems defective in two other instances: first, that he could read doth not appear; secondly, that he understood what he read doth not appear.

Since he could not from thence discover whether the tenement was described therein according to the occupied bounds or not:] the court of appeals seem to have supposed that, against the paper, having the same number with that of the plaintiffs ticket, was drawn another paper, on which were written the words John M'Keands tenement; which, without reference to any map, was sufficient to point out his prize. upon which supposition the transaction between William Byrd and the plaintiff, the terms thereof being translated into the language of a solemn agreement, would be exhibited in this or such like form; 'in consideration of five pounds, received from James Southall, to whom is delivered a ticket, numbered 5187, if against a paper, on which that number shall be inscribed, be drawn a paper, whereon shall be written the words 'John M'Keands tenement,' i, William Byrd, oblige myself to convey the title of the said tenement, called John M'Keands, by whatever bounds it ought to be limited, to the said James Southall.' but that any paper, on which were written 'John M'Keands tenement,' was drawn, is not proved; the contrary is presumable, from the ordinary course of proceding in similar cases, which is, by numerical characters on the papers drawn, to refer to some catalogue, where particular descriptions of the prizes may be found—and, not only presumable but, proved undeniably by the list of fortunate numbers published by the managers, the very exhibit on which the plaintiff chiefly relied, and which concludes thus: 'N. B. in the first column of figures are the numbers of the tickets, in the second the NUMBER to each prize' this being the case then, the compact between William Byrd and the plaintiff is exhibited truly in this form: 'in consideration of five pounds, received from James Southall, to whom is delivered a ticket numbered 5187, if
107 against a paper whereon *that number shall be inscribed, be drawn a paper, which is marked with the characters 327, i, William Byrd, oblige myself to convey to the said James Southall the title of a parcel of land, represented in the map of Richmond, by that diagram, which is marked with the characters 327, and on which is written the word M'Keands.' if this be correct, the plaintiff, when he quarreled with the plan, excepting to the admission of it in evidence, was thought ungrateful to a benefactor, and is thought so still, by one, who is not enough enlightened by the reversing decree, nor enabled otherwise, to discover that, without the aid of the plan, the plaintiff could have shewn any title whatever to the tenement now holden by him for M'Keands.—how, with the aid of the plan, the title might have been shewn, and probably was shewn, will be explaned.

In the mean time, let one ask if that part of the reversed decree, which states part of the land included in M'Keands tenement by the survey never to have been cultivated or otherwise occupied by M'Keand or any tenant before him, deserved to have been totaly neglected in the other decree? ought the plaintiff to recover the value of the land which had been occupied by the former tenents, in right of that occupation, and in violation of the survey, and yet retain the ground which had not been occupied by those tenents in right of that survey?

And therefore it is unnecessary to decide how far the copies from that plan ought to be admitted as evidence:] a hearer of the reversing decree, convinced perhaps by the preceding parts of it, may yield assent to this part, in which the plan of Richmond, even if the original were produced, is treated as a tabula rasa, merely because a certain James Southall, owner of one ticket, which before the drawing of the lotery no man could know to be more the darling of fortune than any other of ten thousand tickets, DOES NOT APPEAR to have been present when the lands represented in the plan were surveyed, or to have read the plan, suspended in the house where the lotery was drawn, at the time, or to have been able to discover from the plan whether the tenement called John M'Keands was described according to the occupied bounds. in opposition to this a man, who is not convinced, ventures to declare that, in his judgment, the plan alone, if admited to be evidence, is decisive of the question.

In shewing this, the copy exhibited by the defendents, may be taken to be a faithful exemplar of the original, not only because the proofs that it is so, explicitly stated in the decree of the high court of chancery, have not been controverted, but because those who reversed the de-
108 cree, waiving that question, *have denied that the survey, represented by the plan, that is the original plan, if it were produced, ought to affect the interest of the appellant, James Southall, or the interest, if not of him, of any other fortunate adventurer. an hypothetical argument may fairly be answered hypotheticaly.

The case then may be stated, as to this question, thus:

William Byrd owned the towns, as he called them, although the grounds do not appear at that time to have been disposed in lots and streets, of Rockyridge and Shockoe, the names of which were afterwards changed to Manchester and Richmond by which they are now distinguished, lying

on opposite sides of the James. he also owned other lands in the neighbourhood. within the limits of these towns and adjacent to them were twenty nine tenements, for which were paid by the holders of them certain annual rents. one of these tenements was holden by John M'Keand who paid twelve pounds annual rent, occupying a house, but not any part of the land about it.

William Byrd published his intention to sell the inheritance of these lands to those people who, paying the value of them, equal to fifty thousand pounds, would consent that the subjects to be sold, instead of being divided into so many parts as were equal to the number of purchasers, and being distributed so that every one of the later would be intitled to one of the former, should be divided into 839 parts or lots, in such a manner that every improved tenement should be one lot or prize, every hundred of ten thousand acres of land, situated in this place, should be one lot or prize, and every half acre of the land situate in another place should be one lot or prize, and every one of certain islands should be a lot or prize—that every purchaser should have one or more slips of paper called tickets, paying five pounds for each, on which were written, after the number, shewing its place in the arithmetical series of 1 to 10000 inclusive, these words: 'this shall intitle the owner to such prize as shall be drawn against it, in W. Byrds lotery, 1767, W. Byrd.' such a ticket, the number whereof was 5187, had the plaintiff.

For purposes explaned in the decree of the high court of chancery, William Byrd procured the lands to be surveyed and the situations and boundaries of them were represented in a plan. tickets were sold and in the hands of perhaps 2500, 3000 or more purchasers.

In order to determine which ticket would win a lot or prize, the managers appointed to superintend the drawing are supposed to have conducted the business in the following manner: 10000 other slips of paper, on which were written numbers corresponding with the numbers of the tickets holden
109 by the purchasers, *were droped into a wheel, wherein was a cavity closed so that they would not fall out in revolutions of the wheel; and into a similar wheel were droped slips of paper equal in number to the others, of which, 9161 were blank, no letter or signature being written on them, and the others were marked by the characters 839 inscribed on one, the character 1 inscribed on another, and characters significant of the numbers between those extreme terms inscribed in a progressive order on the remainder.

When, from the wheels, after being turned for confusing their contents, the attendant upon each drew one paper, if that drawn from the prize and bank wheel were marked, the characters thereof were entered in a list opposite to the number on the paper drawn from the other wheel.

For example: when the paper numbered 5407 was drawn from one wheel, opposite to it were entered in the list the characters 301, on the papers drawn at the same time from the prize and blank wheel: when the paper numbered 5187 was drawn from the former wheel, opposite to it were entered the characters 327 on the paper drawn at the same time from the later wheel: and so on until all the 839 characterized papers were exhausted.

The entries were in different columns. the column which contained the numbers corresponding with the numbers of the tickets shewed to the holders of those tickets that they were fortunate; and the other column, containing the characters on the papers drawn at the same time, refered the holder to some map, by which they could discover in what their felicity consisted; so that this later column was nothing more than an index to that map in which corresponding characters would designate the prize; and that map was the plan in this case.

When therefore the paper numbered 5187 was drawn from one wheel, the characters 327, on the paper drawn from the other, refered to the plan which shewed the same characters there inscribed; so that the plaintiff must have resorted to this very plan in order to intitle himself to the prize which his ticket won, and that would have been no more than the quantity represented in the plan.

But after the lotery was drawn, the managers, for information of the purchasers, published a list of fortunate numbers in this form:

No. 5407	a double forge and mill with 2000 acres of land.	No. 301
5254	a ferry &c	
5187	M'Keands tenement.	327

N. B. in the first column of figures are the numbers of the tickets; in the second the number to each prize.

110 *Every candid man will probably grant, without proof, that the managers, or their amanuensis, in preparing this list, had recourse to the plan. for that they could otherwise know whenever a prize was drawn what it was; or, if they could, that they would have suffered an enquiry, for obtaining the knowledge, to interrupt their progress in a business which must have employed them several weeks, cannot be supposed.

But the plaintiff, instigated by zealous friends, who discovered that the lines, including the lot 327, upon the area of which in the plan the surveyor had written the word M'Keand, would not include all the ground which had been occupied by that tenents predecessors, in order to assert his title to the surplus ground, waived the plan, as not binding upon him because he did not agree to the survey, and pretended to clame by the original scheme, and the publication of the managers, preposterously supposing the later to refer to that scheme, and not to the plan, whence one can scarcely doubt it was taken. and he hath been more successful than his counsil seemed to ex-

pect; for the original plan not being ostensible, they laboured to prove that the copy ought not to be admitted in evidence; but, according to the reversing decree, the former, if admitted, would not hurt him.

That the appellant being thus intitled to the ground in dispute and M'Keand a purchaser with full notice of that title, if the appellant had prosecuted his clame immediately, and M'Keand had proceded in improving the ground, he would probably have lost both together:] if the plaintiff could have vindicated his title in a court of common law, and there had prosecuted his remedy, and been as successful as he was in the court of appeals, M'Keand must have lost both together, unless the court of equity would have him relieved, so far as to award some kind of compensation. whether it would or would not have relieved him? is a question which, when to determine it in some other case may become necessary, will seem to deserve consideration to one who reads what Home had said, on this question, in his principles of equity, part I. sect. II. art. I.

But however it might have been in that case, the plaintiff, for recovering what he clamed in this case, the title which only could demand audience in the court of common law, resting at this day in Charles Carter, one of the defendents, necessarily resorted to the court of equity; a court which requireth of its votaries that they perform that justice which they exact from others.

But since the appellant, &c. to the
111 end of the paragraph.] *what law will authorize the application of John M'Keands real estate, in the first instance, to supply the deficiency in his personal estate, to satisfy the damages which may be found, on trial of the issue to be directed? perhaps the deficiency intended is what may be caused by discharging out of the personal estate demands chargeable on the real estate. can execution be awarded against the executors or administrators of John M'Keands for the costs in the court of appeals? as they are now to be made parties must they not be convented by subpoena to answer the bill, or, being called specific parties, must they only disclose the assets?

BETWEEN
WOOD JONES, *appellant.*
AND
ELISHA WHITE, *appellee.**

May, 1791.

Chancery Jurisdiction—Title to Land—Fraud.—In controversies respecting conflicting titles, by grant, to lands, where fraud is suggested and proved, Courts of Equity have competent jurisdiction, are most usually and properly resorted to, and can afford ample and adequate relief. Held by the Court of Appeals and also by the chancellor on reconsideration. Bill dismissed, because fraud was not proved. See this appeal in 1 Wash. 116.

*For the continuation of this case, see White v. Jones, 1 Wash. 116, 4 Call 253.

A TRACT of vacant land was surveyed for Henry Hatcher, in the year 1740, and was granted to him by letters patent, which were sealed the 16 day of august, 1756.

Leave was granted, by the governor in council, the 3 day of may, 1744, to Wood Jones, to survey and obtain a grant of land, which was accordingly granted to him, and within the bounds of which is included the land granted to Henry Hatcher.

The appellee, in the year 1780, filed a bill in equity against Wood Jones in the county court of Charlotte, stating that, in the year 1761 or 1762, the appellee purchased the title of Henry Hatcher, paying to him a valuable consideration for it; that the appellee being afterwards informed of the grant to Wood Jones, and that it included the land granted to Henry Hatcher, upon inquiry discovered that by occasion of a dispute between the people and governor of Virginia, the latter of whom demanded of a fee, which the other thought unlawful, for his signature to the grants of land, the grant to Henry Hatcher had been detained in the land office, and in the mean time the title was liable to forfeiture by non performance of the conditions in the grant; and that the appellee, in order to save it, entered a petition
112 *for a grant of the land to himself, which he obtained. this grant sealed the 15 day of august, 1764, is annexed to the bill. the appellee charged that Wood Jones clandestinely, whilst the dispute before mentioned depended, paid the fee demanded by the governor, and procured his grant; and prayed a decree that Wood Jones should give and restore to the appellee the land granted to Henry Hatcher.

Wood Jones died, not having answered the bill.

A bill of revivor was filed against his son and heir of the same name.

Who in his answer thereto denied notice of Hatchers survey, and said nothing supposed to be material, unless it be this: that he did not conceive this dispute to be the proper object of a court of chancery.

The cause being heard on the bill, answer, and certificate of survey for Henry Hatcher, order of the governor in council to Wood Jones, and the grants to Henry Hatcher, and the appellee, read as exhibits, the county court decreed that the plaintiff (appellee) recover against the defendent the land clamed by him; that the appellee be quieted in possession, and that the defendent pay to the appellee his costs.

From this decree the defendent on his petition, was allowed an appeal to the high court of chancery; on hearing which, the 12 day of may, 1791, that court delivered this

OPINION,

That the appellees title, if any he hath, to the land in controversy, must be supported on this foundation: that the grant to Henry Hatcher operated retroactively—giving to his title like vigor as if the consummation thereof, by the grant, had been cotemporaneous with the commencement,

which preceded the commencement of the appellants right;—or on this other foundation: that the grant to Wood Jones was obtained surreptitiously, when the officer, to whose function the transaction of that business belonged, did not know part of the land comprehended in the grant to have been appropriated, or clamed, by another, who, in not perfecting his title, had been in no default, or was obtained by collusion between the officers and the grantee. and upon supposition that the grant to Henry Hatcher by relation was prior in effect, although posterior in date, to the other, or that the latter was fraudulent, this, so far as it intended to intercept his right, was void, and the appellees remedy in a court of common law was proper and adequate. and this court discerning no ground for application by the appellee to a court of
113 *equity, especially when that so great a length of time had elapsed, after the commencement of Hatcher's title, before any one appeareth to have attempted to assert it, and the manner in which it was derived to the appellee, are remembered, is of opinion the decree of the county court is erroneous, and

Reversing that decree, dismissed the appellees bill. from which decree Elisha White appealed.

OPINION AND DECREE of the court of appeals,* 13 day of october, 1792.

This day came the parties and on mature consideration of the transcript, and the arguments of the counsil, although this court doth not approve of the general reasoning in the introduction to the decree of the high court of chancery, being of opinion that in controversies of this nature, where fraud is suggested and proved, courts of equity have competent jurisdiction, are most usually and properly resorted to, and can afford ample and adequate relief; yet since the appellant (Elisha White) hath made no proof in support of the allegations of his bill, or of any fraud on the part of Wood Jones, father of the appellee, in obtaining his patent, this court is of opinion there is no error in the said decree, therefore it is decreed and ordered that the same be affirmed.

REMARK.

The decree of the court of chancery is, upon reconsideration, admitted to have been made upon a wrong foundation, namely, that the appellee, if he had any title, having an adeaquate remedy to recover it by action in a court of common law, ought to have resorted to that remedy; the nature of this controversy being such that to the court of equity the appellee might properly resort, as the court of appeals have stated in their opinion. if Wood Jones, the father before the grant to him, had known of the grant to Henry Hatcher, or perhaps of the survey for him, the latter grant would have related, as is conceived, to his survey, the origin of his title, and have avoided pro tanto the grant to Wood Jones, as well in a court of law as in a court of equity. but that notice not being confessed or proved, nor even explicitly charged in the bill, the relation which is never allowed to antedate an act, if an innocent stranger would be thereby harmed, is inadmissible. the doctrine contained in the decree conformably with what is said here, on the subject of relation, is supposed not to have been disapproved by the court of appeals.

*This appeal is reported more fully in 4 Call 253, than in 1 Wash. 116.—Note in edition of 1852.

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*BETWEEN 114

WILLIAM DAWSON, *plaintiff*,

AND

BEVERLEY WINSLOW, *defendent*.

May, 1791.

1. **Penalties—Equitable Relief against—Case at Bar.**—Injunction to judgment founded on an award. D. owing only £100 was induced to give his bond for £150—the £50 being regarded as a penalty.—Equity will relieve against said penalty. not only upon the general principle of making compensation. but because in this case the plaintiff was prevented by defendant (who was also guilty of fraud) from performing one of the alternatives agreed upon.
2. **Awards*—Setting Aside.**—An award will be set aside for improper and unfair conduct of the referees.
3. **Same—Power of Court of Appeals to Correct.**—The Chancellor's remarks on the opinion of the Court of Appeals; and as to their power to correct awards. See Ross v. Pleasants, Shore & Co., in this volume, p. 25; and 1 Wash., 158.

THE bill was to enjoin a judgment, founded on an award.

The plaintiff, in september, 1783, agreed to purchase 150 acres of land from the defendent for 200 pounds, and, some weeks afterwards, executed two bills penal for payment, one of 100 pounds, and the other of 150 pounds, to the defendent, on or before the 25 day of december, in the same year.

The defendents design in taking one bill, which the plaintiff reluctantly signed, for 150 pounds, instead of 100 pounds only according to the agreement, was by subjecting the plaintiff to the penalty of 50 pounds, to secure punctual payment or an equivalent. this if it were not confessed by the defendent, in his answer, would be manifest by a memorandum on the same paper, signed by him, purporting to be an agreement that the bill might be discharged by payment of 100 pounds, on or before the 25 day of december then next, or by delivering to the defendent a bond which he had given for 100 pounds payable to Henry Garrett the 10 day of february thereafter; and that the plaintiff had liberty til that day to procure the bond.

*Awards.—See monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

Henry Garrett had promised the defendent, at his request, the time of which request doth not appear, not to part with this bond, before the money should become payable.

The plaintiff, a few days before the day of payment, applied to Henry Garrett, and proposed to take up the bond, offering to give his own bond, with a surety, for payment of the money, to which Henry Garrett would have consented, if he had not made the promise; although he agreed to assign the same bond, when the money should be payable, to David Garth, if a contract made with him should not be discharged otherwise. Henry Garrett referred the plaintiff to Garth that by a treaty be-
115 tween *them the plaintiff might obtain the bond. a treaty was accordingly between them, but without effect at that time, Garth refusing to accept the plaintiffs, in exchange for the defendents, bond, from whom the money, or a negro in part payment, was expected.

On the 8 day of november, 1784, the defendent paid 14l. 6s. 2d. to Garth, now the holder of the bond, by which, after 3l. 14. 3d. deducted for interest, 89l. 8s. 1d. of principal money, remained due.

David Garth, on the 19 day of february, 1785, assigned the bond, for the money then due by it, which was 90l. 13s. 3d. to the plaintiff, and he ten days afterwards was preparing to deliver it, with 70l. 6s. 0d. in money, to the defendent, who eluded a formal tender thereof, so soon as he discovered the plaintiffs intention, by withdrawing abruptly. yet the defendent on the bill penal for the 150 pounds endorsed a credit for Henry Garretts bond.

The defendent having commenced actions at common law on the bills penal, in the county court of Spotsylvania, and the plaintiff having confessed a judgement for 41 pounds, which was three pounds and some shillings less than was due to the defendent, if the plaintiff were chargeable by both the bills penal with no more than two hundred pounds of principal money; by consent of parties, on the 3 day of november, 1785, all other matters in difference between them, respecting those suits, were refered to the final determination of Joseph Brock, William Smith, Edward Herndon, and James Lewis, or any three of them, whose award thereupon was to be made the judgement of the court; and all errors in the proceedings were released.

Three of these referees reported, that having heard the parties, and examined their accounts and papers, they found a balance due to the plaintiff (who is defendent in this suit) of 55l. 16s. 6d. exclusive of the judgement confessed for 41 pounds, and awarded the present plaintiff to pay the 55l. 16s. 6d. with interest from the date of that act, and costs to the present defendent. according to which award the judgment sought to be enjoined was entered.

Two of the referees, examined as witnesses, deposed, that when they were appointed arbitrators, and undertook the office, which had frequently happened, they supposed themselves judges both of law and equity; and confessed that to them the defendent or his attorney read a state of his case, but do not remember whether the rehearsal had or had not influence on the referees; and by one of them this question, which the defendent propounded, were not the parties and their attorneys
116 *heard with patience; and were not their accounts and other papers examined; and all other testimony that was offered by either party at the trial properly attended to? was reported by the commissioners, who took the examination, to have been answered in the affirmative.

Two witnesses, attending the referees, on behalf of the plaintiff, were not examined by them, who declared it was not worth while to examine any witnesses, nor do they appear to have examined any.

The plaintiff excepted to reading the statement of facts by the defendent, which nevertheless was read by him and his attorney, before the arbitrators, and seems to have been admitted, although the plaintiff alledged that he could disprove some of the facts by witnesses, if the arbitrators would examine them.

The memorandum on the bill penal for 150 pounds had been torn off by the defendent, although it was produced, with other papers, to the referees.

At the hearing, 20 day of may, 1791, the high court of chancery delivered this

OPINION,

That the defendent, in prosecution of a design to gain and secure to himself a profit illegal and unrighteous, was guilty of fraud, both in tearing the memorandum from one of the bills penal, and in obstructing the plaintiff in the procurement of Henry Garretts bond, mentioned in the memorandum; (a) and that the referees, in deciding the difference submitted to them, acted in such a manner that the award made by them ought to be set aside; and

Decreed a perpetual injunction to the whole judgement, awarding to the plaintiff the costs in the action wherein the judgement was given, with the costs of the suit in equity.

The court of appeals* before whom
117 the cause was brought *by the defendent, 17th day of october, 1792, pronounced the following

(a) The court of chancery would not. for this reason only. have set aside the award. if the arbitrators had not appeared to have acted improperly: because the sentence of arbitrators. even if to a court it seem unjust. was theretofore thought to be definitive: but the arbitrators were believed to have misbehaved in refusing to examine witnesses produced by the plaintiff. whose testimony appeareth. by their written examinations. to have been pertinent and important. and might and probably would have contradicted or represented differently the facts stated by the defendent before the arbitrators. and supposed to have been admitted by them.—Note in edition of 1795.

*[The report of this case in the Court of Appeals is in 1 Was. 119. See Groves v. Graves. 1 Wash. 1.—Ed.] Note in edition of 1852.

OPINION AND DECREE,

'That there is error in the said decree, in making the injunction therein stated perpetual, as to the whole judgment for fifty five pounds sixteen shillings and six pence, and the interest, whereas three pounds twelve shillings and eight pence, part thereof, appears by the record to have been due to the appellant, on the 3 day of november, 1785, for the balance of the bond for 100 pounds and the money paid by the appellant to Garth in part of his bond to Garret and interest to that time, over and above the 41 pounds, for which judgement was on that day confessed, and made no part of the 50 pounds and interest in dispute between the parties: that as to the said 50 pounds and interest there is no error in the said decree, the court being of opinion that the said 50 pounds, was to be considered as a penalty for further inforcing the payment of 100 pounds, or procuring an assignment of the appellants bond to Garret for that sum, against which penalty the appellee was intitled to relief in equity, not only by the general principles of that court, to relieve against penalties on making compensation, but, because in this case, the appellee was prevented in performing one of the alternatives by the interposition of the appellant, and that the said decree is not erroneous as to the costs at law, more money appearing to have been tendered to the appellant before suits brought than was due to him at that time. Therefore it is decreed and ordered that the said decree be reversed and annulled as to 31. 12s. 8d. part of the judgment for 55l. 16s. 6d. with interest from the 3 day of november, 1785, that the injunction obtained by the appellee in the said high court of chancery be dissolved as to so much; that the residue of the said decree be affirmed, and that the appellee pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

REMARKS.

The court of chancery is confessed to have erred in perpetuating the injunction to the whole judgment. an account was not stated, as it ought to have been, at the hearing, to shew that the money due from the plaintiff to the defendent was between three and four pounds more than the 41 pounds, for which the judgement had been confessed.

Upon the main question in the case, 118 namely, whether the *plaintiff ought to be relieved by a court of equity against the judgment? the opinion of the court of appeals is stated in these terms, that the said 50 pounds was to be considered as a penalty for further enforcing the payment of 100 pounds, or procuring an assignment of the defendents bond to Garret for that sum, against which penalty the plaintiff was intitled to relief in equity, not only by the general principles of that court, to relieve against penalties on making compensation, but, because in this case the appellee was prevented in performing one of the alternatives by the interposition of the appellant. by which that court is supposed to have considered the case in the same manner as if no award had been made in it: and consequently to have established this position, that a court of equity hath power to relieve against a judgment founded upon an award, if the award appear to be contrary to the principles of equity, and if, as in the present case, the party, in whose favor the award is, had by his interposition prevented the other party from performing something whereby he would have saved a penalty, which he was condemned by the award to pay; and this notwithstanding the whole matter discussed before the court of equity had been discussed before the arbitrators.

That, in this case, the matters discussed before the court of chancery were discussed before the arbitrators is manifest by the exhibits and testimony, the question controverted between the parties, before both tribunals, being only, whether the defendent ought or not to have the fifty pounds penalty?

The act of the arbitrators may be understood therefore in the same sense as if their sentence had been declared in these term: upon the two questions controverted between the parties we are of opinion, 1, that the defendent (that is the plaintiff in the court of chancery) ought not to be relieved against the penalty of fifty pounds, upon making reparation for all damage sustained by his failure to deliver to the plaintiff (that is the defendent in the court of chancery) his bond to Henry Garret, within the time limited. (b) and 2, that the plaintiff is intitled to the fifty pounds penalty, although it was incurred by his act and default, the one, in obtaining a promise from Henry Garret not to part with the bond before a certain time, and the other, in not having released, Henry Garret from the promise before the defendent applied to him for the bond. and therefore we do order and award, that the defendent pay 119 to the plaintiff 55l. 16s. *6d. the principal money, including that penalty, found due to him from the defendent, exclusive of the 41 pounds for which judgement hath been confessed, with interest from this time, and costs.

Let us admit the opinion of the arbitrators to have been erroneous in each question; hath any court, for that reason only, power to correct their sentence?

The object of these compromissary disceptations is to prevent the expense, delay, turbulence, and other inconveniences of forensic litigation. the parties intend the determination of the arbitrators to be final. it is so declared in the formula by which the controversy is submitted to their deter-

(b) In truth no damage was sustained: but the plaintiff derived no less benefit from the defendents procurement of the bond, at the time when it was procured, than he would have derived from a procurement before expiration of the time limited. —Note in edition of 1795.

mination. it was so declared in the submission in this case.

When parties differ in opinion, or pretend to differ in opinion, each thinks, or pretends to think, the opinion of the other wrong. the question then between them is which is right? unable theirselves to decide this question they empower other men to decide it for them. the submission to those men imports an agreement by each party that he will allow to be right that opinion which the arbitrators determine to be right. the judgement of the arbitrators therefore is the judgement of the parties. he whose former opinion the arbitrators condemn is selfcondemned. this is believed to be the genuine ratio which breathes in the trite argument, against rescission of awards, unless for some misbehaviour in the arbitrators, namely, that they are judges chosen by the parties themselves. the choice of parties cannot make the arbitrators abler judges. and if the arbitrators may justly be suspected of inclination to favor the party who chose them, they ought not to be chosen, nor ought their sentence to bind the other party, if he knew not the cause of suspicion. from the sentence of arbitrators no direct appeal lieth to any court. accordingly courts of appeal are appointed to reverse and correct the decisions of courts which form part of the judiciary system, and not to reverse and correct the decisions of judges whom the parties appoint to adjust their disputes.

This doctrine is not peculiar to us, nor to our times.

In Athens, the sentences of their diallacterioi, who were judges chosen by the parties, differing from our arbitrators only in being sworn, were not reversible, as we learn from the oration of Demosthenes against Midias.

By the roman civil law arbitrorum genera sunt duo, unum ejusmodi, ut sive aequum sit, sive iniquum, parere debeamus: quod observatur, cum ex promisso ad arbitrium itum est. Dig. lib. XVII. tit. LVI. I. 76. qualem autem sententiam dicat arbiter, add praetorem non pertinere, Labeo ait, dummodo dicat quod ipsi videtur. Dig. lib. IV. tit. VIII.

120 *In many cases, however, a refusal to abide by an award is justifiable, and in such cases the magistrate, without whose authority execution of the sentence cannot be enforced, may, not only deny his aid but, abrogate the sentence. for example, 1, where an arbitrator giveth sentence for the party by whom he is bribed, or giveth sentence for one party, moved by good will toward him, or ill will toward his adversary; because the arbitrator is disqualified to perform the office undertaken by him, that is, the office of a judge, who ought to give the sentence which the praecepts of justice dictate, not the sentence which corruption in the one case, or affection or malice in the other cases, may prompt: the sentence of a judge, who thereby earneth sordid wages, or gratifieth a vicious passion, is no less a void act, than it would be, if he were to gain a part of the thing in controversy. 2, where the arbitrator giveth sentence for one party whom he doth hear, without hearing the other party, or giveth sentence without hearing either party, or, after hearing both, without bestowing convenient time in deliberating on the subject of controversy; because he doth not perform the office of a judge, which is to decide after hearing both parties, and to decide after duly deliberating on their allegations, the former being idle, if not rendered momentous by the other. 3, where the award itself is shewn to be such as could not not have been made without corruption, improper influence, (c) or precipitancy in the arbitrator, which hath frequently happened.

The writer of these remarks perhaps hath mistaken the decree of the court of appeals, if not, he asks whether it be not a decree primae impressionis, and whether it doth not constitute every court of equity a court of appeals from awards?

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*BETWEEN 121

ROBERT GAINES BEVERLEY, *plaintiff*,

AND

JOHN RENNOLDS, executor of Leroy Hipkins, *defendent*.

Oct., 1791.

1. **Equitable Relief—Award on Illegal Contract.***—An award condemning a party to pay damages for refusing to ratify an illegal and fraudulent contract is not binding; and relief against a bond given in conformity with said award is properly sought in equity.
2. **Same — Award — Excessive Damages.** — Excessive damages alone ground of relief, as proving the arbitrators to have acted in some unjustifiable manner.

THE plaintiff Beverley, an improvident young man, in order to be supplied with money for present purposes of gaming and squandering, having agreed, whilst he was under age, to sell his land, worth four hundred pounds, for the value of forty or fifty pounds, to Hipkins, who paid the consideration partly in tobacco, and partly in paper money, refused to abide by the bargain, when he attained his full age; offering however to repay the value which he had received, with interest. Hipkins, unwilling to forego the benefit of the contract, and complaining of the breach of it by Beverley, proposed a reference of the controversy between them to arbitrators. the friends of Beverley, knowing the influence over his mind, which, by ministering aliment to his rage for play, and practising on his habits of dissipation, Hipkins had gained, and suspecting (a) that this

(c) See the next case, Beverley v. Rennolds.—Note in edition of 1795.

*Awards.—See monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

(a) Their suspicion seemed justified by the sequel. —Note in edition of 1795.

proposition was made with hopes to profit by that influence, would have dissuaded Beverley from consenting to the reference; and he declared to them he would not consent to it. notwithstanding which, the same day, he was prevaled upon to submit the matter to the arbitrators, who adjudged him to pay three hundred pounds, to secure which he granted his bond. some time afterwards Beverley became bail for appearance of Hipkins, arrested in an action of debt against him brought by one Buckner, and, by the management of Hikpins, was compelled to pay the money recovered by Buckner, which exceded one hundred pounds. the defendent commenced an action, and obtained a judgement, against the plaintiff, on the bond for payment of the three hundred pounds awarded; and to be protected from that judgement, by an injunction to stay execution of it, was the object of this suit.

The court was of opinion that by the award the plaintiff ought not to have been charged, because refusing to perform a contract, which was not only void in law but made in such circumstances that, if infancy of one party were not in the 122 case, a *court of equity ought not to have decreed a performance of it, the plaintiff did no injury; so that the award condemning him to pay damages for that refusal seemed illegal; and if it be illegal, relief against it, a bond having been granted in conformity with it, was conceived to be properly sought in equity. and the court was also of opinion, if the plaintiffs refusing to perform such a contract could be denominated an injury, or if relief in equity could not be properly sought against an award condemning him who hath not done injury to pay damages, that the damages awarded in this case exceeded any measure of reparation, authorised by the principles of equity, so far, that this alone is sufficient to prove the arbitrators to have proceded in some unjustifiable manner, (b) for which their act, and the bond in consequence of it, ought not to be accounted valid; and the plaintiff, in satisfying Buckners judgement, having paid more than he justly owed to the defendents testator; the court, 26 day of october, 1791, decreed the injunction, which had been awarded upon presenting the bill to be perpetual.

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*BETWEEN 123

JOHN DANDRIDGE and William Armistead, executors of Bartholomew Dandridge, *plaintiffs*,

AND

THOMAS LYON, *defendent*.

Oct., 1791.

1. **Wills—Residuary Bequest—Judgment—Injunction—Case at Bar.**—The testament of *M. F.* besides a bequest of a negro girl to *E. W.* after the death of her mother, said, "I give and bequeathe unto my mother all the remainder of my estate during her natural life; then after her death, this estate to return to *W. P.*" After the death of the mother *M. F's* heir at law brought detinue for certain slaves then held through *W. P.*, as said legatee. By arbitration, the said heir lost said slaves. But his son and heir brought detinue again for them and obtained verdict and judgment. On the trial, the award and judgment upon it, having been destroyed by fire, could not be produced, nor legally authenticated, (although they afterwards were authenticated.) HELD, that the verdict and judgment were contrary to right, and a Court of Equity should give relief; and an injunction was perpetuated.

2. **Same—Same—What It Embraces—Case at Bar.**—*M. F's* father, after bequeathing to her said mother all his estate during her life bequeathed the three first children a certain slave H. might have, to his three children, of whom M. F. was one, and she succeeded to the rights of the others. HELD: that the slaves of *M. F.* where embraced by her bequest to W. P., whether they were the said children of H. or not; and whether her mother was already entitled to them for life, by the will of the father, or not.

3. **Same—Testator Can Appoint Owner of Thing Not in Existence.***—A testator can appoint an owner before the existence of the thing to be owned; as well as an owner not in existence at the time of appointment.

THOMAS LYON, owner of a woman slave named Hannah, whose progeny are the subject of the present controversy, by his testament, after bequeathing to his wife Mary Lyon, whom he appointed one of his executors, his whole estate during her life bequeathed the three first children which Hannah should bring forth to three of his children severally, of whom Mary Frazer was one. Mary Frazer who succeeded to all the descendible property of the other two legataries, as well as to that of a fourth child, undisposed by them, made her testament, which, besides the bequest of a negro girl to Elizabeth Willis after the death of

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(b) The injury for which Hipkins demanded reparation was that Beverley endeavoured to escape the ruin which the art of Hipkins was contriving. those, who could approve such a demand, perhaps would have thought the demand of Fimbria plausible, who having wounded Scaevola, whom he intended to slay, and finding the wound not mortal, cited him, after he recovered, to appear before the judges, and being required to state the cause of his complaint against Scaevola, answered quod non totum telum corpore recepisset. Cic. orat. pro. S. Roscio Amer.—Note in edition of 1795.

***Wills—Bequest of Future Increase of Slaves.**—In Taylor v. Yarbrough, 13 Gratt. 189, it is said: "The grant of the future increase of a female slave would of course confer but a contingent and uncertain interest; but as the children were born they would vest in the donee and the title become complete. It has even been held that the owner of a female slave may give her to one child and her future increase to another. Banks' Adm'r v. Marksberry, 3 Little's R. 275. In one case decided in the old General court in 1786, a bequest of the future increase of slaves to others than those to whom the slaves were given, was held to be void. Stone's Adm'r v. Pope, Jeff. R. 43. In a subsequent case decided by CHANCELLOR WYTHE in 1791, such a bequest was sustained. *Dandridge v. Lyon, Wythe's R.* 123. The last case would I apprehend furnish the rule at this day."

her mother, contained these words: i give and bequeath unto my dear mother Mary Lyon all the remainder part of my estate real and personal during her natural life; then, after the death of my said mother, for this estate to return to William Poindexter.

After the death of Mary Lyon, John Lyon, the heir at law of Mary Frazer, commenced an action of detinue, in the
124 county *of New-kent, against Bartholomew Dandridge, demanding the slaves in controversy from him, in whose possession they were and who had the right of William Poindexter. the parties in that action, by rule of court, submitted the controversy between them to the arbitrament, of three men, consenting that their award should be made the judgment of the court. the arbitrators, by their award, affirmed the right of Bartholomew Dandridge, and a judgment was entered accordingly.

After the deaths of John Lyon and Bartholomew Dandridge, the defendent, son and heir of the former, claiming the right, in attempting to assert which his father had failed, commenced an action of detinue against the plaintiffs, executors of the latter, in the county court of James city, for the same slaves. on the trial of the issue in this action the award and judgment before mentioned, having been destroyed by fire, could not be produced; nor legaly authenticated, although they have been since authenticated, and a general verdict was found, and a judgment thereupon rendered, for the defendent, affirming his right to the slaves.

For an injunction to that judgement, this bill was brought.

By the court, 31 day of october, 1791.

Whether the bequest to William Poindexter by Mary Frazer comprehended these slaves? was made a question by the defendents counsil.

The words of that bequest, all the remainder part of my estate, are comprehensive of every interest not before disposed which the testatrix had; so that, if between the bequest to Elizabeth Willis and that to Poindexter the bequest to the mother had not been inserted, the declaration of the testatrix that this estate, i. e., all the remainder part of her estate should return to William Poindexter, would have transferred to him her interest in the slaves as effectually as if they had been designated by their names.

How will the intervening bequest influence the exposition of the testament?

The defendents counsil objected, that no estate was bequeathed to Poindexter, after the death of the mother, besides the estate which was bequeathed to the mother for her life; but these slaves could not be properly bequeathed by Mary Frazer to her mother for life, because by her husbands testament she had before a right to them for that time; and from Mary Frazers want of power to make such a bequest of the slaves to the mother, the objector concluded they were not comprehended in the bequest to the mother; and, if not in that,
125 *they were not comprehended in the bequest to Poindexter, but descended to the heir of Mary Frazer.

If the slaves in controversy be the three first children of Hannah and their issue, Mary Lyon perhaps had no right to the use of them for her life, otherwise than by the testament of her daughter, unless the bequests in the testament of her husband Thomas Lyon to his three children be void, and, notwithstanding the objections made by some to a bequest of that kind founded on the supposed inability to appoint an owner before the existence of the thing to be owned, and on considerations of humanity, this court, whose decisions must be here authorities, until they be disapproved by the wisdom of a superior tribunal, hath formerly sustained such a bequest, for these reasons;

1. The power to appoint an owner not in existence, at the time of appointment, for example, a child who shall be born twelve months, or twenty or more years, afterwards, is tolerated by law; but this cannot be less exceptionable than the power to bequeath a thing not in existence at the testators death. to bequeath to one who is not, and to bequeath that which is not, may seem absurd, because in such a bequest the right of the testator is supposed to continue after he ceaseth to be, and consequently ceaseth to have any right, until a taker shall exist, in the former instance, and until a thing to be taken, which is to be produced by some other thing, shall exist in the other instance. but they are not more absurd than testamentary successions in ordinary cases. the difference between them, namely, that the right of the legatary commenceth immediately after the death of the testator, in the ordinary case, but not until a more distant event in the other case, are unimportant in this disquisition; for the transition of a right implieth in the nature of the thing two successive events, and consequently some time must intervene, and during that time, whether it be long or short, the right of the former owner continueth.

2. The disposition attempted by such a bequest of what is not in being the law allows to be affected by this mode: a testator may bequeath his slaves to trustees, directing them, at the end of a limited term, to distribute their increase in the manner then prescribed by them. and that may be said to be the case here; for this testator appointed executors, who are trustees, although by a different name, directed to fulfil his desire to provide for his children.

3. The roman civil law, the authority of which, if not decisive, is respectable, in cases of testamentary dispositions of chatels, allowed such bequests as this.

Instit. lib. II. tit. 20 § 7. Ea quo-
126 que res, quae in rerum natura *non est, si modo futura est, recte legatur, veluti fructus qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit.

Dig. lib. XXX. l. XXIV. quod in rerum natura adhuc non sit legari posse, veluti, quidquid illa ancilla peperisset, constitit.

4. No danger of a negro childs perishing by the cruelty of the mothers owner, in not allowing her time to nurse and cherish it, for the benefit of another, is to be apprehended in the cases where such bequests occur. the most frequent case is, where the testator, owning one woman slave only, and wishing to provide in the best manner he can for a needy family of children, would distribute among them the offspring which she, with kind treatment, may rear, left in the hands of his childrens mother, as in this instance, or of some friend, in whose goodness to supply the place of a parent he confides. if negro children do perish, by cruelty of those with whom their mothers live, as is supposed, it is believed to be in cases where they are hired out, or are under the direction of overseers at places far distant from the habitations of their owners.

But the slaves in controversy not appearing to be the three first children of Hannah and their issue; let the supposition be, that the contrary is true, and that Mary Lyon was entitled to them by the testament of her husband for her life; yet the objection founded on that supposition that they were not comprehended in the bequest to William Poindexter, is disallowed.—the proposition, that no estate was bequeathed to William Poindexter, except the estate which was bequeathed to the mother for her life, if by the words bequeathed to the mother, be understood, effectualy bequeathed to the mother, in which sense they must be understood, or else from the proposition the conclusion drawn doth not follow, is not true.

Upon the words, then after the death of my mother, for this estate to return to William Poindexter, the question is, not whether by this estate she designed an estate which she had or had not bequeathed, or had or had not a power to bequethe, to her mother for her life? but what estate she designed William Poindexter should enjoy after the death of her mother, whether she or any other had bequeathed it to her mother for life? this refers to the descriptions of the estate, whch description is all the remainder part of my estate, i. e. all that remainder after deducting the negro girl bequeathed to Elizabeth Willis; and consequently includes the slaves in controversy.

Perhaps the mind of no man, who considered this testament, desirous only to discover the meaning of it, would have entertained a doubt, before the invention of an interested party or his counsil suggested a doubt, that the testatrix intended to 127 dispose *all her estate among three people. That intention is the type after which, if the foregoing verbal criticism be not so just as it is at present supposed to be, her testament may be moulded, so as to effectuate the intention. let her testament be thus paraphased: i give my negro girl Poll to Elizabeth Willis, after the death of my mother; and i give all the rest of my estate to my mother, during her life; and, after her death, i give this estate, that is, all the rest of my estate; except the girl given to Elizabeth Willis, to William Poindexter. this is planely her meaning. by the other exposition, according to which that only was given to William Poindexter, the use of which the testatrix had power to give to her mother for life, if these slaves were the principal part, as they probably were, if not the whole, of her estate, William Poindexter, for whom she designed the bulk, would have taken little or nothing of it, in contradiction to her meaning.

If by the true exposition of the testament, and by the plain intention of her who made it, the slaves in controversy were comprehended in the bequest to William Poindexter, the verdict and judgment, by which the defendent recovered them, were manifestly contrary to right.

Presumptions can not be made in favour of the verdict, because all the facts and documents, pertinent to the dispute between the parties, pretended by either of them to have existed, appear in the preceding state of the case, and by the verdict and judgement the defendent recovered slaves, to which, according to that state, the plaintiffs indubitably had the right.

No court of law can now give the redress, which they ought to have, to the plaintiffs; and, if they cannot sue for it in a court of equity, they must succumb.

Ought this to be so? ought a verdict and judgment, when the opportunity to prevent the verdict, or to set it aside, or to reverse the judgement, hath been suffered to slip unheeded, to be fate, so that their doom, however unrighteous, is irrevocable? if by a wrong decision one be injured, why should he not have redress, as well as when the injury is occasioned otherwise.

Our system of jurisprudence seems not so defective as to suffer a right to redress for any injury to be without a remedy. the common law delights, if the prosopopoeia may be allowed, in redressing injuries, by whatever causes produced. in some instances, it is restrained from granting any redress, and in others, the redress which it can grant is inadaequate, being either too much, or too little, or not early enough. in such instances, the court of equity, supplying or proportioning the remedy, or applying it in time, exerciseth the functions which were the 128 *objects of its institution. in proceeding thus, the court of equity maintains a perfect harmony with the court of common law, or is not at variance with it, aiding the party to assert, or to assert in the most convenient form, those rights which the common law either recognized, or doth not reprobate, and giving remedies which that law reluctantly withholds, and thereby contributing its part towards accomplishing the main design of both, which is the attainment of justice.

In the court of common law, the plaintiffs

in this case might obtain a kind of redress by prosecuting a writ of attaint against the jury for their false verdict, but this objection ought not to effect a repulse of the plaintiffs address to the court of equity; because, if to conduct such a prosecution, of which an example is believed never to have been in Virginia, and supposed not to have been in England during the last three hundred years, would be found to be practicable, the remedy would be inadaequate in two respects: for 1, the injury to the plaintiffs, which is not complete until the execution of the defendents judgment, ought not to be complete; but the prosecution of an attaint would not impede the execution in the mean time; and 2, the defendent, if not hindered, obtaining possession of the slaves, removing them with himself, might render this remedy by attaint ineffectual: against both which this court may provide.

If for the reason before explained application to this court be not proper to obtain redress against a false verdict, it seems proper for another reason, namely, that the plaintiffs could not regularly be permitted to give evidence of the judgment upon the award, which was an important part of their defence.

Let the injunction to stay execution of the defendents judgment be perpetual.

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*BETWEEN 129

JOSEPH WOODSON, *plaintiff*,

AND

JOHN WOODSON, *defendent*.

Oct., 1791.

1. **Pawn—Creditor Holding Should Account for Profits Arising Therefrom.**—A creditor with whom a pawn yielding profit is deposited, ought to account for such profit, though he has not undertaken to do so: e. g. If *A.* lend *B.* tobacco and, to secure the payment thereof, *B.* deposit with *A.* a slave, *A.* shall account for the profits of said slave, after deducting therefrom the interest on the tobacco.

2. **Same—Case at Bar.**—*B.* by the agreement, was restrained from paying the tobacco in the beginning or middle of a crop, so that said slave might not be recalled from *A.* at either of those times. *B.*, by contract with *J.*, would have paid it in March, but *A.* refusing to deliver said slave then, prevented the payment, and so defeated the contract with *J.*; qu? whether he ought to make amends to *B.* for the loss occasioned thereby.

BY writing, which the parties signed, the 17th day of april 1782, the plaintiff agreed to let the defendent have a negro man slave named Jacob, for the consideration of 13000 pounds of net tobacco, to continue in the service of the defendent, as his own, until that quantity of tobacco should be paid; and the plaintiff also agreed, if Jacob should die, or by any other accident be rendered unfit for service, to sustain the loss, and either put a negro of like value in his stead, or pay the 13000 pounds of tobacco, when demanded, and not to force the defendent, in the begining or middle of his crop, to receive the tobacco, so as that the plaintiff might recover his negro again.

The negro, admitted to be a valuable labourer, was put into the possession of the defendent.

Early in the year 1786, Richard James contracted with the plaintiff to purchase the negro Jacob for 15000 pounds of tobacco, and to pay 13000 thereof to the defendent in march, when the negro should be delivered to the purchaser, and the residue to the plaintiff at a future day.

About a fortnight before the time appointed for the first payment, James communicated the contract to the defendent, acquainting him that the tobacco would be ready accordingly, but was informed by him, that he would not deliver the negro, before the then present crop should be finished, shewing the written agreement to justify the detention till that time.

The 20th day of january, 1787 the parties submitted the controversy between them, without explaining, in the submission, what was the controversy, to the arbitrament of three men who signed a writing, which they named an award, and 130 which is in *these words: we being chosen by John Woodson and Joseph Woodson, to arbitrate and determine a matter in dispute between them, relative to the loan of a quantity of tobacco by John to Joseph, do make our award and determination, as follows: that is to say, that John shall have peaceable possession of Jacob, until Joseph shall redeem him by payment of 13000 pounds of tobacco; and when Joseph shall pay or tender to John that quantity of tobacco then John shall deliver to Joseph the negro Jacob if living, or, if not, then Joseph shall put in Johns possession another negro, of equal value, until the above quantity of tobacco shall be paid to John, agreeable to contract, considered by us in the arbitration.

In january, 1788, the plaintiff brought a bill in equity against the defendent before the county court of Goochland, complaining, that the defendent, by not consenting to surrender Jacob to the man who would have purchased him of the plaintiff, and paid the tobacco due to the defendent, in march, had broken the agreement; requiring an account of the profits of Jacob; and praying, that the surplus of those profits, after discharging the annual interest of the 13000 pounds of tobacco, to secure which the slave was pledged, might be applied towards diminishing the principal debt; or that the plaintiff might be otherwise relieved.

The defendent, by his answer, insisted, he was not accountable for the profits of Jacob, by the terms of the agreement; denied that he had any tobacco offered him, when Richard James applied for the delivery of Jacob, declaring, that he never thought himself secure to deliver him, without first receiving the tobacco, not being bound by the contract to do so; and claimed the benefit of the award.

The county court dismissed the bill,

awarding costs, against the plaintiff; from which dismission he appealed.

By the court, the 31 day october, 1791:

The award ought not to obstruct the plaintiff in his application for any redress, to which, if no award had been made, he might have been intitled; because the terms of the award are indecisive, obliging the parties to perform nothing more than what the agreement obliged them to perform; and it ought not, even from preventing its perdition, to be extended by implication so as to determine, that by the agreement, the defendent should retain all the profits of Jacob, in satisfaction for the interest of the tobacco due to him; for such determination, if what followeth be right would have been unjust, insomuch, ut magis pereat quam valeat: and the award, so expounded, would approve
131 *the defendents interpretation of the agreement, an agreement, which, if that be the true interpretation, pourtrays usurious oppression.

The award then being neglected, the question is, whether a creditor, with whom a pawn, yielding a profit, is deposited, ought to account, not having undertaken by special pact to account, for such profit? reason seems to dictate, and the precedents recollected, so far as they are applicable to the question, seem to affirm, that the creditor is accountable. a creditor, taking possession of land mortgaged to him for payment of his debt, is accountable, altho he did not by covenant in the mortgage, or by other contract written or verbal, oblige himself to account, for the profits of the land. in the eye of reason and equity the debtors ownership of the land continues, until his right to redeem is superannuated. the security of a debt, not the sale of land, is in contemplation of the parties; the value of the land is not compared with the debt, for the purpose of immediately paying the one by transferring the other, although the creditor will, at all times when he can, take a mortgage of what is sufficient, that he may be safe, if he should be compelled, finally, to resort to it; the debt is not discharged, but on the contrary, the mortgage usually contains a covenant for payment of it, and sometimes a separate obligation for the payment is granted; and that one should be intitled to his debt, and own the land, and the other be chargeable with the debt, and deprived of the land, at the same time, is inconsistent. the creditor then, entering into the land mortgaged, possesseth the property of the debtor, and taking the profits, likewise receiveth his property: for the owner of the land is owner of the profits, which it produceth, also. now, when one by right possesseth a thing which is the property of another, the possession is fiduciary—is for the benefit of the owner. hence a creditor, in possession of the land mortgaged, to which he hath a legal title is called a trustee for the debtor, who hath an equitable title. from the nature of this function therefore, without any pact, results the creditors obligation to account for the profits of the land, no less than to restore the lahd, which produced the profits.

If this doctrine be sound, in the case of land mortgaged, a creditor seems charged with a similar obligation to account for the profits of a slave, pledged for payment of a debt.

No english adjudication, in any case, except that of land, resembling the principal case, is recollected.

By the roman civil law, to which recurrence is frequent in questions arising on pigneratitious contracts, the creditor was accountable for the profits of a pledge, without any distinction between land and other things.

132 *Cod. lib. 4. tit. 24. § 1. Ex pignore percepti fructus imputantur in debitum; qui, si sufficiunt ad totum debitum, solvitur actio, et redditur pignus; fi deditum excedunt, qui supererunt, redduntur; videlicet, mota actione pigneratitia.

Ibid. § 2. Quod ex operis ancillae. vel ex pensionibus domus, quam pignori detineri dicis, perceptum est debiti quantitatem relevabit.

Ibid § 3. Creditor, qu ipraedium pignori sibi nexum detinuit, fructus, quos percepit, vel percipere debuit, in rationen exonerandebebiti computare, necesse habet: et si agrum deteriorem constituit, eo queque nomine pigneratitia actione obligavit.

This differs not from the decisions of the english courts of equity, in cases of land mortgaged, unless it be that, by the former the creditor is accountable, not only for profits quos percepit, but for profits quos percipere debuit, whereas, by the latter, he is not accountable for profits which he might have made.

Indeed the defendent must admit himself to be accountable for something, notwithstanding he insists by his answer, that he was not: for he hath not inserted in the agreement an article for payment of interest, and being bound to restore the pledge, on receiving the principal debt, hath no satisfaction for it otherwise than by the profits. now, if he be accountable for any profits, he ought to be accountable for the whole profits.

The decree of the county court, dismissing the plaintiffs bill, is erroneous: reverse it, and let an account be stated of the profits of the slave Jacob, to be applied towards discharging, first the interest of the debt and then the principal if there be a surplus.

Note. the court did not consider another question, which seemed intended to be propounded by the bill arising thus; by the agreement, the plaintiff was restrained from offering to pay the debt in the beginning, or middle of a crop: James would have paid the debt for the plaintiff in march: that month, by the act of 1785, cap. 63. sect. 43. seemed to the plaintiffs counsil to be the time to be accounted the beginning of a crop. now, whether was the defendent bound to receive the tobacco, which, if he had not declared his resolu-

tion not to receive it, would have been offered in march? and by his declaration, that he would not deliver up the negro before the end of the year, preventing the offer, and so defeating the contract between the plaintiff and James, ought he to make amends to the plaintiff for loss occasioned thereby? the court did not consider this question, be-cause the decree, as it is, was thought to do compleat justice between the parties.

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*BETWEEN 133
DAVID COCHRAN, *plaintiff*,
AND
JOHN STREET, *defendent*.

Oct., 1791.

Slander—New Trial—Verdict Found under Mistake.*—In an action for slander, the judgment was enjoined, and new trial awarded by the County Court, on the ground that four of the jurors would not have found any damages but for the impression produced on them by the other jurors that they were bound to yield to the majority. The jurors were allowed to testify as to the facts. The H. C. C. refused new trial, and dismissed the bill. Reversal by the Court of Appeals; on the ground that the verdict was found under a mistake. See this case reported in 1 Wash. R. 79.

The defendent, in an action on the case against the plaintiff for slander, commenced in Hanover county court, to the declaration in which the plea was not guilty, had recovered 150 pounds damages.

The county court granted an injunction to stay execution of the judgement until further order, upon a bill filed by the present plaintiff, stating that the trial of the issue had been brought unexpectedly and as he conceived irregularly, and when for that reason he was not prepared to make a defence, that not only the damages were excessive, if the words alleged to be defamatory had not been true, but, that the truth of them would have been proved, if the plaintiff had not been surprised by a premature trial, and that some of the jurors, who were disposed to condemn the plaintiff in trifling if in any damages, being convinced by the reasoning of their more experienced, and as they believed at that time more knowing, brethren, who affirmed that the less number were bound by law to acknowledge their agreement in a verdict, however discordant with their own sentiments, which the greater number had approved, concurred in the sentence of which the plaintiff complaineth, and to which they would not otherwise have assented.

The defendent by answer denied the trial to have been brought on irregularly, and neither admitting nor denying the allegation relative to the influence of some jurors over others, objected that the examination of them, in order to prove their own misconduct, would be a mischievous practice.

No irregularity in bringing on the trial of the issue was made to appear.

Several witnesses were examined to prove, on one side, the truth, and, on the other, the falsehood, of the words alledged to be defamatory. As to the influence of some jurors over others, one juror deposed, 134 *that, from the evidence, he was of the opinion no damages ought to have been found against the plaintiff, but being unacquainted with the law concerning juries, he was imposed upon by some of his brethren, who told him that all the jurors must acknowledge their agreement in any verdict in which a majority were agreed; and under this imposition he did acknowledge his agreement in the verdict then found; whereas had he known that his own conscience ought to be satisfied in the propriety of the verdict, he would not have consented to a verdict for any damages against the plaintiff.

Another juror deposed to the same purpose with respect to himself, and indeed in the same words, adding that he desired the foreman, whilst he was writing the verdict, to consider him the deponent as dissenting from it.

A third juror deposed to the same purpose as the first, adding that he desired the foreman to write that the majority but not the whole were for a verdict in favour of the plaintiff.

And a fourth juror also deposed to the same purpose as the first.

Not one of them. when the verdict was returned, and the usual question 'have you agreed in a verdict?' was propounded, signified his dissent.

Four other jurors, who were examined, acknowledging the diversity of opinions among them, at first, insomuch that some would have found 500 pounds damages, others less damages, and others no damages at all, do not admit or believe any means to have been practised by any of the jury for the purpose of misleading others, and state their own opinions respectively to be that, after some time the majority appearing inclined to find 150 pounds, all of them agreed to the verdict returned for those damages.

The county court decreed another trial of the issue between the parties.

From this decree the defendent appealed to the high court of chancery, who, the 28 day of october, 1791, delivered this

OPINION:

That, if the damages found on trial of the issue in the action at common law, had been excessive, the application to obtain redress, for that cause, to the court of equity, in the first instance, was improper, unless, for some reason not apparent in this case, a motion to the court before which that trial was, to award another trial, either could not have been 135 made, or if made *must have been

*New Trial—Mistake in Verdict—Mistake Proved by Jurors.—See principal case cited in Woods v. Macrae, Wythe 253. See generally, monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

unsuccessful; (a) and that no other good cause for awarding the new trial in this case appeareth, the surprise upon the appellee (plaintiff) not being proven; the truth of the slanderous words spoken by him of the other party being a proper subject of inquiry, upon a motion, which ought to have been made instead of a bill in equity, for awarding a new trial; and that some of the jurors should at length join in a verdict which they do not approve, prevailed upon by their fellows to do so, being in most cases unavoidable, and perhaps generally those verdicts being the most just, which are the result of discussion introduced by diversity of sentiments professed by different jurors on their first consultations:

And, reversing the decree of the county court, dismissed the bill.

This decree was reversed the 16 day of may, 1792, by the court of appeals, whose opinion was, "that the fact 'that the verdict in the suit at common law between the parties was founded in mistake of some of the jurors,' being well established by the depositions was a good ground for a court of equity to decree another trial in the said suit."

This last decree is acknowledged to be right if we may attend to four jurors, of whom, although three of them were more than 30 and the other 26 years of age, neither had before served in that office, and who having declared their disapprobation of the sentence in which they seemed to concur to have been so invincible that they would not have concurred in it, if they had not been missled by some of their brethren into a belief that in questions refered to juries the opinion of a majority was decisive. But to permit part of a jury to retract a verdict recognized in solemn form is thought by some a dangerous precedent.*

(a) In some cases, where the damages were said to be excessive, two or three judges, who heard the evidence, would have approved motions for new trials; but the others would give no opinion, because they were not present at the first trials: so that there were no courts who would hear the motions. In other cases where verdicts have seemed exceptionale for various reasons, prejudices against one of the parties have been so prevalent that from their influence even justices of the peace have not been free. motions for new trials to courts composed of such judges must be vain. in cases like these interposition of the court of equity may be justified.—Note in edition of 1795.

*[See Ross v. Pleasants, Shore & Co., in this vol. note p. 10, and in 1 Wash. 158. The doctrines as to whether and to what extent jurors should be permitted to testify by affidavit or in open court, against their verdicts, have been very recently a good deal discussed in the Federal Court, for this Circuit; in the Superior Court of Law for Henrico County and in the General Court—The questions are now pending in the Appellate Courts both of the Union and this Commonwealth. In this State, they are involved in the case of Nicholas O. Thompson, found guilty in the second degree of the murder of his wife.—His motion for a new trial, based, in a great measure, upon the testimony of the jurors themselves, was overruled by the Superior Court. The General Court not having time, at its last session, owing to the unavoidable delay in presenting his petition, to decide the questions arising thereon, awarded a writ of error, and will hear and determine them at their next term. Questions as to the separation of the jury, and their taking something to drink, though only in moderation, are also involved in the case.—Ed.]—Note in edition of 1852.

*BETWEEN 136

JOHN HOOMES, *plaintiff*,

AND

JACOB KUHN, *defendent*.

Oct., 1791-2.

Assault and Battery†—New Trial.—New trial in action of assault and battery refused;—The judge below having refused it, and there being no matters before this Court which ought to have changed his sentiments.

The bill in this cause, brought for another trial of the issue in an action of assault and battery, was dismissed, the 28 day of october, 1791, the opinion of the court being, that a motion for the new trial having been rejected by the judge before whom the verdict was found and no matters now appearing to this court, which, if they had been known to that judge, ought to have wrought a change in his sentiments, in such a case the interposition of this court would be improper.

This decree of dismission, from which the plaintiff appealed,‡ was affirmed, the 20 day of october, 1792.

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*BETWEEN 137

THOMAS COBS, *plaintiff*,

AND

JOHN MOSBY, *defendent*.

Oct. & Nov., 1791.

Verdict—Bill for Relief Dismissed.—Bill for relief against a verdict dismissed: the motion for a new trial,—the only ground for the interposition of the Court,—having been rejected.

IN this cause, heard the 28 day of october, 1791, the bill brought for relief against a verdict, was dismissed, a motion to the court, before which the issue was tried, to award a new trial, for the causes now suggested, having been rejected, and no other cause for the interposition of a court of equity appearing upon the proofs.

BETWEEN

PHILIP TURPIN, *plaintiff*,

AND

THOMAS TURPIN, William Turpin, and Horatio Turpin, executors, and the said Horatio Turpin, devisee of Peterfield Turpin, *defendents*.

Wills—Case at Bar.—*P. T.'s* will, dated 1789, gave and

†**Assault and Battery.**—See monographic *note* on "Assault and Battery" appended to Roadcap v. Sipe, 6 Gratt. 213.

[‡This case, reported in 4 Call., 274, decides:

"If the defendent has been negligent in his preparation for the trial of the cause a court of equity will not relieve against the verdict on account of absence of witnesses, who can only prove, in substance, the same things which other witnesses can.

"If the defendant only asks one witness to attend and sends a subpœna, by a servant to another, which reaches him on the day of appearance, at so great a distance from the court where the cause is depending that there is no probability that he can reach it in time, this is a gross negligence; especially if he does not communicate those circumstances to his counsel, nor make any other preparations for the trial.

"And in such case, equity will not interfere if the judge who tried the cause, and knew what passed at the trial twice refused it upon the same representation."—Ed.]—Note in edition of 1852.

bequeathed ten negroes, naming them, and lands. He then *owned* neither, but only possessed part of the land. He afterwards acquired them by the will of his father. HELD by the H. C. C. and decree affirmed by Court of Appeals.

1. **Same—Devise of After-Acquired Land*—Validity.**—That the devise of the lands was valid, by the Stat. of 1785-7, allowing devises of all estate, right title and interest, in possession, reversion, or remainder, present and future, in and to lands, tenements and hereditaments.

1. **Same—Devise of After-Acquired Slaves*—Validity.**—That though the negroes are not embraced in said statute,—not even in the term "hereditaments," which might include them,—yet the devise of them is also valid, on general legal principles.

Decision of Court of Appeals.—The decision of the Court of Appeals, 1 *Wash.* 75, seems confined to the *lands*.

PETERFIELD TURPIN, who was brother of all the parties, by his testament, dated in february, 1789, among other devises, gave and bequeathed to the defendent Horatio the land and plantation whereon his father lived, also 732 acres of land in Buckingham, near the head of Appomattox, and also ten negro slaves distinguished by names.

At that time, this testator owned
138 not any of the things thus *given and bequeathed, and possessed only the land in Buckingham.

His father Thomas Turpin, who was owner, of them, and possessor of all, except the Buckingham land, by his testament, dated in March, of the same year, gave the same lands and slaves to Peterfield Turpin. Both the testators are dead, the son having survived the father.

The plaintiff claimed a share of the lands and slaves, insisting they descended to the heirs of Peterfield Turpin, who were his brothers, not being disposed of by his testament, because he had them not at the time when he made it, although he had them at the time when he died.

Some examinations of witnesses were taken, to prove, on one side, a revocation, and, on the other, a republication of his testament by Peterfield Turpin; but the proof was defective.

By the court, 8 day of november, 1791.

Decisions of questions, arising both on the english statutes, and on the customs of particular places in that country, authorizing alienations of land by testament, had declared the law to be, that a devise of land which the testator had not, i. e. of which he was not seised, at the time when he made the devise, was void, although he should have the land at the time when he died.

Memorable examples, of these decisions occur, one on the statutes, in the case between Butler and Baker, 200 years ago, which, as Coke the reporter of it says, had been argued one and twenty times, and the other on the custom of gavelkind, in a case between the heir and widow, who was devisee, of William Buckenham, near 100 years ago, which is published, with the arguments, in the book called, law of devises and revocations.

If the law with us had not been altered, these two cases might have been relied upon, as authorities, in the present controversy, with respect to the lands.

But a statute of this commonwealth, made in 1785, and taking effect in january, 1787, and therefore being the law by which the question in this case must be decided, hath enacted that every one, aged twenty one years or upwards, being of sound mind, and not a married woman, shall have power, at will and pleasure, by last will and testament in writing, to devise all the estate, right, title, and interest in possession, reversion or remainder, which he or she hath or, at the time of his or her death, shall have, of, in, or to, lands, tenements, or hereditaments.

By the terms of the statute, power
139 being given to devise an *estate in possession, reversion or remainder, which one hath, that is, at the time of making his testament hath, or an estate in (a) possession, reversion, or remainder which at the time of his death he shall have, in lands—power to devise a future or a possible, as well as a present or an actual estate; the identity of the lands, said to be given and bequeathed to Horatio Turpin, and the lands, in which Peterfield Turpin, at the time of his death, had an estate, being confessed; and the devise either being a devise of the estate which Peterfield Turpin, at the time when he made his testament, had in the lands, or being a devise of the estate which at the time when he should die, he should have in them; (for the devise must be understood in one of those two senses), the only question in this case, as to the lands, is whether the words in the devise of them do or do not comprehend a future estate, that is, an estate which Peterfield Turpin at the time of his death should have in those lands! if the words do comprehend that estate, Horatio Turpin hath a right to the whole lands of which the bill clames a share.

The devise, understood in the former sense, that is, a present inchoate alienation of the right which he then had in the lands, would be adjudged void; unless the executor would have been bound to purchase the lands for the legatary or pay the value of them to him, out of the testators estate, as the executor, by the roman civil law, was bound to do, in a like case, where the testator knew the thing bequeathed not to be his. I. 1. II. tit. XX § 4.; C. 1. VI. tit. XXXVII. 1. 10. yea, if the testator had owned an estate in the lands, but an estate

*Wills—Gift of After-Acquired Property.—See Harrison v. Allen, 3 Call 289, and *foot-note*: 2 Min. Inst. (4d Ed.) 1009; monographic *note* on "Legacies and Devises"; Va. Code 1887, §§ 2512, 2521.

(a) No man, as is believed, will refer the terms, shall have, to an estate, in revision or remainder only; for a revision, or a vested remainder is a present estate, and a remainder contingent at the death of the testator, if his death were before the event, cannot be called an estate which the testator either had or should have.—Note in edition of 17

less than that which was bequeathed to him by his father, the devise, understood in the former sense, would have been void; because an ademption of the legacy, without a republication of the testament, would have been wrought by the change of the estate devised.

But the devise may be understood, with equal propriety in the latter sense; for the words i give and bequeath the land and plantation where my father lived, also 732 acres of land in Buckingham, near the head of Appomatox, do not confine the devise to an estate, which Peterfield Turpin had in the lands at one time, more than to the estate which he should have in them at another time. indeed, the terms, i give, although they purport an immediate alienation of the thing given,
140 are, when used *in a testament, from the nature of that act, no more than a declaration of a testators will, that the legatary, at a future day, shall have the thing said to be given to him, and even that not certainly, but subject to a change of will, which may appear by revocation, ademption, translation, &c. so that the terms, i give in a testament, are understood more properly of a future, than of a present time. and the testator, having a power to devise, and no doubt, expecting to own, a future estate in these lands, and willing in every event that his brother Horatio should succede to them, and not having altered that will, the law, which favours acts authorised by itself, as testaments are, will suppose the testator to have exercised his power to devise a future estate, and accordingly approve that exposition of the devise by which it will be valid; that is in the same sense as if the testator had used these words: i give to Horatio Turpin the land &c. if i have them at the time of my death, and do not alter my will.

Whether the defendent Horatio hath a title also to the slaves bequeathed to him by the same paragraph in the testament? would not be a different question from that already discussed, if the statute be supposed to have designed to comprehend slaves, which in some instances are an hereditary kind of property, in the term, hereditaments, used in the statute to designate one of the subjects of devises which it authorizes.

But this statute is supposed not to have comprehended slaves; because that kind of property was bequeathable by the common law, which lands are said not to have been; and because, as the law is now, and always hath been, a bequest of slaves transfers the property of them in the same manner as if they were chatels.

Then let the bequest of the ten slaves here be considered independently of the act of 1785, and as a bequest of chatels.

A man bequeaths slaves by their names, which at the time of making the testament were not his property, but afterwards became his property; whether hath the legatary a right to the slaves?

Swinburne (part III. § VI. no. 17.) hath stated this case, without any important variation, propounding the same question. in considering it, he observes that, by the civil law, the thing bequeathed is not due to the legatary, but in some few cases. he adds, by the laws of this realm (England) it seemeth that we are to distinguish whether some special thing be devised or not. for if a special or certain thing be devised, as if the testator do bequeath the manor of Dale, then tho the testator had no such manor, when the will was made, yet by the purchase made
141 *afterwards, the testator is presumed to have had this meaning from the beginning, to purchase the same for the benefit of the legatary: and so the devise is good, but if the legacy be not special, but general, as if the testator do bequeath all his lands, then the testator having some lands at the time of making the testament, and purchasing other lands afterwards, those lands purchased after making the testament shall not pass.

This writer quoted, for the civil law, what is called the regula catoniana, and for the english law, the case between Brett and Rigden, in Plowdens commentaries; neither of which is satisfactory, as to this question.

The regula catoniana, which occurs in Dig. lib. XXXIV. tit. VII. is this: quod si testamenti facti tempore decessit testator, inutile foret: id legatum, quandoc unque decesserit, non valet. this rule, in several instances there mentioned, is said to be false. it is true, without doubt, in other instances: e. g. if one, before he is the proper age, if one, non compos mentis, if a married woman, making a testament, and surviving the inability to perform such an act, die without a republication, the testament is void no less than it would have been void if the inability had not ceased, before the death happened. but it seems an improper canon in many cases to which it may be extended, and perhaps is true only where the vice in the original constitution of the testament is defect of age, understanding, or freedom of will, in the testator.

The quotation from Plowdens commentaries is apposite to the principal case, and a rational opinion, but is not of decisive authority, because the example is a devise of lands, and because it is an opinion only of serjeant Lovelese, and denied to be law by the chief justice Holt and Trevor, in their arguments of the case on Bockenhams will.

Chief justice Holt, in his argument, on that occasion, mentions two cases, one in Goldesborough 93, and the other in March 137, which may seem, at first view, not unlike this; but, upon consideration, they are thought to differ from it so as not to be applicable. in the former case, the surrender of the lease was an ademption of the legacy; and in the latter case, if the executor did not assent to the legacy before the death of the legatary, who bequeathed the sub-

ject of it, and whether he did assent or not doth not appear, the case cannot be compared with the principal case.

In this disquisition, any case adjudged, which is a direct authority, not being remembered, we must have recourse to some other topics.

If a bequest, like a gift among the
142 living, were a present alienation *or conveyance of a right in the thing said to be given, the objection to the validity of this bequest must prevale, for the transition of a right, which doth not exist, or, rather before it exists, is preposterous.

But a bequest is not a present alienation; the testator doth not intend nor doth the law declare it to be so. it is no more than the appointment of him whom the testator wishes to succeed him after his death in the ownership of the thing said to be bequeathed and why such an appointment should not be fulfilled, if the testator at his death, before which it is not intended to be effectual, have the thing, no good reason hath yet been, nor, as is believed, can be assigned.

On the contrary, by the roman civil law, which is ordinarily thought a reasonable rule of decision, the bequest of that which the testator never had is valid in many cases, and in some cases, whether he knew or did not know the thing to be the property of another; so that the executor was bound to purchase it for the legatary, or pay the value of it to him out of the testators estate. this is manifest by the institutes and Code in the places before mentioned. and that this particular doctrine is still approved in those countries where that law has been generally adopted, appears by the Code de l'Humanite, in the word LEGS, if, to sustain such an appointment, where the testator never owned the thing, be reasonable, to sustain it, if he do own the thing at the time of his death, when the succession is to take effect, can not be less reasonable, all other circumstances remaining the same.

And the appointment seems authorized by deductions from legal principles. nothing is pretended to invalidate this bequest, but that the testator, when he made it, did not own the slaves said to be given, although when he died, he did own them. but, if the proposition that the testator must own the thing at the time of bequeathing it were true, which is not admitted, because it is thought not possible to be proved, the testator in this case is affirmed to have bequeathed the slaves at the time when he owned them, that is, to have bequeathed them when his father died; for, the testament not having been revoked, the law supposed the benevolence of the testator towards the legatary to have continued. this is assumed as a proposition incontrovertible. now, the continuance of Peterfield Turpins desire, when he became owner of the slaves, that, after his death, his brother Horatio should have them, is by operation of law, a repetition or republication of the bequest at that time, because it hath the same effect; for a republication is no more than an evidence that the testators desire con-
143 tinues; *and if the law supposes it to continue, the republication is unnecessary. if indeed a man who had lands at the time of making his testatment, devise his lands, by a general description, and afterwards purchase other lands, a republication might perhaps be necessary, to transfer the after purchased lands, if necessary in any case. Holt, in his argument of the case on Bockenhams will, calls the notion, stated in the preceding part of this section, to wit, that the testator, eo instanti that he becomes owner of the thing devised, may be supposed to make his will, absurd and repugnant. but it is denied to be absurd and repugnant, and seems dictated by the spirit of the law, which doth not appoint a successor, unless the deceased owner hath omitted an appointment, and will always, if it can, establish the right of the testamentary successor.

The right of Horatio Turpin is thought to be supported no less by authorities, as far as those authorities will apply, than by the principles of law and reason.

By a bequest of chatels generaly, those which are acquired after the testament was made, have been frequently adjudged, and are universaly admitted, to be transfered to the legatary, so that if Peterfield Turpin, who bequeathed some slaves to several of his relations, had bequeathed the residue of the slaves, without naming them, to his brother Horatio, he would have been intitled to these ten confessedly: but they who confess this deny him to be intitled to them in this case, where they are bequeathed to him by their names.

This distinction, between a general and specific bequest, seems thus founded: its favourers say, the law allows a power to bequeath future acquisitions of chatels, by general descriptions, to prevent the inconvenience of making a testament, which otherwise might be necessary, every time changes, frequent in that kind of property, happen. whereas there is not the like reason to allow that power in the case of a specific bequest. but, if the opinion before explaned, be correct, the distinction doth not exist; the power of the testator is the same in both cases; and the times when the bequest of chatels generaly, and the bequest of a specific thing, shall begin to operate upon the after acquired property, are the same; and those times are when he becomes owner of the things; although neither bequest is an act so complete as to transfer the property before his death.

Dismiss the bill.

The plaintiff appeal. [See it, 1 Wash. 75.—Ed.]

The decree was affirmed.

*BETWEEN 144
ALEXANDER LOVE, *plaintiff*,
AND
CARTER BRAXTON and Thomas Ham, *defendents*.*

March, 1792.

1. **Purchase of London Estate—Notice of Rights of Third Person—Effect—Case at Bar.**—*H.* purchased of *B.* a London estate: thereby hindering *L.* from enjoying a right and exercising a lawful power derived to him from an agreement and letter of Attorney from *B.* to *L.* If *H.* had notice thereof, before his purchase was complete and before payment of the purchase money, he is liable to *L.* for damages in an action at law.—*L.* not being able, by decree of any Court here, to subject the estate which lieth in Great Britain; nor ought *L.* to be compelled to resort for redress to any Court of Great Britain, where, if *H.* be so liable, the remedy is no more proper than here; and he might be disappointed of his remedy against the land by a sale thereof to a purchaser without notice of his claim.
2. **Same—Same—Equitable Relief.**—Equity will also grant him relief in a suit for discovery whether *H.* had such notice, and though *H.'s* answer deny such notice, the bill is still sustainable in order that plaintiff may endeavor to prove the purchase such an one as ought not to avail him who pleaded it.

UPON one question in this cause, the court, on the 19 day of march, 1792, delivered this

OPINION:

That, if the defendent Thomas Ham had notice of the agreement between the other defendent, Carter Braxton, and the plaintiff of the 28 day of June, 1783, and the letter of attorney, of the first day of july thence next following, given by the former of those parties to the later, before the defendent Thomas Hams purchase of the London estate, mentioned in those exhibits, from the other defendent was complete, and before payment of the purchase money, the plaintiff, who, by decree of any court in this commonwealth, cannot subject the estate, because it lieth in Great Britain, to his demand, ought to recover satisfaction for the damage which he hath sustained, if indeed he hath sustained damage, by the purchase; that by this intermission of the defendent Thomas Ham, if he had such notice, the plaintiff was injured, being hindered from enjoyment of a right. and from exercise of a lawful power, derived to him by that agreement and letter of attorney; that, for redress of such an injury, he ought not to be compeled to resort to a court of Great-britain, where, if the opinion that the defendent Thomas Hams intromission was injurious be
145 correct, the remedy is *not more proper than here, and where, in one event, which may indeed not have happened in this case, but which may happen in a similar case, he might be disappointed of his remedy against the land, by a sale thereof to one who had not notice of the plaintiffs clame; but that for such an injury an action at common law to recover satisfaction in damages is maintainable; and that the plaintiff may now procede to obtain that satisfaction in this court, where the suit originated properly for discovering a necessary fact which he suggested his inability to prove: for although the bill was partly for discovering that fact by the defendent Thomas Ham, namely, his notice of the agreement before his purchase, and although by his answer he denied the notice to have been prior to his purchase, the bill is supposed to be sustainable afterwards, in order that the opposite party might endeavour to prove the purchase to have been such an one as ought not to avail him, who pleaded it.

*See Love v. Braxton, 5 Call 537.

BETWEEN
ISAAC WILLIAMS and Joseph Tomlinson, *plaintiffs*,
AND
JOHN JEREMIAH JACOB and Mary, his Wife, and David Jones, *defendents*.

May, 1792.

1. **Land—Settlement—Survey—Priority.**—Priority of claim to land, by virtue of settlement, again sustained by the Chancellor, and again denied by the Court of Appeals. His remarks thereon.
2. **Same—Same—Same—Case at Bar.**—The plaintiffs had prior claim by settlement, and one of them by sentence of the Commissioners. The other had entered a *caveat*, which was dismissed for want of witnesses. Defendants obtained grants for same land; and the plaintiffs afterwards also obtained grants; and filed a bill to remove the impediment to their title. The H. C. C. decreed in favor of plaintiffs. But HELD unanimously by Court of Appeals, that settlement gave no right to lands, in law or equity, before the act of 1779, and was then to operate upon mere waste land,—not to defeat any claim to lands under surveys established by that Act.
3. **Evidence—Depositions—Lite Pendente Purchaser.**—*By Chancellor.* Depositions may be read against a *lite pendente* purchaser, though they were taken when he was not a party to the suit. *Court of Appeals* rejected said depositions; because he was not a party to the suit; but say, that had he been a *pendente lite* purchaser, they might perhaps have been read. See 1 Wash. 231.

THE plaintiffs, in right of settlement, clamed the land in controversy, lying in the county Ohio.
146 *They stated in their bill that they had located on this land a military warrant. no proof of the warrant and entry with the surveyor for the purpose of locating it appeareth; but the grants to them, hereinafter mentioned, are proof of this warrant or of some other legal warrant, because, otherwise, those grants could not regularly have issued.

David Rogers, in 1775, located a military warrant partly on the lands clamed by the plaintiffs, and at that time in their possession, and partly on land then clamed by

the defendent David Jones, in right of settlement, or in character of agent for the indiana company, and procured a survey of them, with other lands adjacent, the sum of all which quantities was 1193 acres, to be made and certified by the proper officer.

The plaintiffs exhibited their clames before the special court of commissioners, constituted by statute of may session, 1779, who, on the 19 day of february following, affirmed the right of the plaintiff Joseph Tomlinson; but do not appear to have given sentence on the clame of the other plaintiff. they postponed it at their first meeting, as he suggested, because the defendent Mary, who clamed the land in controversy by devise in the testament of David Rogers then dead, did not attend, and they declined any further consideration of it, at a subsequent meeting, because they thought the matter transferred to another tribunal by the caveat after mentioned. but these proceedings before the court of commissioners seem unimportant, unless it be to shew that the plaintiffs persisted in endeavoring to assert the rights which they clamed.

The plaintiff Joseph Tomlinson, however, is supposed to have believed his right secured by the adjudication in affirmance of it by the court of commissioners; for he did not unite with the other plaintiff in a caveat which he entered against emanation of a grant upon the survey made for David Rogers.

The plaintiff Isaac Williams stated, that counsil was retained and instructed to prosecute the caveat; but that subpoenas, which were sent by the council, for summonning witnesses to support objections against the grant, not having come to him in due time, which is supposed to have happened from the distance between Ohio, the place of his residence, and Richmond, where the counsil resided, the caveat was dismissed.

After dismission of the caveat, a grant to the defendents John Jeremiah Jacob and Mary his wife of the land surveyed for David Rogers, dated the first day of april, 1784, passed the seal.

The plaintiffs obtained grants also of the lands which they clamed, but the operation of those grants, as conveyances of legal titles, the dates of them being, one 147 in 1785, and two others *in 1787, was hindered by the anterior grant to John Jeremiah Jacob and Mary his wife.

To remove this impediment to the benefit of their grants the plaintiffs filed their bill in the high court of chancery praying that those defendents might be decreed to convey to the plaintiffs so much as they claimed of the lands granted to the representatives of David Rogers.

The defendents John Jeremiah Jacob and Mary his wife, by their answer insisting that David Rogers had the right, by settlement, prior to the settlements, in virtue of which the plaintiffs clamed, said they had sold their right to David Jones, and required that he should be cited to defend it.

Before this answer, to which oath was made in november, 1789, was filed, David Jones was no party to the suit, and for some time instead of claiming any title derived from the representatives of David Rogers, had confederated with the plaintiffs in opposition to that title, which was adverse to his own right by settlement, or derived from the indiana company, stated before. but his purchase of that title since from the other defendents did neither vitiate his present right, because he was not bound, by any general praecept of justice, or by a particular compact, to admit the plaintiffs to participation of the benefits of the purchase, nor render his title to the litigated lands better than the title of those from whom he purchased, because he had notice of the clames which the plaintiffs at that time were endeavouring to assert, and never had abandoned.

The plaintiffs apprised of the purchase by David Jones, finding that thereby, from a syntagonist with them, he was become the only party against whom they must finaly have redress, and whose changes of sides, they seem improperly to have thought a perfidious tergiversation, filed a bill against him. if he were a lite pendente purchaser, this bill was unnecessary, because, without being made a party, he would have been made subject to a decree against the other defendents.

Great part of the answer to this bill by the defendent David Jones is the history of his procedings in the character of agent for the indiana company, which is unimportant; for he did not state that he derived his title from the company, nor explane what their title was. in the remaining part of the answer he chiefly relied upon the priority of settlement by men from whom David Rogers claimed.

By the examinations of witnesses which, although taken before David Jones was made a defendent, might regularly 148 be *read against him; if he were, as he is presumed (a) to have been, a lite pendente purchaser. the priority of settlement by men whose titles the plaintiffs have appeared to the court of equity, at the hearing in may, 1792, to be proven.

If that fact had not been proven, and if the evidence of priority had seemed otherwise equilibrious, which was thought to be more than the defendents could plausibly allege, the court allowed actual possession of the plaintiffs, at the time of location by David Rogers of his warrant, to preponderate, and presumed, in conforming with the maxim in aequali jure potior est conditio possidentis, the right by settlement to be in the plaintiffs.

Upon this proof or presumption: whether the owner of a military warrant could lawfully locate the warrant upon land in pos-

(a) Presumed, because, 1, he doth not shew when he became a purchaser, nor even allege the purchase to have been prior to the institution of the plaintiffs demand by filing their original bill, and, 2, he was confessedly for some time a confederate with them in opposing the title of David Rogers.—Note in edition of 1795.

session of another who had settled upon it before the year 1779, and deprived him thereof? was the question, which the H. C. C. determined on the side of the settler, for reasons stated in the case between Maze and Hamiltons, decreeing accordingly.

The court of appeals, in november, 1793, reversed the decree, (b) first, because the examinations of witnesses, on behalf of the plaintiffs, to prove the priority of their settlements, ought not to have been read against the defendent David Jones, who was not a party at the time the examinations were taken; and secondly, that court were of opinion unanimously, that a settlement gave no right to lands, in law or equity before the act of 1799, and was then to operate upon mere waste land, not to defeat any clame of a citizen to lands under surveys established by that act.*

REMARKS.

1. Upon the rejection of the examinations.

1. The court of appeals, in delivering their opinion, stated that the plaintiffs replied to the answer of the defendents
149 John *Jeremiah Jacob and Mary his wife, took out commissions, and examined the witnesses on notice to Jacob and wife; insinuating, that after that answer, disclosing the purchase by Jones, the witnesses were examined. but the transcript, then before that court, shews the witnesses, to prove the priority of settlement on behalf of the plaintiffs, to have been examined before those defendents had sworn to their answer, and before David Jones was formaly made a party.

2. When no exception to reading examinations appeareth to have been taken, at the hearing, before the inferior court, the superior court, upon an appeal, may properly, as is conceived, presume the reading of the examinations to have been unexceptionable.

3. Perhaps the examinations ought not to have been rejected, if the exception had been taken before the inferior court: for if the defendent David Jones were a lite pendente purchaser, the examinations, unquestionably, might be regularly read against him.

4. If he do not appear to have been a lite pendente purchaser, there being good reason to presume him to have been such a purchaser in this case, ought the decree, on the ground of examinations having been improperly read against the defendent David Jones, to have been reversed against the defendent John Jeremiah Jacob and Mary his wife? and ought the reversal and dismission of the bill, upon the same ground, to have been absolute, as to the defendent David Jones? ought not the dismission to have been without prejudice? in which case the plaintiffs might have carried their decree against Jacob and his wife into execution, even against the defendent David Jones, unless he shewed himself not to have been a lite pendente purchaser.

5. The possession of the plaintiffs, at the time of the survey by David Rogers, a fact admitted, is sufficient presumptive proof, as hath been observed, of a prior settlement by them, until the contrary be proved by the other party, which is not pretended to have been done.

But if proofs of prior settlements by the plaintiffs were incontestable, they would not avale: for

II. That court have resolved, that a settlement gave no right in law or equity before 1779. upon which to the remarks made in the case between Maze and Hamiltons shall be here added only, that the right by settlement, which the general assembly solemnly adopted, dignifying it with the emphatical appellation of property, now appeareth to have been a property from which any man, with a military warrant, might extrude the proprietor; and that the military man, with his warrant, was
150 a more terrific *invader than a company, with their order for council; for the latter were obliged to let the settler keep the land upon payment of a certain price; but the military man plundered, without permitting the settler to ransome; who, in the anguish of soul, felt by one forced to yield up that, which toil expense and danger in the acquirement, amelioration and preservation had endeared to him, could only bewail his misfortune in some such terms perhaps as—dulcia linquimus arva, and mutter to himself

Impius haec tam culta novalia miles
habebit?

BETWEEN
JAMES BURNSIDES, *plaintiff*,
AND
ANDREW REID, Samuel Culbertson, Thomas Walker, *defendents*, and
BETWEEN
ANDREW REID, attorney in fact and assignee of Samuel Culbertson, *plaintiff*,
AND
JAMES BURNSIDES, *defendent*.

1. **The Chancellor again Reversed.**—The Chancellor, supposing that he is following their opinion, again reversed by the Court of Appeals: His remarks thereon.

2. **Land—Settlement—Survey—Priority—Case at Bar.**—*R.* represented the right by prior settlement, and claimed pre-emption. *B.* represented the claim by survey; part of the land having been surveyed in 1775. *R.* entered a *caveat*, and the General Court decided in favor of *R.*,—thereby overruling the Commissioners. *B.* filed his bill for an injunc-

(b) The decree of reversal doth not explane the reasons of it; but that they are here truly stated unquestionable authority can be produced to shew.* —Note in edition of 1795.

[*The appeal is reported in 1 Wash. 230; and decides, that a right by settlement in the crown lands, could not be acquired until the act of 1779; and this act only gives to settlers a preference in lands at that time waste and unappropriated, and which had not before that time been located under warrants. See Maze and Hamilton and Reid v. Burnsides, in this volume.—Ed.]—Note in edition of 1852.

tion; and before the defendents had answered it, he procured, in 1786, a survey and grant embracing the land in controversy. *R.* filed his bill to vacate them. The H. C. C., in supposed congruity with the opinions of the Court of Appeals, in the cases *supra*, and between the *Loyal and Greenbrier Companies*, decreed as to the pre-emption in favor of *B.*

3. **Same — Same — Same — Case Distinguished.** — Reversal by Court of Appeals;—this case distinguished from *Maze and Hamiltons*, differently, by Chancellor and by the Court of Appeals. 2 Wash. 43.

THE subject of controversy in these causes, between James Burnsides, and Andrew Reid, on behalf of Samuel Culbertson, was four hundred acres of land, called Culbertsons bottom, clamed in right of settlement, with six hundred acres of the land adjacent, clamed in right of preemption.

Andrew Culbertson had made a set-
151 tlement on the land called *his bottom, in 1753; left it through fear of the indians; and afterwards sold it to Samuel Culbertson.

During several years afterwards, that part of the country was infested by the enemy, so that the place appeared to be deserted by the Culbertsons, although they seem to have done every thing, which they could do safely, to prevent the belief of an intended dereliction.

There removal however having been to a great distance, before Samuel Culbertson could assert his title conveniently, other men claimed the land which had been settled, all whose pretentions at length concentered in Thomas Farley or Farlow, who paid for it the purchase money demanded by some men, called the loyal company, to whom the governor in council had granted leave to appropriate an enormous territory, including within its limits, if it can be said to have limits, this parcel.

In March, 1775, Thomas Farley procured the land, which he had thus bought, being 355 acres, to be surveyed, and took a certificate thereof, in order to obtain a grant so soon as the land office, then occluded, should be opened; and assigned his right to James Burnsides.

In may, 1779, Samuel Culbertson, by letter of attorney, impowered Andrew Reid to demand, and institute process for recovering possession of the land.

In 1782, the controversy was exhibited before the court of commissioners, a tribunal, constituted by statute in 1779, for deciding cases between litigant settlers. by their sentence the right of James Burnsides to four hundred acres of land, including the three hundred and fifty five, which had been surveyed for Thomas Farley, in right of settlement, and to six hundred acres adjacent, in right of preemption, was sustained.

Andrew Reid, having entered a caveat against emanation of a grant to James Burnsides, which otherwise would have passed the seal, upon a certificate of the adjudication by the commissioners, presented a petition to the general court, stating that unavoidable accidents had disabled him to produce before the commissioners, at the time of their session, testimony, which otherwise he could have produced, sufficient to support his clame, and praying the same to be considered. the general court allowed a hearing, and thereupon, the 12 day of october, 1784, reversed the adjudication of the commissioners, and awarded that a grant should issue to Samuel Culbertson for the lands clamed both by settlement and preemption.

To obtain an injunction for staying execution of this judgement of the general court, on certain grounds stated in the bill,
and to compel the defendent Thomas
152 Walker, an agent for the *loyal company, to yield his consent to a grant to James Burnsides of the land clamed by him, were the objects of the suit, in which he was plaintiff. an injunction, until further order, was granted, in may, 1785. the grounds stated in the bill were, 1, that the right of Culbertson, which originated in a settlement, a species of right never adopted for legitime before 1779, was by the statute of that year, postponed to every other right therein recognized, so that the right of Thomas Farley now derived to James Burnsides, which was by survey, and established by that act, although the survey were posterior to the settlement, must be superior to the right by settlement, and therefore ought to prevale against it. (a) 2, that the decree, as it is called, of the court of appeals, the 2 day of may, 1783, on the clames of Thomas Walker and Thomas Nelson, some way or other, determined the question in this case in favour of James Burnsides. (b) 3, that James Burnsides had the right even of Andrew Culbertson by purchase from one to whom it had been transfered, before the pretended sale to Samuel Culbertson. (c)

Before the defendents in that suit had answered the bill, James Burnsides, having, in january, 1786, procured to be made a survey of 1200 acres of land, including the lands in controversy, and a certificate thereof, surreptitiously obtained a grant to himself of the said lands, of which grant a repeal is the object of the other suit, commenced against him by Andrew Reid.

On hearing these causes together the 15 day of may, 1792, the opinion and decree of the high court of chancery were pronounced in these terms.

'The court is of opinion that James Burnsides, after obtaining an injunction to stay execution of a judgment by the general court against him, having pro-

(a) The climax of rights, here attributed to the statute, seems to have been fabricated by the companies of land mongers who, not content with the extravagant license granted to them by orders of council, perhaps as beneficial as if they had been boundless, wished to convert them into monopolies. —Note in edition of 1795.

(b) See the case between Maze and Hamiltons, ante 51.—Note in edition of 1795.

(c) The testimony in proof of this purchase is incredible.—Note in edition of 1795.

cured a survey to be made, and a grant to himself to pass the seal, of land, to which land the title of Samuel Culbertson was asserted by that judgement, and which according to the judgement would have been secured to him by a grant, if James Burnsides had not prevented it, was guilty of a fraud, because the register of the land office, if he had known such a judgement to have been rendered, by which he was ordered to issue a grant of that land
153 to the said *Samuel Culbertson, ought not to have issued, and therefore probably would not have issued, the grant to Burnsides. and the court is also of opinion that Andrew Reid, on whom the right of Samuel Culbertson hath devolved, is not barred of relief against James Burnsides, by the decree and order of the court of appeals, on hearing the clames of Thomas Walker and Thomas Nelson, not only because a clame under the survey for Thomas Farlow, which James Burnsides in his bill suggests to be the foundation of his title, doth not appear to have been established by the decree and order of the court of appeals, and could not be legally established, so as to bind the right of any who were not parties in that proceeding but, because the grant to James Burnsides was founded, not on that survey, but on a survey certified to have been made for himself, in january, 1786, by virtue partly of an entry, on a certificate from the commissioners for the district of Washington and Montgomery counties, for 400 acres, dated the 10 of September 1782, which certificate of the commissioners, with their adjudication affirming the right of James Burnsides, was annulled by the general courts judgement aforementioned. and now the court would have pronounced such a decree as in its opinion, if what followeth had not happened, ought to be made—a decree nearly like that which was pronounced in the case between James Maze, plaintiff, and Andrew Hamilton and William Hamilton, defendents; but that decree hath been reversed by the court of appeals; and this court, from that reversal, supposeth, perhaps erroneously, the opinion of that honorable court to have been, that, by the order of council, granting leave to the greenbrier company to take up 100000 acres of land, lying on Greenbrier river, northwest and west of the Cowpasture and Newfoundland, all lands within those limits, if they must be called limits, were appropriated, so that the company or their agent had power to survey and sell any parcel, which they should chuse, of such land although another man had settled on the parcel before the surveying and selling, and although the act of general assembly, passed in the year 1779, had declared to be just, that those who had settled on the western waters, upon waste and unappropriated lands, for which they had by several causes been prevented from suing out grants, under such circumstances, should have some reasonable allowance for the charge and risque they had incurred, and that the property so acquired should be secured to them; the honorable court seeming to have understood that, by the terms waste and unappropriated lands, to which no other person hath any legal right or clame, the act intended lands which the company had not chosen to
154 survey, after, *as well as before, they had been settled; whereas some, who have observed that the surveys made by orders of council and confirmed by the act are surveys of waste and unappropriated lands, likewise, think the application of the term, unappropriated, in the case of lands surveyed by orders of council to lands not settled before the surveys, would be found criticism; especially the act having dignified the settlement with the emphatical appellation of property, property acquired, and acquired at large and risque, means of acquirement generaly esteemed meritorious; and think the words lands, to which no other person hath any legal right or clame, more restrictive than the words lands unappropriated, which comprehend lands to which no other person hath any right or clame, whether legal or equitable; and the honorable court seeming to have understood that the act, by the terms upon lands surveyed for sundry companies, &c., people have settled, &c., in the seventh section, designed to include lands surveyed as well after, as before, the settlements; whereas some commentators conceive that the interpretation, which confineth the words to surveys prior to the settlement, is not inconsistent with the rules of grammar, with the intention of the legislature, or with the principles of natural justice. and this court supposeth the opinion of the honorable court to have been, that where a settler of land, surveyed after his settlement by virtue of the companys order of council, had obtained a grant of the land, including an additional quantity in right of preemption, one who was a prior settler, recovering the settlement from the grantee on that principle, shall not recover with it the preemption land; whereas others think that he, who recovereth in right of priority, ought to be in the condition in which he would have been, and consequently ought to have the preemption, to which he would have been intitled, if the posterior settler had not obtained the grant. and this court also supposeth the right of the loyal company, under whom James Burnsides in the principal case clameth, and the territorial limits of whose order of council are not more definite than those of the other company, to be no less extensive, and not less to be prefered to the rights of settlers, than the rights of that other company; on these suppositions, this court, in order to such a final decree as at this time is believed to be congruous with the sentiments of the court of appeals, doth direct (d) that a survey be made of the 400 acres of land, for the settlement by Andrew Culbertson, which may be laid down as either party

(d) Conformably with the decree entered by order of the court of appeals in the case between Maze and Hamiltons.—Note in edition of 1795.

shall desire, to enable the court to 155 decide between *them on the propriety or reasonableness of the location; that the patent of James Burnsides be also surveyed and laid down, to shew how much it includeth of the 400 acres; and when this shall be adjusted, the court doth adjudge order and decree that James Burnsides do convey to Andrew Reid the inheritance of so much of the 400 acres as shall be found to lie within the bounds of the said patent, with warranty against himself, and all claming under him, and deliver possession thereon upon Andrew Reids paying to him, at the rate of three pounds per hundred acres, for the quantity so to be conveyed, that as to those 400 acres the bill of James Burnsides be dismissed; and, as to the residue of the land contained in the patent, that the bill of Andrew Reid be dismissed; but Andrew Reid is nevertheless to be at liberty to procede to survey the 600 acres of land for his preemption, if he can find land to satisfy the same, without interfering with the said patent, or any other prior clame.'

From this decree both parties appealed, each from so much of it as partialy dismissed his bill.

On the 19 day of november, 1794, the court of appeals pronounced their opinion and decree in these term:*

'The court, having maturely considered the transcript of the record and the arguments of the counsil, is of opinion, that the said decree is erroneous in this, that, after setting aside Burnsides patent, for fraud, so far as it comprehended the lands adjudged by the general court, in 1784, to samuel Culbertson for his settlement right, it makes the preemption clame of the said Culbertson, founded on the said judgment, yield to the patent of the said Burnsides, which was not obtained till 1786; which patent appears to have been obtained upon a survey made in 1786; and herein this case differs from the case of Maze against Hamilton, because that survey was made under the greenbrier company in 1775:† therefore it is decreed and ordered, that the said decree be reversed (e) and annulled, and that the said James pay to the appellees, in the first suit, and to the appellant, in the second, their costs by them in this behalf expended. and this court, proceding to 156 make such decree as *the said high court of chancery should have pronounced, it is further decreed and ordered that a survey be made of 400 acres of land, for Culbertsons settlement, and 600 acres adjoining, which may be laid down as either party may require, to enable the court of chancery to determine as to the reasonableness of the location; that the patent to James Burnside be also surveyed and laid down, to shew how much it includeth of the 1000 acres. and, when this shall be adjusted, that the said James Burnsides be decreed to convey to the said Andrew Reid the inheritance of so much of the 1000 acres as shall be found to lie within the bounds of the said patent, with warranty against himself and all claming under him, and deliver possession, upon his paying to the said Burnsides, at the rate of three pounds per hundred acres, for the quantity so to be conveyed; that as to those thousand acres the bill of the said Burnsides be dismissed; and as to the residue of the lands contained within his patent, that the bill of the said Reid be dismissed, and that the said Burnsides pay to the other parties their costs in each suit in the high court of chancery.

REMARKS.

The decree is admitted to be erroneous, by him who delivered it, and who declared, at the time, that it did not accord with his own opinion, but that it was congruous, as he believed, with the sentiments of the court of appeals. he was mistaken. but, perhaps, to avoid such a mistake will not seem easy to one who peruseth the reversing decree, and endeavoureth to connect the conclusion, begining at the word, therefore with the premises. (f)

The reversed decree is said to make the preemption clame of Culbertson yield to the patent of Burnsides, obtained not before 1786; but that decree is denied to contain such terms, or terms of such meaning.

This case is said to differ from the case of Maze and Hamiltons, because that survey was made under the greenbrier company in 1775.

Let us inquire whether this difference exists.

In 1775, Samuel Lewis, an agent of the greenbrier company, surveyed 1100 acres of land, including a place on which James Maze had settled more than ten years before; whence the place derived the appelation Mazes cabbin.

In the certificate of survey a blank 157 was left for the name of *him who should purchase from that company. both Hamilton and Maze had treated with the agent for a purchase. but before any bargain with either, both of them exhibited their clames before the court of commissioners, who sustained that of Hamilton. this judgement, upon a caveat and petition by Maze, was reviewed and reversed by the general court, who awarded to him the settlement and preemption.

Hamilton, thus defeated, and being denied by the general court an appeal from

*[See 2 Wash. 43—Ed.]—Note in edition of 1852.

†See the judgment of the Court of Appeals as to the claims of the Greenbrier and Loyal Companies, which applies to surveys, properly qualified prior to 1776. and made by virtue of orders of council to said companies.—Ed.]—Note in edition of 1852.

(e) This naughty decree, as to the 400 acres of land, is repeated almost literaly, altho it is said to be reversed intirely, by the correcting decree. another example of a decree said to be reversed, that is, intirely reversed, and yet agreeing in most parts of it with its corrector, occurreth in the case between Ross, plaintiff, and Pleasants and others, defendents.—Note in edition of 1795.

(f) An example of this kind of argumentation may be seen in the cases between Hill and Braxton, plaintiffs, and Gregory, defendent, ante 73.—Note in edition of 1795.

their sentence, and being also denied a writ of error, for which he applied to the court of appeals, renewing the treaty with the agent, concludes a bargain, procures his name to be inserted in the blank left for it in the certificate of survey, and, bringing that certificate to the land office, obtains a grant; the register not knowing the land, to which Mazes title had been asserted by the general court, to be included in the grant.

Maze brought a bill in equity to be relieved against the grant; and, by the decree of this court, was reinstated in the condition in which he would have been, if Hamilton had not practiced the fraud, for which decree the reasons were stated at large. it was reversed by the court of appeals, declaring it in general terms to be erroneous, and directing another decree to be entered, whereby Maze was allowed to retain so much of the settlement as lieth on one side of a line, (g) said to have been made by agreement between Maze and one Tacket, to run from Wachubs spring; and Hamilton was allowed to retain all the rest of the land, and consequently the preemption.

Whatever principles may have governed the court of appeals, in the formation of their decree, in the case between Maze and Hamiltons this appeareth certain, namely, that, according to their opinion, the preemption was attached to the right by survey, and not the right by settlement: and if so, the case of Reid and Burnsides, differs not, as is conceived, from the case of Maze and Hamilton, as the court of appeals say it doth in that particular.

For although the grant to James Burnsides was obtained upon the certificate of a survey performed 1786, yet the identical plot of ground in controversy, Culbertsons bottom, included in that survey and grant, had been surveyed in march, 1775, for Thomas Farley, who had purchased from the loyal company, and transferred his right to James Burnsides.

158 *If then to the right by survey, in 1775, was attached the preemption, in the case between Maze and Hamiltons, to the right by survey, in 1775, was attached the preemption, in this case; herein therefore the cases do not differ.

But from a real difference between the cases, he, who knew the grounds of decision in one of them, perhaps might have expected a decision in favour of James Burnsides in the other. The difference is this: the Hamiltons had not the greenbrier companys right to the survey, which includeth Mazes cabbin, until after his right to it had been asserted by the sentence of the general court. but Thomas Farley, from whom James Burnsides derives his clame, had the loyal companys right to the survey itself of Culbertsons bottom, long before the right of Culbertson, represented by Reid, was asserted by the sentence of the general court.

Now the court of appeals, when they decided the case between Maze and Hamilton, declared their opinion unanimously to be, that settlement gave no right to lands, in law or equity, before the act of 1779, and was then to operate upon mere waste land, not to defeat any clame of a citizen to lands under surveys by order of council, although the settlements were before the surveys—and when they decided the case between Williams and Tomlinson, plaintiffs, and Jones, defendent, declared their opinion, without dissention, to be, and accordingly resolved, that a survey, by authority of even a military warrant located upon land, then in actual possession of settlers, should prevale over their right, and sanctify their expulsion.

Why then was the right of James Burnsides under a survey, which the loyal companys order of council authorised, defeated by Culbertsons settlement right? for that Culbertson derived any right from that company by purchase or agreement, is not proved or even suggested.

That the decree now directed is the decree which, one part of it excepted, the high court of chancery ought to have pronounced, is admitted, for reasons stated in the decree of that court in the case between Maze and Hamiltons, and hereinafter mentioned. the exceptionable part is that whereby the three pounds per hundred acres which was the money demanded by the loyal company illegaly, as is believed, from prior settlers were decreed to be paid.

The high court of chancery would have pronounced the decree here approved, because the judgement of the general court, in such a case as this, was, by statute, declared to be definite; so that no appeal from it should be allowed. if nevertheless the court of appeals felt themselves

159 at liberty to examine the *merits of such a case, and to alter the judgement in it, as they certainly did in the case between Maze and Hamiltons, this question might have occurred which, perhaps, deserved attention, whether a judgement or decree against James Burnsides, who confessedly was a purchaser for valuable consideration, and who neither knew, nor is suggested to have known, anything of Culbertsons title, unless he be presumed to have known it because the place was called by that name, be consistent with precedents which can be FURNISHED in the court of appeals?

BETWEEN

WILLIAM SHERMER, heir, executor, and residuary legatee of Richard Shermer, *plaintiff*,

AND

DUDLEY RICHARDSON, executor of John Shermer, and the heir and next of kindred of Ann Shermer, *defendents*.

Sept., 1792.

Wills—Construction—Devise to Wife for Life with

(g) From reports of the surveyor, directed to perform the decree of the court of chancery entered in obedience to the decree of the court of appeals. whether this line will ever be found seems doubtfull: and the researches for discovering the spring, either perennial or temporary, seems to have been hitherto not more successfull.—Note in edition of 1795.

Absolute Power of Appointment*—Effect.—The words (in 1775) "I give to my wife the use and profits of my whole estate, during her natural life, and after that is ended, my will is that the whole of my estate exclusive of that already given my wife, be equally divided betwixt whoever my wife may think proper to make her heir or heirs, and my brother R. S.," create a fee simple in the wife to one half the estate; just as if he had said, "I give one half of my estate to her and her heirs, and I give the other half to her during life and after her death to my brother." Affirmed by Court of Appeals. 1 Wash. 266.

IN this cause, upon these words in the testament of John Shermer, who died in 1775, 'I give to my wife the use and profits of my whole estate, both real and personal, during her natural life, and, after that is ended, my will and desire is, that the whole of my estate, exclusive of that already given my wife, be equaly divided betwixt whoever my wife shall think proper to make her heir or heirs, and my loving brother Richard Shermer,' a question was made, whether Anne Shermer, the wife of the testator, who died, a few days after him, in the same month, without making any disposition of her estate, took a fee simple in one half of the land devised, and a property in one half of the other estate bequeathed, to her? the plaintiff, who is heir of John Shermer, and next of kindred to him, claming the half, of which she had not the ownership, as he insists, but only power to dispose; because, by
160 her failure to exercise *that power, that half was undisposed, and consequently descended and devolved upon him.

BY THE COURT, the 27 day of september 1792.

By the first section of Lyttleton's tenures we learn, that, in feoffments and grants, a fee simple, or the greatest property, in land is not conveyed to the taker, unless in the habendum after his name be inserted the words, 'and to his heirs.' but these words, notwithstanding the addition of them at that time was necessary, in those acts, to augment the estate, from an estate for life, which without them it would have been, to an estate of inheritance, do not import, as an ordinary reader might suppose, a transfer of any right to the heirs. indeed if he, to whom and to whose heirs, land is conveyed, make no disposition thereof, his heir will succeed to it. yet this is not because he was indicated by the word 'heirs,' in the deed of conveyance, for where an inheritance is acquired, not by tralatitious act, as by estopel, disseisin, abatement, intrusion, &c. the heir, if no disposition be made of it, will succeed to it. it is because where the dying owner of an inheritance hath not appointed a successor, the law appointed one for him: but he may prevent the hereditary succession, by act taking effect in his lifetime, e. g. by a sale or gift, or not until after his death, e. g. by appointment of a testamentary successor, of a haeres factus. the words, 'to his heirs,' therefore, even where they are requisite, are an antiphrasis:—they do not restrain the ancestor from disinheriting, but instead of that, making him absolute owner, impower him to disinherit, the heir. a grant to one and his heirs, then, is, in effect, a grant of power, in popular language, to dispose. so that a grant to one of a power to dispose of lands, a form naturally as apt to convey an inheritance, as a grant of the lands to him and to his heirs.

Accordingly in some formulae the word heirs is unnecessary. in a testament technical language is dispensed with, and may be supplied by the testators intention; for if a man devise lands to one, TO GIVE in this case a fee simple doth pass by the intent of the deviser. Cokes institutes, 1 vol. fol. 9. b. and more than a myriad of other examples to the same purpose may be quoted. a devise then to one to give, is equivalent to a devise to one and to his heirs. a devise to my wife, 'and to whomsoever she shall think proper to make her heir or heirs,' is equivalent to a devise to my wife, 'to give;' and consequently equivalent to a devise to my wife and to 'her heirs.' a devise in this form 'i make I. S. heir of my estate,' or 'i will that I. S. inherit my estate,' hath been adjudged in a multitude of cases,
161 *without an exception, to convey a fee simple; for, although, if I. S. be not he, whom the law denominateth the heir, the testator can no more make him heir than he can change the law, yet his intention being manifest, that I. S. should have the same interest in the estate, as if the characters of an heir were verified in him, the meaning technical of words, which would effectuate that intention, is transfused into the inartificial words by which the testator declared it. in like manner in a devise to my wife, with this addition, 'and my desire is that, after her death, the estate shall go to the heir or heirs whom she shall think proper to make,' the intention being manifest, she should have such a right and power that he to whom she should think proper to give the estate, or dispose of it otherwise, should have the same interest in it, as if he were in law her heir, or, if she should make no disposition, that her heir should succede to it, whether she should give or dispose of it, or suffer it to descend, being a matter unimportant to the testator or his family, to the testators inartificial words shall be attributed the meaning of those technical words by which his desire will be accomplished. that is, it shall be a devise to the wife and to her heirs.

Now the words of John Shermer's testament being 'i give to my wife the use and profits of my whole estate during her life, and after that is ended, then my will and desire is, that the whole of my estate be

*See principal case cited in Wilkins v. Taylor, Wythe 341, 346.

equally divided betwixt whoever my wife shall think proper to make her heir or heirs, and my brother Richard Shermer;' this devise, if for some terms in it be substituted the equivalent terms, being read thus: 'i give to my wife the use and profits of my whole estate, during her natural life, and, after that is ended, my will and desire is, that the whole of my estate be equally divided between my wifes heirs, and my brother Richard Shermer,' would unquestionably have conveyed a fee simple in one half of the lands, and an absolute property in one half of the other estate to the wife; and such ought to be the operation of the testators own words, unless it be interdicted by the gift to her for life. if this be relied upon, two answers are given to it, either of which is sufficient to obviate the objection, if it deserve that appellation; 1, that where an estate for life is given to one, and afterwards in the same conveyance the estate is given to the heirs of the donee, the donee takes the inheritance immediately. Cokes institutes 1. vol. fol. 22. b. and, by like reason, where an estate for life is devised to one, and afterwards in the same testament the donee is impowered to make an heir of the estate, the donee takes the inheritance immediately. 2, that in the devise to the wife, the words, 'during her natural life,' ought not to be applied to that moiety
162 *of his estate which the testator designed for her heir or heirs, because a power to dispose, or to make an heir of the moiety, which she undeniably had, and an inheritance or property in the moiety, being synonymous terms, the words, 'during her life,' can have no effect upon her right to that moiety, which was greater than an estate during her life but ought to be confined to that moiety, which was designed for his brother, and in which her interest would cease with her life. so that the devise ought to be expounded as if it had been written thus: 'i give one half of my estate to my wife, and to whomsoever she shall think proper to make her heir or heirs, that is, i give one half of my estate to her and to her heirs, and i give the other half of it to her during her life only, and after her death, to my brother Richard Shermer.'

This exposition of the testament fulfilleth the intention of him who made it, to divide, after the death of his wife his estate between their two families equally.

Dismiss the bill as to the moiety of the estate whereof the wife had a power to dispose.

This dismission was affirmed upon an appeal.*

*["It was proved that the testator frequently said, he would leave his wife one-half of his estate to dispose of as she should please, and that most of his estate was acquired by his inter marriage with her." The Court of Appeals, however, say, that "upon a view of the will, the intention is apparent." &c.; and "their relative situation and his prior declarations only shew such intention to be liberal and just." 1 Wash. 266, 272.—Ed.]—Note in edition of 1852.

*BETWEEN 163

WILLIAM YATES and Sarah his wife, *plaintiffs*,

AND

ABRAHAM SALLE, Bernard Markham, Edward Moseley, Benjamin Harris, and William Wager Harris, *defendents*.

June & Sept., 1792.

Legacy—Payment in Depreciated Paper Money†—Case at Bar.—A legacy from a father to a daughter, (payable 100 £ within twelve months after August, 1777, and the rest at the discretion of his executors, when it could be conveniently raised from the profits of his estate,) paid in 1778, to her guardian in depreciated paper money, is, by the *subsequent* act of 1781 good, and will be a discharge at the nominal amount, as to both the executor's and co-legates. And the guardian, having lent out part of the money, and received it in depreciated paper, which he at last funded, is not liable for the loss by depreciation.

Same—Same.—So held by the Court of Appeals: See 1 Wash. 226. The Comments thereon by the Chancellor, who had held otherwise. This case is not in the Chancellor's volume of Reports, but one of the pamphlets afterwards issued.

BENJAMIN HARRIS, father of the plaintiff Sarah, of five other daughters, and of the defendents Benjamin Harris and William Wager Harris, seized of valuable lands, possessed of a number, between fifty and sixty, of slaves, and intitled to credits, amounting to about one thousand pounds, by his testament, in april, of the year one thousand seven hundred and seventy six—after devising and bequeathing part of his estate to his wife, to be holden during her life, in satisfaction of her dower; after devising and bequeathing to his sons his most profitable lands, and his slaves and personal estate, except the parts thereof given to his wife and daughters; and after bequeathing to his daughters Mary Spencer and Hinson Wager Moseley, who is supposed to be the wife of the defendent Edward Mosely, each, one hundred pounds, current money, to be raised out of the profits of his estate, and four young negroes, and to Mary Spencer a bed and furniture, or ten pounds, current money,—bequeathed to his daughters, Phoebe, Edith, the plaintiff Sarah, and Nancy Hinson Wager, each, one hundred pounds, current money, to be paid within twelve months after they should respectively attain their ages of eighteen years, or marry, also two hundred pounds more, of like money, when they could be conveniently raised from the profits of his estate, to be paid at the discretion of his executors, also four young negroes, and a bed and furniture, or ten pounds; declared his will to be, that his son Benjamin pay to his son William Wager three hundred pounds, current money, in regard the estate given to the former was more valuable than that
164 given to the latter; *devised three lots of land in Manchester to his sons, and ten thousand acres of land in

†See Ambler v. Wyld, Wythe 235.

Transylvania to his eight children; directed all his estate to be kept together for paying off the money legacies, for maintenance of his family, and for education of his children, until his son Benjamin, or, in case of his death, until his other son should attain the age of twenty one years; and appointed the defendants Abraham Salle, Edward Moseley, and Bernard Markham, with Samuel Nivins, of whom the last is supposed to be dead, because, after proving the testament, nothing more appeareth to have been done by him, executors.

Before depretiation was perceptible the testator died; for in september, 1776, a certificate for obtaining the probate of his testament was granted.

A few months afterwards, the plaintiff Sarah chose the defendent Abraham Salle her guardian, and in august 1777, attained the age of eighteen years.

The defendents Edward Mosely and Barnard Markham voluntarily tendered to the guardian of the plaintiff Sarah, on the 12 day of September, 1778, one hundred pounds, and on the 31 day of august, 1779, two hundred pounds more, both in depretiated money, and required him to receive them in discharge of the money legacies of his ward. the defendent Edward Moseley proposed to tender Nancy Harris's legacy to her guardian Thomas Harris, who refused to receive it in paper money; and it was afterwards paid in specie.

The guardian of the plaintiff Sarah was unwilling to receive the paper money, and wished to have declined it, but thought himself compelled, by the laws of the country, to take it, when payment was offered; and received it accordingly. so soon as the money was paid to him, he lent out two hundred pounds upon interest, and was compelled, as he says, to receive them again, much against his inclination, and could not lend out the money afterwards. he offered the whole three hundred pounds to the plaintiff Sarah, when she attained full age, which she refused to accept. and then he funded the paper money.

No other legatary, besides the plaintiff Sarah, sustained, considerable, if any, loss, from depretiation.

The plaintiffs brought their bill for the wifes legacy, to be paid by the executors of her father, or by the sons, whose estates were chargeable with it.

The executors, in their answer, admit the facts before stated and the two, who tendered the paper money, say, 'they thought themselves bound by their duty, and in obedience to the will of their testator, to tender the legacy so soon as the estate was in circumstances to pay the same;' 165 that the plaintiff Sarah, before *they paid her legacy, informed them she wished to receive it, that she might draw interest upon it; and that the defendent Bernard Markham advised her not to take it. and they admit that they have bond, belonging to the estate of their testator, still in their possession, to the amount of little more than two hundred pounds, and that they have given up to the other defendents a large personal estate.

And those other defendents, the sons, in their answer, clame the benefit of the payments to the guardian, conceiving the clame to be just, because the estates, received from their father, had been injured, as they allege, by payments in paper money to the executors about the time of discharging the legacy.

By accounts, to which the executors refer, the testators credits, by bond and a note of hand, at the time of his death, amounted to seven hundred and seventy seven pounds five shillings and seven pence, supposed to be principal money. of these credits; the executors received from Hannah Easley, on the 5 day of march, 1777, two pounds, from John Short, on the 8 day of may 1779, sixty one pounds and fifteen shillings, from James Harris, on the 25 day of June, 1780, one hundred and fifty pounds ten shillings and seven pence, and from John Scott, on the 8 day of december, 1785, sixteen pounds and ten shillings. so that of the credits five hundred and forty seven pounds had not been received by the executors, and, according to their answer, the securities for payment of that remainder, with many years interest, the first of them being dated in 1768, and the last of them on the 2 day of august, 1776, were retained by the executors, or 'given up' to their friends the sons.—and the other credits, by payments of which in paper money the sons pretended the estates given them by their father to have been reduced, arose from sales by his executors after his death; so that the estate, in the hands of such thrifty managers, probably gained as much as it lost by depretiation. two months before the tender of the two hundred pounds to the plaintiff Sarahs guardian, the executors received four hundred pounds for one horse, sold to John Harris, supposed to be the horse valued by a witness at thirty-five pounds in specie, and one month after that tender, received two hundred pounds for less than nine hundred and sixty pounds of tobacco sold to Francis Locket. but if the payments in paper money were detrimental to the estate, the contrivance of executors, entrusted for the benefit of all the children, to burthen one of them with nearly the whole loss, was as nefarious, as the retention of the iniquitious gain by her brothers was rigorous.

The cause was heard on the first day 166 of june, in the year *1792, when the opinion of the court was declared to be, that the plaintiffs were bound by the receipt of the guardian of the plaintiff Sarah of one hundred pounds, part of the three hundred pounds bequeathed to her; but that the plaintiffs were intitled to the residue of that legacy, with interest, and the court decreed the executors to pay to the plaintiffs two hundred pounds, with interest thereupon from the first day of january, one thousand seven hundred and eighty two, and costs.

The distinction in the decree between the

payment of the one hundred pounds and the payment of the two hundred pounds was afterwards thought to be grounded on a false principle, unnecessary to be here explained; and,

On the 26 day of september, in the same year, the decree, by consent of parties, was reviewed, and the court, partly reversing it, decreed the executors, out of the estate of their testator, in their hands to be administered, to pay to the plaintiffs the whole three hundred pounds, bequeathed to the plaintiff Sarah by the testament of her father, after deducting therefrom the payments to the guardian, according to the true value thereof at the times of payment, with interest from the times when she was intitled to receive her legacy, an account of the payments and interest was directed to be stated by a commissioner, upon whose report the sons would have been decreed to pay so much of the legacy and interest as exceded the effects in the hands of the executors.

He who awarded this decree was not moved, in forming it, as hath been supposed, by compassion* for an orphan CONFESSED† to have been INJURED† by those who ought to have protected her, but was moved by these considerations:

I. The money bequeathed to the plaintiff was intended by her father to be equal in value to the money current at the date of his testament, which was of the same value, or nearly of the same value, as the money current when the decree was pronounced. for.

First, he did not know that, between that time, and the times appointed for payment of the legacy, the comparative value of money would vary more than the comparative values of other commercial subjects; and

Secondly, the testament itself exhibited a criterian for adjusting the value of the money legacies, which indicates the value contemplated by the testator to have been the value of money current when he was bestowing them. the parts of the testament, to which this observation al-
167 ludeth, are those by *which were bequeathed a bed and furniture, OR TEN POUNDS, to one married daughter, and the same to each of the daughters unmarried; and by which the son Benjamin was enjoined to pay THREE HUNDRED POUNDS to his brother, in order that their ESTATES might be more nearly EQUAL IN VALUE. whence may be inferred, that the testator intended, that every ten pounds of the portions to his daughters should be equal in value to a bed and furniture; and that the three hundred pounds legacy to each daughter should be equal to the three hundred pounds, to be paid by one of the sons to the other; and did not intend that his son Benjamin, by payment to his brother, in december, 1781, of three hundred pounds, at that time worth, by legislative estimation, not more than a dollar, and, by vulgar estimation, nothing, should discharge the obligation to make the estates of both equal.

One may rationaly suppose, that the testator, if he had foreboded those events, by which the comfortable provision, as he thought, for his daughter, became unworthy her acceptance, would have bequeathed to her portions of the fruits to be yielded by his estate, equal to the value of the money, by which he expected she could procure those fruits, which might have been effected, without impairing the capital funds devoted by him to the use of his other children; that he would have estimated the substitute for money by some ratio analogous with that observed in the instance of the bed and furniture, and of the difference in value between the estates given to the two sons; or that he would have provided for her otherwise, in some such manner as that she, and of all his family she only, should not be deprived of more than half the portion which he wished her to enjoy.

So that the executors, who say, 'they thought themselves bound, by their duty, and in obedience to the will of their testator, to tender the said legacy, so soon as the estate was in circumstances to pay the same,' if they did think so, manifestly misinterpreted that will, according to their interpretation, the testator, who, providing for the support of a child, after she probably would leave his family, where he had directed her to be maintained during the minority of his sons, or one of them, bequeathed to her one hundred pounds, to be paid within twelve months after she should be eighteen years old, and two hundred pounds more, 'when the same could be CONVENIENTLY RAISED from the profits of his estate, to be paid at the DISCRETION of his executors'—the testator willed that this child should be defrauded of her portion;—that when the calamities of war and emergencies unforeseen,
168 without diminution *of his estate, or the profits thereof, should reduce the paper money, uttered after his death, to little more than a shadow of what it pretended to be, the testator willed those executors, in their DISCRETION to sham this child with a payment in that money, because they could conveniently RAISE more of it than was sufficient, by selling one of his beasts, or a hogshead and a half of tobacco.

II. The guardian, who was one of the executors, knew that his ward would be injured by receiving, for no other reason can be assigned for his unwillingness to receive, the paper money; another of them Bernard Markham advised the plaintiff Sarah not to take the paper money, which advice could only be justified by the like reason; and the other, who was the most eager and active of the triumvirate in this foul business, knew that she would be injured by the payment of paper money, for he is proved by

*This motive was ascribed to him when the decree was condemned.—Note in edition of 1852.

†See decree of reversal at the end.—Note in edition of 1852.

a witness to have avowed the design of payments to some of the daughters, in that manner, to have been, that thereby the sons might get almost all the estate; which design was contrary to the maxim jure naturae aequum est, neminem, cum alterius detrimento et injuria, fieri locupletiorem, (Dig. Lib. L. tit. XVII. reg. ccvi); was contrary to his duty, requiring him to be the friend of all the children equaly; and was the more blameable, if he were the husband of one of the legataries, who appeareth, by the accounts before mentioned, to have received her legacy in 1776, and therefore not depretiated. when those who are empowered to perform an act know that injustice will be done, injustice not foreseen by their constituent, arising from causes existence, of which even in embryo were not contemplated by him, and injustice, against which, if he had foreseen it, he would have provided, and when, on the other hand injustice will not happen from nonperformance, which appeareth to have been precisely the case here, execution of the power ought to be suspended until the causes, if they be temporary, shall cease to operate, or, if they be permanent, until the difficulty can be solved by competent authority. if the zeal of the two executors would have suffered them to postpone, or the guardian had been as dexterous as Thomas Harris was in parrying, the tenders, for sixteen months only, the young woman might have escaped the barbarous spoliation insidiously meditated against her. and when execution of a power, in such peculiar circumstances, shall have intervened, especialy if fraud and oppression shall have accompanied it, the court of equity, vacating the act, and restoring all parties to the state in which they would have been, if the agents had remained quiescent, fulfills one of the main purposes of its institution, and doth not transcend the limits of its province.

169 *III. If the testator did intend the legacies to his daughter to be paid in money, equivalent to the money current in his day, the legataries had a right in equity to such portions of his personal chatels, and profits of his whole estate, both of which were in terms chargeable with the legacies, as were equal to that value; and if the executors, willing to act justly towards all the children, had discharged the legacies by delivering those portions of the goods, and of the specific profits, when the one could be spared and the other could be conveniently raised, the court of equity would, as is conceived, have applauded their discretion—conceived, because the court, upon a previous application by them, would probably have authorized the adjustment, unless it seemed precipitate; and will sanctify what it would have authorized, if a stranger be thereby not injured. be this as it may, the court of equity would not, as is believed, have directed the guardian, against his will, to receive the paper money, according to its nominal value at the time of the tenders, and ought not to ratify the receipt, at most no farther than to grant him a quietus from any demand against him, in that character, by his ward, leaving her at liberty to seek satisfaction from those who injuriously withold it.

IV. Legal compulsion, an apology which was urged by the defendent Abraham Salle to justify his conduct in receiving the paper money did not exist. he was not compellable by law to receive it. the statutes, by authority of which the paper money of this commonwealth had been generated, and that of Congress had been adopted, which declared that it should pass current in all payments, trade, and dealings, and be equal to the same nominal sum in spanish milled dollars, which inflicted penalties upon those who estimated the metalic and paper monies differently, and which enacted that the paper money should be a lawful tender in payment of all public and private debts—these statutes did not COMPEL any one, whether he would or not, to receive the paper money,—did not, for that purpose, authorise corpuscular violence,—did not declare the duty to be cancelled by refusal,—but proceeded no farther than to make the refusal an extinction of the right to interest., If the guardians fear to incur popular odium, prevailing over his fortitude, compelled him to concur with his colleagues in this flagitious transaction, they, who, practising upon his pusillanimity, led or terrified him into the dilemma, violated their duty, in defeating the design of their testator, and were partial in suffering the guardian of another legatary to elude the same injury meditated against her; and the conduct of all three was a subject meet for praetorian animadversion.

170 *V. That paragraph of the act of general assembly, passed in the november session of the year 1781, intituled 'an act directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes,' which provided, 'that in all cases of payments, in paper currency, of any DEBT, CONTRACT, or OBLIGATION WHATSOEVER, the PARTY paying, or upon whose ACCOUNT the money shall have been paid, shall have full credit for the nominal amount of the payment,' perhaps doth not comprehend the case of a legacy; for

A legacy is not a debt of the testator. It is, with respect to him, a beneficence, to exaction of which from him the law did not intitle the legatary. the testator might have revoked it which he could not have done, if a legacy were synonymous with a debt. Besides, the right of the legatary, before the testator's death, is not perfect. the testator then was not a debtor whilst he lived; and with his existence his power to become a debitor ceased. a legacy is not the debt of an executor. a debt originates ex contractu, which doth not exist between him and the legatary, the executor, by wasting the testators goods, may be responsible indeed for the value of them, to an unsatisfied legatary; but here the legacy is not, but reparation for maladministration in his office, is the thing demanded from

the executor, the right to demand it originating ex malificio, although the legacy is the measure of that reparation. the words debitum in praesenti solvendum in futuro, often used in cases where the question is whether a legacy was lapsed or not, do not describe the nature of a legacy, but relate only to the time when the legatary right became or would have become complete. obligation, the other term occuring in the paragraph cited, the extent of which is supposed to be defined by the following words, 'PARTY paying or on whose ACCOUNT the payment shall have been,' includes an obligation which the party who paid, or on whose account an agent paid, the money, was originaly under obligation to pay the money; but the testator was not under obligation to pay the legacy.*

But this paragraph if it do comprehend the case of a legacy generaly, can apply to the case only, where the payment and receipt being fair, and therefore supposed to be valid acts, the question between the parties is, how much credit ought to be allowed for the payment; not to such a case as this, where the money tendered unnecessarily, injuriously, contrary to the manifest 171 *intention of the testator, money tendered by one entrusted in some measure with the care of all his testators children and their estates, but prompted by an eagerness to enrich some of them by half ruining another, was accepted by her guardian, against his consent, impelled by a false notion, craftily infused or negligently embraced that he was by law bound to accept it, or terrified into an apprehension that he durst not refuse it; not to such a case as this, the case of an infant, who ought not, in vain, to supplicate relief in a court of equity.

Upon these considerations, the decree was thought to be so righteous a sentence as that it would be approved, even in that tribunal where a

Quaesitor Minos urnam movet,

until its damnation was solemnly announced by this act:

At a court of appeals, held at the capitol, in the city of Richmond, the 2 day of November, 1793,

Abraham Salle. Bernard Markham and Edward Moseley, executors of Benjamin Harris deceased, and Benjamin Harris and William Wager Harris, appellants, against William Yates and Sarah his wife, appellees.

Upon an appeal from a decree of the high court of chancery, pronounced the twenty sixth day of September, 1792,

This day came the parties, by their counsil, and the court, having maturely considered the transcript of the record, and the arguments of the counsil, is of opinion, that the three hundred pounds current money legacy, devised to the appellee Sarah by the will of her father Benjamin Harris, was dischargeable in paper money, at the times the respective sums of one hundred pounds and two hundred pounds were to be paid, according to the will, and the executors of the said will, having actualy paid the same accordingly to the guardian of the said Sarah although the paper was then in a state of depretiation, which rendered the payment very injurious to her, yet she was deprived of any relief by the subsequent act of general assembly, intitled 'an act directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes,' which directs, that in all cases where actual payments had been made, by any person, or persons, of any sum or sums of the aforesaid paper currency, at any time or times, either to the full amount, or in part payment, of any debt, contract or obligation whatsoever, the party paying the same, or upon whose account such a sum or sum of money had been actually paid, should have full credit for the nominal amount of such payments, which should not be reduced; that the 172 guardian *of the appellee Sarah being compellable by law to receive the said paper money, and it not appearing that he used the same for his own purposes, but kept part of it by him and lent other part out at interest, which on its being returned, he also kept until it was funded, according to another act of assembly, ought not to be subject to the loss by future depretiation, subsequent to his receipt of the money from the executors, and consequently that the said decree, as also the decree of the first day of June, 1792, are erroneous: therefore it is decreed and ordered, that the same be reversed and annulled, and that the appellees pay to the appellants their cost by them expended in the prosecution of their appeal aforesaid here. and this court, proceeding to make such decree, as the said high court of chancery should have pronounced, it is further decreed and ordered that the bill be dismissed, as to the appellants Bernard Markham, Edward Moseley, Benjamin Harris, and Wm. Wager Harris, and that the parties bear their own costs, and the cause is remanded to the said high court of chancery, as to the appellant Salle, the guardian, for an account to be taken of the said money so received by him, according to the principles of this decree, which is ordered to be certified to the said high court of chancery.

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*BETWEEN 173

THOMAS BAILEY and Anne his wife, *plaintiffs*,

AND

LEVIN TEACKLE, executor of Ralph Justice, Edward Ker, and William Harmanson, and Henry Harmanson, executors of John Harmanson, *defendents*.

March, 1793.

Wills—Construction—Case at Bar.—1751. A testator devised lands to his wife *during her widowhood*; and then to his daughter A. and her heirs after

*[The Court of Appeals, however, through their president, say, "It is remarkable that to the words debts and contracts are added, or obligations whatsoever, which comprehend legacies." 1 Wash. 227.—Ed.]—Note in edition of 1852.

the time limited to her mother; also other land, and a negro to another daughter, and her heirs; and then added, "in case my two children should die without heirs of their bodies, then I give my said wife my plantation, [before devised to her and to A.,] during her life, and after her death to my brother: my will is that my wife have all my estate till the first child marries or arrives to the age of twenty one years; and my will is that there shall be an equal division of my estate and settlement."—HELD, that the condition annexed to the first devises to the wife, viz: the continuance of her widowhood, is not discharged by the subsequent devise to her until the elder child should be married or attain the age of twenty one years. She is entitled to all the estate: to part, if she continue a widow: and to the remainder, till the other event, whether she married again or not.

2. **Same—Same—Same.**—If she marry again, (as she did.) her title under the will to the land devised over to A. ceases; but her title to dower in it remains.

3. **Personalty—Distribution—Rights of Half Sisters.**—A. died an infant, intestate and unmarried; and her share of the personalty was distributed among her mother, sister, and two half sisters; but HELD, that the half-sisters not entitled to share A.'s personal estate; and the feme plaintiff not being of age when married, the statute of limitations is no bar to recovering the portions received by the half sisters.

4. **Profits of Realty—Rights to—Case at Bar.**—The plaintiffs, A.'s sister and her husband, are entitled to two-thirds of the profits of the lands devised to A., made after the marriage of her mother.

5. **Wills—Signature of Testator*—Top of Will.**—Insertion of testator's name at top or in any other part of a will, equivalent to signature at bottom.

RICHARD DRUMMOND by his testament devised as followeth: 'i give and bequeathe to my wife Catharine Drummond the land left me by my father Richard Drummond, lying on Hunting creek, containing 600 acres, including the half of Halfmoon island, during her widowhood; and i also give my said wife the use of my watermill, lying on the head of Hunting creek, during her widowhood. item i give and bequeath unto my daughter Alicia Drummond my abovesaid plantation, lying on Hunting creek, after the time limited to her mother, to her and to her heirs, and i also give my said watermill to my daughter Alicia, to her and to her
174 heirs. item i give *and bequeath to my daughter Anne Drummond the plantation which my father bought of Jacob Litchfield, to her and to her heirs, and i also give my daughter Anne a negro boy named Jamey. and in case my two children Alicia and Anne Drummond should die without heirs of their bodies then i give my said wife my plantation, lying on Hunting creek, during her life, and after her death to my brother Spencer Drummond. my will is that my wife Catharine have all my estate till the first child marries or arrives to the age, twenty one years. and my will is that there shall be an equal division of my estate and settlement.'

The writing purporting to be this testament begins with these words, 'i Richard Drummond of Accomack county, &c. do make and ordain this my last will and testament, &c.,' and concludes with these words, 'revoking all other wills before made. in testimony whereof i have hereunto set my hand and affixed my seal, this day of april, in the year of our lord 1744. signed, sealed, published, and delivered in presence of,' no name is written under it.

Richard Drummond died in february, 1750-1. probate of this writing for his testament was obtained in october, 1765, when three witnesses, before the court of Accomack county, to whose jurisdiction the matter belonged, deposed that they believed it to be all of his handwriting, with which they declared themselves to have been well acquainted.

Administration of the goods, chatels and credits of Richard Drummond, on the supposition of his intestacy, was committed to Catharine his widow, the mother of the plaintiff Anne and her sister. the daughter Alicia died an infant, intestate, and not having been married, between three and four years after the death of her father.

In 1756, the widow was married to Ralph Justice, who died in her lifetime, in december, 1759, having made his testament, whereof he appointed the defendent Levin Teackle executor.

The plaintiff Anne, the other daughter of Richard Drummond, in may, 1759, being then an infant, was married to William Justice, son of the before named Ralph Justice, and after his death, which happened in april, 1762, was married in november, of the same year, whether then an infant or of full age doth not appear, to her present husband.

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*Wills—Signature of Testator—Where.—In Perkins v. Jones, 84 Va. 362, 4 S. E. Rep. 838, it is said: "In this state as we have seen, no witnesses were required to a will wholly written by the testator; and although our courts showed a disposition at one time to follow the English view as to the sufficiency of a signature anywhere on the paper (*Bailey v. Teackle, Wythe* 173; Selden v. Coalter, 2 Va. Cas. 553), the publication required in England in such cases being absent under our law, the view was questioned and finally denied, as the proof of finality of intention might be altogether wanting in an unsigned and unattested will, recited in the case of Waller v. Waller, 1 Gratt. 454. Such a will coming under consideration, it was held in this court that a will unsigned and unattested, was lacking in evidence of finality of intention, and the will in such guise was rejected. The legislature thereupon amended our statute so as to bring it plainly in accord with this decision, and it was required that the will should be signed in such manner as to make it manifest that the name was intended as a signature." See principal case also cited in Waller v. Waller, 1 Gratt. 474; *foot-note* to Selden v. Coalter, 2 Va. Cas. 553.

See further, on this subject, *foot-note* to Waller v. Waller, 1 Gratt. 454; Ramsey v. Ramsey, 13 Gratt. 664, and *foot-note;* Roy v. Roy, 16 Gratt. 418, and *foot-note.*

Catharine Drummond, at the time of her marriage with Richard Drummond, was the widow of John Shepherd, to whom she had borne two daughters, Margaret and Elizabeth, who were married, the former to the defendent Edward Ker, and the latter to John Harmanson, the testator of the other defendents William Harmanson and Henry Harmanson.

175 *The plaintiffs commenced their suit, first against the defendent Levin Teackle alone, by their bill filed in march, 1767, stating Richard Drummond to have died intestate, and alleging that Ralph Justice, after his marriage with the mother of the plaintiff Anne, entered into the lands and took possession of the slaves and other chatels of Richard Drummond, and received the profits thereof, and converted to his own use part of the personal estate, and demanding an account of those profits a d personal estate, and praying a decree for the plaintiff Anne's proportions of them, or so much as had not been accounted for to her former husband William Justice.

The defendent, by his answer to that bill, admitted that the daughter Alicia's part of her fathers estate had been divided into four parts, and distributed among her mother, the plaintiff Anne, and her two half sisters, in such manner as he was advised the law directed; and alleged that Ralph Justice, whose possession of Richard Drummonds lands and other estate, from some time in 1756 until may, 1759, is admitted, delivered up the whole estate real and personal to William Justice, after the intermarriage of him and the plaintiff Anne, about the time last mentioned; which delivery, as the defendent insisted, discharged his testator from obligation to render any further account of that estate or its profits.

That cause was set for hearing in february, 1770. 14 of november, 1782, an order was made, by consent of parties, appointing commissioners to state and report an account of such part of Richard Drummonds estate as came into possession of his widow, before her marriage with Ralph Justice, and also of such part of the estate of Richard Drummond as came into possession of Ralph Justice after his marriage with Catharine Drummond, and of the nett profits of the whole estate from the death of Richard Drummond, and an account of such part of Catharine Drummonds estate as came to the possession of Ralph Justice, after his marriage aforesaid, and of the disbursements and applications by Ralph Justice, or his executor, in discharge of debts and in delivery thereof to persons claming the same.

Similar orders, subsequent to this, appointed other commissioners, who made reports, upon which was no decree.

In may, 1787, the plaintiffs filed an amended bill, making the other defendents parties.

In the amended bill the plaintiffs set forth the testament of Richard Drummond, stated that it had been in possession of Catharine Drummond, from the time of his death, until the year 1765, when the plaintiff Thomas Bailey procured it to be proved, and obtained a commission of administration of that testators

176 *goods, chatels and credits, with the testament annexed, that Catharine Drummond took her dower in the real, and received her distributive share of the personal estate of her said husband, and that the share of Alicia was distributed among her mother, the plaintiff Anne, and her two half sisters; stated the intermarriage of Ralph Justice and Catharine Drummond, his death, and appointment of an executor, and the marriages of the plaintiff Anne; insisted that the half sisters were not intitled to any part of Alicia's estate, and that the right of Catharine the widow, who did not renounce the benefit she might clame by the testament, to the profits of Hunting creek land, ceased by her marriage with Ralph Justice, or, if not, that the plaintiff Anne was intitled to two third parts of those profits, after the intermarriage; stated that the balance of the personal estate left by Richard Drummond, which came to the possession of Ralph Justice, amounted to 6891. 12s. 3d, the profits of the said estate, during the widowhood of Catharine Drummond, that is from february, 1752, until may, 1756, to 6841. 9s. 6d, and the profits during the possession of Ralph Justice, that is, from may 1756, until 1759, to 3721. 4s. 9d; charged Ralph Justice, and after his death his executor, with receiving moneys from the debtors of Richard Drummond and Catharine Drummond, and from the tenent of a plantation belonging to Richard Drummonds estate, for rent; and prayed the like decree as they prayed by the original bill against the defendent Levin Teackle, and a decree against the other defendents to refund the money wrongfully received for the shares of the two half sisters.

The defendent Levin Teackle, after admitting by answer the several facts stated in the amended bill, except the receipts of profits, debts, and rent, to so much of the bill as demanded the profits of Richard Drummonds estate demurred, insisting that, by his testament, his widow, and, in her right, Ralph Justice, after their intermarriage, were intitled to the profits; by further answer, alleged that Ralph Justice delivered up the estate to William Justice, former husband of the plaintiff Anne, after their intermarriage, and that the representatives of Catharine, the administratrix of Richard Drummond, were responsible for her transactions in that office, not the defendent; demurred to that part of the bill, which demanded an account of monies which had been due to the said Catharine, and with receiving which the defendent and his testator were charged, and of rent, because, first, the charges were vague, secondly, the executor or administrator of the said Catharine only can properly demand that account, and, thirdly, where the land for which the rent became due lieth, or when the rent became due, is not

177 shewn; *and demurred to that part of

the bill which inquired after the distribution of Richard Drummonds estate, because the defendent is not stated to be executor or administrator of Richard Drummond.

The defendent Edward Ker after by answer denying a demand from him by the plaintiffs before exhibition of their present bill, on account of any matter therein contained, and confessing himself, in right of his wife, to have received in february, 1762, 53l. 12s. 8¾ for her distributive share of Alicia Drummonds personal estate, demurred to that part of the bill, which prayed a decree against him to refund the money so received insisting that his wife was intitled to it by the statute for distribution of personal estate undisposed by testament, and, if she were not intitled, that a demand of this nature, first made after the expiration of 27 years, ought not to be countenanced in a court of equity. and

The other defendent, executors of John Harmanson, by their answer, relied upon the statute for limitation of actions in bar of the demand against them.

The case was argued on the second day of march, 1793.

The validity of the writing, proved for the testament of Richard Drummond, to devise lands was not controverted, perhaps is not controvertable. the statute made in 1748 (chap. III of the edition in 1769, sect. VII) which required devises of land to be written, and signed, and attested, or to be wholly written by the testator, dispensed unquestionably with attestation in the autograph. insertion of the testators name at the top hath been adjudged, and in any other part probably would be adjudged, equivalent to signature of his name at the bottom of the writing, for the purpose of signature being to indicate the author of the act, that indication in any part of the act seemeth sufficient. the testator indeed by the two last clauses in the writing sheweth an intention to sign it in presence of witnesses, but the absence of a ceremony, for signature before witnesses and their attestation were no more in this case, cannot frustrate an act defective in not one essential quality.

Upon the questions which were controverted the court delivered this

OPINION,

That the condition, annexed to the devise, by the testament of Richard Drummond, of his Hunting creek land, half of Halfmoon island, and a mill, to his wife Catharine, namely the continuance of her widowhood after his death was not discharged
178 *by the subsequent devise to her of all his estate, until the elder of his children should be married, or should attain the age of twenty one years;

Because the presumption, that the testator, who with his own hand wrote his testament, did not remember, whilst he was forming the later devise, what was contained in the former, or that he had changed his mind, during the short time in which such an act as the writing this testament may be performed, seems less probable, than the presumption, that he supposed the condition expressed in the one would be understood in the other, and therefore the insertion of it in this would be an unnecessary repetition; and that he had not changed an intention, indicated no less than three times in explicit terms, an intention originating from the contemplation, in his wifes future matrimonial alliance, if not of an effect which would more divide her affection, at least, of her inability to provide for her offspring by him so well as she might otherwise have provided for them:

And altho the wifes interest in the testators other land was determinable, not by her marriage, but, by another event, this difference, which that the testator designed may be doubted, no cause for it being descernible, if considerable at all, ought not to alter that interpretation of the testament according to which

The wife was intitled to all the estate to one part, if she continued a widow, and to the remainder, in either that, or the contrary event, until the elder of the children should have been married, or if she had not died, would have attained the age of eighteen years, when an equal division of the estate was directed to be, and the wife could have retained her dower only;—but if she should marry again, then her title by the testament to the land devised to Alicia ended and her title of dower in it remained, (a) and by which interpretation a harmony will be in all parts of the testament one with another, the reverse whereof will be effected by any other interpretation.

And that the defendent Levin Teackle, out of the estate in his hands to be administered of Ralph Justice, ought to pay to the plaintiffs two thirds parts of the profits of the land, devised by the testament of Richard Drummond to his daughter Alicia, made by the said Ralph Justice, after his marriage with her mother, as well those received by himself, as those received, after his death, by his executor, which had not been accounted for with William Justice, the plaintiff Annes former husband.
179 *The court is also of opinion that the two sisters of Alicia Drummond by her mothers first husband, John Shepherd, were not entitled to shares of the said Alicias personal estate, because, altho the statute, then in force for distribution of the estates which the owners disposed not by testaments, provided 'if after the death of a father any of his children shall die intestate, without wife or children, in the lifetime of the mother, that every brother and sister, and the representatives of them shall have an equal share with her,' and although all the children of one woman, by divers men, are brothers and sisters to one another, yet in the same statute the words,

(a) The plaintiffs supposed the widow, by not renouncing the testament, to have been barred of dower in the land devised to Alicia, but the act of general assembly to which they allude for this, 1727, chap. IV, of the edition in 1769, sect. XXI doth not extend to lands.—Note in edition of 1795.

'and if all the children shall die, intestate, without wife or children, in the lifetime of the mother, then the portion of the child so dying last shall be equally divided, one moiety to the mother, and the other moiety to the next of kindred by the father,' immediately following the words before rehearsed, so that in this case, after the death of Alicia, if the plaintiff Anne had died intestate, having never been married, her portion would unquestionably, have been divided between her mother and next of kindred by her father, in exclusion of Shepherds daughters, suggest an argument which seems to prove, that by 'brother and sister,' were intended brother and sister by the same father, if the position, that the statute appointed those successors to an intestate, whom the legislature supposed his affection would have moved him to appoint, if he had made his testament, be true, as it is said to be; for the predilection towards a paternal uncle or aunt, or even remoter kinsfolk, in the case of the child dying last, cannot operate so powerfully, as the supposed predilection towards the sister by the father, in the present case operates to the exclusion of uterine sisters from the succession;

And consequently that the plaintiffs, in right of the wife, were intitled to one half of the shares of Alicia Drummonds personal estate, which were received by the defendents Edward Ker, and John Harmanson, the testator of the defendents William Harmanson, and Henry Harmanson, in right of their wives, the daughters of Catharine Drummond by John Shepherd, and were also entitled, if the said Catharine died intestate, to one third part of the other half;

And that the plaintiffs are not barred, by the equity of the statute for limitation of actions, of recovering the plaintiff Annes own half from the defendents Edward Ker, and William Harmanson and Henry Harmanson, unless she had attained her full age at the time of her marriage with her present husband in which case the plaintiffs are not barred of recovering that half from the defendent Levin Teackle,

180 *Who by his answer to the original bill, having acknowledged himself to have distributed the personal estate of Alicia Drummond among her mother and three sisters, either, if such his intromission therein were wholly unauthorised, or if the administration thereof had been committed to him, was a trustee for those intitled to the said Alicia Drummonds estate:

And that upon the same principle the plaintiffs are not barred of recovering from the defendent Levin Teackle the plaintiff Annes third part, if her mother died intestate, of the other half of the shares received as aforesaid by the husbands of her sisters.

And the court, overruling such of the demurrers as this opinion contravened, directed master commissioner Hay to examine, state, and settle all accounts between the parties, according to the opinion, to inquire of the plaintiff Annes age at her marriage with the other plaintiff, and what testament her mother made, if she made a testament, and to report these matters, as they shall appear to him, with any other matters, by himself thought pertinent or by the parties required, to be stated, to the court.

BETWEEN
WILLIAM NANCE and Mary his wife, *plaintiffs*,
AND
GEORGE WOODWARD and Lucy his wife, who was the widow and administratrix of Timothy Vaughan, the son, *defendents*. *

March, 1793.

Wills—Construction—Case at Bar.—The words in a will, "I give to my wife S., all my personal estate and negroes, (naming them,) and the use of the plantation whereon I now live, during her natural life," confer only a life estate in the personalty and the negroes, as well as in the plantation; the phrase "during her natural life" qualifying the whole.

TIMOTHY VAUGHAN, the father, in his testament, the 1 day of december, 1759, after devising lands to his three sons David, Timothy, and Henry, and bequeathing some stock and a bed to his daughter the plaintiff Mary, and a gold ring to each of his daughters Sarah and Cate Rably, added, 'item, give to my wife Sarah Vaughan all my personal estate, and negros, named as followeth, Peter, Nat, Thomas Beef, Nancy, Patt, and the use of the plantation whereon i now live, during her natural life;' and appoint his wife the executrix, directing that she should not be required to give security, and that his estate should not be appraised.

181 *David, the eldest son, and the daughters Sarah and Cate Rably are dead, intestate, and unrepresented otherwise than by their surviving brothers and sister.

No inventory and appraisement of the estate of Timothy Vaughan the father appear to have been returned by his executrix, who died in 1772.

Of the estate in her possession at the time of her death, Timothy the second son, to whom the administration thereof was committed, returned an inventory and appraisement to Newkent county court, which estate is that bequeathed to her by the testament of her husband, or what remained of it and proceeded from it.

The plaintiffs, in right of the wife, claimed her proportion of the appraised value of the negros, and distributive shares of the other chatels.

The defendents insisted, that the property of the personal estate and negros, and not the use for her life only, was bequeathed by the testator to his wife, by whose testament the negros were bequeathed to David the eldest son, from whom they descended to his brother Timothy, former husband of the defendent Lucy.

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*See Wythe 445.

The cause coming on to be heard, the second day of march, 1793, the court delivered this

OPINION.

That in the bequest by Timothy Vaughan to his wife of all his personal estate, and negros, and the use of the plantation whereon he lived, during her life, the words, 'during her life.' relating necessarily to the words, 'i give to my wife,' ought to be connected, and be understood to have been repeated, with them in every intervening member of the sentence to which they apply, limiting the duration of her interest in all the things which were the subjects of the gift, and the bequest ought to be expounded in the sense, wherein it would have been expounded, if it had been written thus: 'i give to my wife, during her life, all my personal estate, and negros, and the use of the plantation whereon i now live; or thus: 'all my personal estate, and negros, and the use of the plantation, whereon i now live, i give to my wife during her life; or, more explicitly thus: 'i give to my wife all my personal estate during her life, and i give to my wife my negros during her life, and i give to my wife the plantation whereon now live during her life.'

That this exposition is the more eligible than the other, according to which the words, 'during her life,' are applied
182 *only to that part by which the use of the land was given to her would be, because, the words, confined to that, would be superfluous, for a devise of the land, without those words, when this testator died, would have conveyed it to her during her life only; whereas the words, applied to the personal estate and negros, are significant.

That, if the bequest be so expounded, and consequently the wife could make no disposition of the personal estate and negros which would be effectual after her death, the former, or so much thereof as did not perish, and was not in the use consumed, in her lifetime, was, with the accessions, distributable, after her death, amongst the children, and the latter, with the increase of the females, descended to the heir at law, of the testator, and

That the value of the negros, for proportions whereof the heir was accountable to the other five children, is the value of such of the original stock, with the increase of the females, as survived at the time of the wife's death, when he had a right to possession of them; which value appeareth by the appraisement returned by Timothy Vaughan the son to be 300l. 10s.

Conformably with which opinion, the eldest son having died intestate and childless, and thereby his brother Timothy, the intestate of the defendent Lucy, to whom the negros descended, being in like manner accountable; and two of the daughters, who are dead, not appearing to have been married, or to have made their testaments, and thereby the plaintiff Mary being intitled, as is supposed, to distributive shares of their proportions, the court pronounced this

DECREE.

That the defendents, out of the estate in their hands to be administered of their intestate Timothy Vaughan, the son, do pay unto the plaintiffs 83l. 9s. 5d. being the sum of the plaintiff Mary's proportion of the value of the negros, and her distributive shares of the defunct childrens proportions, and also pay unto them 17l. 4s. 8d. being the sum of the plaintiff Mary's filial portion and distributive share of 51l. 14s. the appraised value of the personal estate, exclusive of the negros, as appeareth by the forementioned exhibit, with interest upon both those sums from the last day of may, in the year 1773: liberty being reserved to the defendents, on any day of the term next after they shall have been served with a copy of this decree, to shew cause against that part thereof which related to the personal estate, exclusive of the negros, inasmuch as they do not by their answer confess it to have come to the hands of their intestate.

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*BETWEEN 183
MILES CARY and Grizzel his wife, and Josiah Buxton, *plaintiffs*,
AND
NATHANIEL BUXTON, *defendent*.

March, 1798.

1. **Wills—Construction—Election—Case at Bar.**—1751, *J. B.*, who was seised of lands in fee, devised them to his eldest son, who was also heir in tail of other lands which *J. B.* held in tail, and which he devised to his sons *T.* and *W.* The heir of the eldest son recovered the entailed lands which the father had devised; but an injunction was granted; and it was HELD that it was plainly contrary to the testator's intention, that he should have all the lands; and having elected to take those in tail, he was compelled to convey the others to those who claimed through *T.* and *W.*

2. **Same—Same—Same—Same.**—Along with the lands held by the testator in fee, he bequeathed slaves to the eldest son. HELD, that he should also account for said slaves and their increase, and for the rents and profits of the lands to be conveyed by him; and the plaintiffs should account for the rents and profits of the lands recovered by him.

JAMES BUXTON, seised of lands, part in fee simple, and other part, by the testament of Richard Bennett, in fee taille, in the year 1751, devised the former, called his old plantation, to his eldest son John, to whom he also bequeathed several negro slaves and chatels, and devised the latter, consisting of two tenements, one called Bacons, to his son Thomas, and the other called Jordans, to his son William, and to their respective heirs. the devise to John was without words of inheritence. in a subsequent clause is a devise to the testators son Josiah, and to his heirs, of the plantation given to any of his sons who should die without issue; whereby the estate de-

vised to every son, except Josiah, was an entail.

The defendent, only child of John, recovered the lands entailed by Bennetts testament from the plaintiffs, who had succeded to the rights of Thomas and William.

The plaintiffs, by their bill, prayed that the defendent might be decreed to convey and deliver to them the lands and slaves, and pay to them the value of the other estate, which had been devised and bequeathed by his grandfather to his father, and had come into possession of the defendent himself, if he elected to retain the lands recovered, and that the judgment might be enjoined until further order, which injunction was awarded.

The defendent, by his answer, insisted that the devise to his father, if the words were proper to convey a fee simple, was void, because being heir he took by descent, but, whether he took by descent, or whether a fee taille were devised, he clamed 184 *the lands devised by both testators; electing however, if he must be confined to one, to hold those devised by Bennett: and stated that of the slaves bequeathed to the defendents father, and their increase, some were dead, one had been sold by the defendent, and the remainder, who had eloped to the british enemy, never returned.

The case was argued the 2 day of march 1793, when the court delivered this

OPINION,

That the defendent, who, claiming by the testament of Richard Bennett, hath recovered the entailed lands devised by James Buxton to his sons Thomas and William, ought not to retain any estate or interest derived from the said James Buxton by (a) testament, but ought to yield the same to the plaintiff; because the presumption, that this testator, if he had known that right to exist, the assertion of which after his death deranged the partition of the estate made by him, would have provided some other way for those younger sons, at least would have bestowed upon them what he devised and bequeathed to his eldest son, or would have directed their loss to be compensated out of his legatary portion, is no less cogent of our belief, than a paragraph, to one or other of those purposes, inserted in his testament, would have been; and this presumption will authorise the supplement of such a provisory substitution of Thomas and William for John, in the testament. the supple- 185 ment (b) is conceived *to be sanctified by the necessity of some expedient to effectuate, as much as is now possible, and with least inconvenience, the intention of a testator to give some of his lands to two of his children; an intention, otherwise, wholely frustrated through error in him. and this expedient is recommended by its concordance with the principles of 186 equity, which forbid him, *who gaineth by abolishing one part of a testament, to gain also by another part of the same testament suffered to retain its vigor,

(a) In this part of the opinion prefixed to the decree, as it is entered on the record, are the words, hereditary succession or, which were inserted inadvertently.—Note in edition of 1795.

(b) Examples of supplements to render effectual the presumed wills of testators.

1. Curius substitutus heres erat, si posthumus ante tutelae suae annos decessisset. non est natus. propinqui bona sibi vendicabant. quis dubitaret, quin ea voluntas fuisset testantis, ut is non nato filio heres esset. qui mortuo? sed hoc non scripserat. Quinctil. de institut. orator. lib. VII. c. VI. Cicero. orat. pro A. Caecina, c. 8. see eq. ca. abr. part 1 p. 245. c. 10. and eq. ca. abr. part 2 p. 294. c. 24. that the testator, who willed, if a posthumous son should die before a certain age, Caius to be his heir, must have willed the same Caius to be heir if no posthumous son existed, was so presumable that none could doubt it. the judges in that case therefore allowed his claim; but this could not be done without supplying words adapted to the event, so that the testament would be understood as if the terms had been these: Curius heres esto, si posthumus mihi natus non fuerit, aut si ante tutelae suae annos decesserit.

2. Si ita scriptum sit, si filius mihi natus fuerit, ex besse heres esto, ex reliqua parte uxor mea heres esto: si vero filia mihi nata fuerit, ex triente heres esto, ex reliqua parte uxor heres esto: et filius et filia nati essent, discendum est (according to the opinion of Julianus) assem distribuendum esse in septem partes, ut ex his filius quatuor, uxor duas, filia unam partem habeat: ita enim secundum voluntatem testantis, filius altero tanto amplius habebit quam uxor, item uxor altero tanto amplius quam filia. licet enim subtili juris regulae conveniebat, ruptum fieri testamentum, attamen, quum ex utroque nato testator voluerit uxorem aliquid habere, ideo ad hujusmodi sententiam, humanitate suggerente, decursum: est quod etiam Juventio Celso apertissime placuit. Dig. lib. XXVIII. tit. II. l. 13. words must also be supplied here; the testament not having provided for the case of twins, undoubtedly because the event was not contemplated.

This opinion of Julianus seems not approved by Home, in his principles of equity, book 1 part 1, sect. 3. art. 2. yet, in the next paragraph, he approves a decision, perhaps not less exceptionable, of a case thus reported by him:

In a contract of marriage there was the following clause: and in case there shall happen to be only one daughter, he obliges him to pay the sum of 18000 merks; if there be two daughters, the sum of 20,000 merks, whereof 11000 merks to the elder, and 9000 to the younger; and if there be three daughters, the sum of 30000 merks, 12000 to the eldest, 10000 to the second, and 8000 to the youngest. a fourth daughter having existed of the marriage, the question occurred, whether she could have any share of the 30000 merks, upon the presumed will of the father, or be left to insist for her legal provision ab intestato. the court decreed 4500 merks as her proportion of the 30000 merks; so as to restrict the eldest daughter to 10500 merks, the second to 8500, and the third to 6500. though the existence of a fourth daughter was a casus incogitatus, for which no provision was made, yet as it appeared to be the fathers intention to provide for all the children of that marriage, there was a right created in the fourth daughter by this intention, which intitled her to a share of the 30000 merks.

3. Clemens Patronus testamento caverat, ut si sibi filius natus fuisset, heres esset: si duo filii, ex equis partibus haeredes essent: si duae filiae, similiter: si filius et filia, filio duas partes, filiae tertiam dederat. duobus filiis et filia natis, quaerebatur quemadmodum in proposita specie partes faciemus: cum filii debeant pares esse, vel etiam singuli duplo plus quam soror accipere, quinque igitur partes fieri oportet, ut et ex his binas masculi, unam foemina accipiat. Dig. lib. XXVIII. tit. V. l. 81.

4. Gilberts reports of cases in equity, p. 15 nearly resembling the principal case. Bur. rep. part 5 p. 2703 1 id. Raym. rep. 187.

Examples of total rescissions of testaments, presumed to be contrary to the wills of the testators, because they were impressed with the belief of falsehood.

1. De militis morte, cum domum falsus ab exercitu nuntius venisset, et pater ejus, re credita, testamentum mutasset, et quem ei visum esset, fecisset heredem, essetque ipse mortuus: res delata est ad

and require the sharer in a general allotment, who occupieth the portion destined for a fellow sharer, to cede to him the portion destined for himself. (c)

And the court pronounced the following

DECREE.

That the defendent, do convey, with warranty against any claming under him, to the plaintiffs Miles Cary and Grizzel his wife, and to the heirs of the wife, one moiety, and to the plaintiff Josiah Buxton, and to his heirs, the other moiety, of the old plantation, which the testator devised to the defendents father, at the costs of the plaintiffs, and resign the possession 187 *thereof to them; that the injunction, awarded for preventing emanation of the habere facias possessionem, in execution of the judgment against the plaintiffs recovered by the defendent be dissolved; but that the defendent be not intitled to the benefit of this dissolution, until he shall by affidavits have proved to the clerk of the general court that he the defendent had executed the conveyances, and resigned the possession, of the old plantation before mentioned to the plaintiffs, or that he had offered to do so, and that the plaintiffs had failed to procure the one, and refused to accept the other; that accounts of the rents and profits of the plantation to be conveyed to the plaintiffs and also of the lands recovered from them by the defendent, since the last day of december, 1770, and accounts of the slaves, and personal estate of James Buxton, which came into possession of the defendent, and of the profits of the said slaves, and value received by the defendent for any of them which he hath sold or otherwise disposed of, being made up before commissioners afternamed, the plaintiffs to be made debitors for the rents and profits of the lands recovered from them, and creditors for the other articles, with the costs expended by them in prosecution of this suit, the party from whom the balance shall appear to be due do pay the same to the adverse party; and that the defendent do deliver such of the said slaves as remain, if any remain, subject to his power, to the plaintiffs. and Solomon Sheppard and others were appointed commissioners.

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*BETWEEN 188

LAMBERT CADWALLADER and Philemon Dickenson, executors of John Cadwallader, and Edward Loyd, administrator of Edward Loyd, with his testament annexed, *plaintiffs*,

AND

ELIZABETH MASON, Abraham Barnes, Thompson Mason, John Thompson Mason, and Bailey Washington, *defendents*.*

March, 1793.

Mortgages—Mortgagor's Accountability of Profits.†—A mortgagor, or his devisee, who will not redeem

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centumviros, cum miles domum revenisset, egissetque lege in hereditatem paternam. nempe in ea causa quaesitum est de jure civili, possetne, paternorum bonorum exheres esse filius, quem pater testamento neque heredem, neque exheredem, scripsisset nominatim? Cicero de oratore, lib. 1. c. 38. how the question was then decided this author doth not say. Valerius Maximus, lib. 7. c. 7, reports that adolescens, omnibus, non solum consiliis sed etiam, sententiis superior decessit. to show how it would be now decided, any modern adjudication, inducing a probable conjecture, is not recollected.

2. Pactumeius Androsthenes Pactumeiam Magnam filiam Pactumeii Magnia ex asse heredem instituerat: eique patrem ejus substituerat. Pactumeio Magno occiso et rumore perlato, quasi filia ejus quoque mortua, mutavit testamentum, Noviumque Rufum hæredem instituit, hac praefatione: quia hæredes, quos volui habere mihi, continere non potui, Novius Rufus heres esto: Pactumeia Magna supplicavit imperatores nostros, et cognitione suscepta, licet modus institutione contineretur, quia falsus non solet obesse, tamen ex voluntate testantis putavit imperator ei subveniendum: igitur pronunciavit, hereditatem ad Magnam pertinere: sed legata ex posteriore testamento eam praestare debere, proinde atque si in posterioribus tabulis ipsa fuisset heres scripta. Dig. lib. XXVIII. tit. V. 1. 92. the former part of this sentence is thought indubitably right.

Example of a testament becoming null by a presumed change of will from an event not expected when the testament was made.

Num quis eo testamento, quod paterfamilias ante fecit quam ei filius natus est, hereditatem petit? nemo: quia constat, agnascendo rumpi testamentum: ergo in hoc genere juris judicia nulla sunt. Cic. de oratore, lib. 1. c. 57. this author supposed no man would question whether the rupture of a testament were wrought by the posterior birth of a son. this was perhaps because by the roman civil law, qui filium in potestate habet, curare debet ut eum heredem instituat (quamvis ex minima parte) vel exheredem eum nominatim faciat: alioquin si eum silentio praeterierit, inutiliter testabitur. Just. institut. lib. II. tit. XIII. testametum dicitur nullius esse momenti, cum filius, qui fuit in patris potestate, praeteritus est. Dig. lib. XXVIII. tit. III. l. 1. see Home's pr. eq. book 1, part 1. sec. 3. art. 3. Bur. rep. part 5. p. 2703. acts of gen. assembly, oct. 1785. c. 62, sect. 3.—Note in edition of 1795.

(c) To prevent that which a testator willed not to be, is as pious an act as to perfect that which a testator willed to be.

That the testator, in this case, willed his son John not to have all the three tenements, old plantation, Bacons, and Jordans we know with certainty.

To prevent this, since the heir of John hath, by an extraneous right, vindicated to himself two of the tenements, is impossible, if the devise of old plantation to John remain as it is, to declare it intirely void would be nugatory, because he would then take the land by hereditary succession, the only method, therefore, by which the effect desired can be accomplished, is a translation of the benefit intended by that devise for John, if he would have acquiesced in other parts of the testament, to his brothers, Thomas and William, who were deprived by him of the benefits intended for them. thus the benevolence of the testator, interrupted in the course directed by him, will be diverted into the course which he would have directed if he had foreknown the cause of the interruption, although perhaps less copiously than he wished.—Note in edition of 1795.

*For monographic note on Deeds of Trust, see end of case.

†**Mortgages—Right to Rents and Profits.**—In Clarke v. Curtis, 1 Gratt. 289, it is said that, although it is competent for a court of equity, in a proper case, to sequestrate the rents and profits of mortgaged or incumbered property, where a forfeiture has accrued, and such rents and profits may be necessary to discharge the incumbrances, it is not competent to recover from the mortgagor, or equitable owner in possession, the rents and profits actually received by him, or which accrued before any order of sequestration was made.

And, in Allen v. Gibson, 4 Rand. 476, it is said: "A mortgagee, after the mortgage is forfeited, has a right to the possession of the mortgaged premises, and may enter thereon, or maintain an ejectment;

the estate pledged, but retaining the possession taketh the profits thereof after the time limited for the performance of the condition, ought to account for such aftertaken profits.

UPON the principal question in this cause, the court on the 8 day of march, 1793, delivered the following

OPINION:

That a mortgager or his devisee, who will not redeme the estate pledged, but retaining the possession taketh the profits thereof, after the time limited for performance of the condition, ought to account for such aftertaken profits, because, during this period, he is an unrighteous possessor, neither having the legal title, nor asserting his equitable title, probably conscious that the estate is of less value than the debt with which it had been incumbered, and yet diminishing that value, by withholding the possession so long as the laws delay preventeth the wresting it from him, and by enjoying the fruits in the mean time. and to this opinion the court adhereth, notwithstanding the objection, that the mortgager, or his devisee, doth not appear to have been made so accountable in any instance, but, on the contrary, demands of such accounts against a mortgager have been judicialy rejected, in some instances: for the inference, against the existence of a right, drawn from defect of precedents in affirmance of the right, is not allowed alone to be decisive, in any case; and, opposed to the principle before explained, if that be true and well applied, is affirmed to be not decisive, in this case; and the reason assigned for the rejection, to which the latter part of the objection alludeth, namely, that mortgagee ought to take the legal remedies to get into the possession, seemeth not pertinent to the question, nor congruous with the praecepts of justice: for this court cannot discern how, from the mortgagees obligation to resort to legal remedies for recovering possession of land, to which his right is undeniable, is deducible this consequence, that he must be deprived of profits taken before the remedies, dilatory in
189 themselves, and often *made more so through industrious procrastination by the other party, are efficatious—profits which the former would have taken, and to which his right would have been the same as his right to the land which produced them, if the mortgager had not wrongfully detained the possession of this; and to a decision, by any court, which results not, by fair deduction, from the principles alleged to warrant it, the authority of a precedent, which ought to govern in like cases is denied. nor can this court grant that the mortgager, retaining profits, which, on the supposition that he doth not intend to redeme the estate mortgaged, he ought not to have taken, may thus justly enrich himself out of the mortgagees loss.

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and the assertion of this right may be necessary to secure the payment of the debt. The value of the property may not be sufficient to pay the debt, with the accumulated interest during the pendency of an ejectment, or a bill to foreclose (in which cases arbitrary appeals are permitted), unless the rents and profits can be reached to keep down the interest; and they cannot be reached in the case of a first mortgagee (unless under peculiar circumstances), but by his getting the possession of the land."

See further, on this subject, Scott v. Wharton, 2 H. & M. 25; *foot-note* to Bank v. Hupp, 10 Gratt. 23; *foot-note* to Clarke v. Curtis, 1 Gratt. 289; Appendix, Wythe 427; monographic *note* on "Mortgages" appended to Forkner v. Stuart, 6 Gratt. 197; monographic *note* on "Deeds of Trust," following the principal case. And see the principal case cited in Bank v. Hupp, 10 Gratt. 42.

DEEDS OF TRUST.

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Cross References to Monographic Notes.

Acknowledgments, appended to Taliaferro v. Pryor, 12 Gratt. 277.

Deeds, appended to Fiott v. Com., 12 Gratt. 564.
Dower, appended to Davis v. Davis, 25 Gratt. 587.
Ejectment, appended to Tapscott v. Cobbs, 11 Gratt. 172.
Fraudulent and Voluntary Conveyances, appended to Cochran v. Paris, 11 Gratt. 348.
Injunctions, appended to Claytor v. Anthony, 15 Gratt. 518.
Judicial Sales, appended to Walker v. Page, 21 Gratt. 676.
Usury, appended to Coffman v. Miller, 26 Gratt. 698.

I. SCOPE OF TITLE.

The only kind of deeds of trust embraced within the scope of this article are deeds conveying property to a third party in trust to secure the payment of a debt, or to secure the performance of a collateral obligation in the nature of a debt.

II. DEFINITION.

A deed of trust is a conveyance to some supposed impartial person as trustee, of lands or chattels, upon trust, to let the debtor remain in possession until default is made in paying the debt, and then upon the further trust to sell the property, in the manner and upon the terms prescribed in the deed, or if the deed is silent, in the manner and upon the terms prescribed by the law, and out of the proceeds, first, to pay the costs and charges attending the execution of the trust; second, the debt, with the interest thereon; and third, the residue, if any, to the debtor and his assigns. 4 Min. Inst. (3d Ed.) 76; Claytor v. Anthony, 6 Rand. 285.

III. ESSENTIALS OF A VALID DEED OF TRUST.

1. COMPETENT PARTIES.

General Rule.—In order for a deed of trust to be valid, the parties thereto must possess the requisite legal ability to enter into a valid contract. And the point of time to be looked to by the court or jury, in determining the competency of the parties to a deed of trust, is that when the deed was executed. Anderson v. Cranmer, 11 W. Va. 562; Wroten v. Armat, 31 Gratt. 228.

Insane Persons.—An insane person is incapable of being a grantor in a deed of trust; but the presumption of law is always in favor of the sanity, at the time the deed was executed, of a person whose deed is brought in question; and the burden of proof lies upon him who asserts unsoundness of mind, unless a previous state of insanity has been established, in which case the burden is shifted to him who claims under the deed. Anderson v. Cranmer, 11 W. Va. 562.

The condition of the grantor's mind, both before and after the execution of the deed, is proper to be considered in determining what was his mental condition at the time of its execution. Anderson v. Cranmer, 11 W. Va. 562. See monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

Partners.—The doctrine that a partner cannot bind his co-partner by deed does not apply to a case in which the property purported to be conveyed by the deed, is of such a description that a title to it passes by the mere act of delivery. The mere circumstance of affixing a seal to an instrument of conveyance, in such case, does not annul a transfer so consummated. Therefore, a partner has a right to convey the social effects (except real estate) to trustees to pay specified creditors of the firm; and this, without consent of his co-partner. McCullough v. Sommerville, 8 Leigh 483; Anderson v. Bullock, 4 Munf. 442; Williams v. Gillespie, 30 W. Va. 586, 5 S. E. Rep. 210. See monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

And a conveyance by one partner of an undivided moiety of real estate owned by the partnership, in trust to secure a creditor of the partnership, passes a good title both at law and in equity to such moiety, and such creditor is entitled to priority over all other creditors of the firm; but when such property is conveyed by one partner in trust to secure his individual creditors, the property remains subject to the payment of the partnership debts. Jones v. Neale, 2 P. & H. 339.

Corporations.—A corporation, by its duly authorized officers or agents, may give a deed of trust on the corporate property to secure their debts; but, in such case, the deed of trust, to be valid, must be under the corporate seal; the individual seal of the officer or agent being insufficient to make it the deed of the corporation. Rauch v. Oil Co., 8 W. Va. 36; Pratt v. Clemens, 4 W. Va. 443.

But where a corporation creates a lien on its property for the purpose of giving preference to one or more of its creditors (except to secure a debt contracted at the time), such lien enures to the benefit ratably of all creditors existing at the time of the creation of the lien, under Va. Code 1873, ch. 57, § 63. So, where a creditor under a contract made before the creation of the lien, is omitted, and after that time obtained a judgment for unliquidated damages for breach of the contract, the lien enures for his benefit, ratably, with the other creditors. Hardy v. N., etc., Co., 80 Va. 404; Haskinwood, etc., Co. v. Cleveland, etc., Co., 94 Va. 439, 26 S. E. Rep. 878; Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. Rep. 878. See monographic *notes* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348; "Assignments for the Benefit of Creditors" appended to French v. Townes, 10 Gratt. 513.

National Banks.—The national banking laws of the United States which provide that it shall be unlawful for a national bank to lend money upon real estate, were intended for the benefit of the government, which may or may not enforce the forfeiture; and a deed of trust given to a national bank to secure a loan cannot be avoided by the borrower or his creditors because of this statute. Wroten v. Armat, 31 Gratt. 228.

Cestui Que Trust.—Where a *cestui que trust* in a deed of trust has no power to convey the property except with the consent and concurrence of the trustee, a deed conveying the property to secure a debt is a mere nullity. Haymond v. Jones, 33 Gratt. 317.

Cestui Que Trust Need Not Join in the Execution.—It is not necessary to the validity of a deed of trust that it should be executed by the *cestui que trust*. The deed operates to pass the legal title so soon as executed by the grantor and the trustees, and can only be avoided by the dissent, express or implied, of the *cestui que trust*. Skipwith v. Cunningham, 8 Leigh 271.

Creditors Secured Need Not Join in the Deed.—Nor is it necessary to the validity of a deed of trust to secure creditors, that it should be executed by them. The deed passes the legal title as soon as executed by the grantor and the trustee, and can only be avoided by the dissent or disclaimer, express or implied, of the trust creditors. Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611. As to who is a competent party to be a trustee in a deed of

trust, see *post*, "The Trustee—Who May Be Trustee."

2. CONSIDERATION.

a. IN GENERAL.—A deed of trust, to be valid, must be supported by a consideration not illegal in itself; and in order to be valid as against the creditors and purchasers of the grantor the consideration must be one deemed valuable in law. Long v. Meriden, etc., Co., 94 Va. 594, 27 S. E. Rep. 499; Hughes v. Kelly, 2 Va. Dec. 588; Webb v. Ingham, 29 W. Va. 389, 1 S. E. Rep. 816; Chamberlayne v. Temple, 2 Rand. 384; Davis v. Noll, 38 W. Va. 66, 17 S. E. Rep. 791. But no attempt will be here made to classify the various cases in which deeds of trust have been attacked as founded on an illegal or insufficient consideration, as the only object of this section is to break the subject up by cross references to other monographic notes where the subject has been fully treated. See monographic *notes* on "Consideration" appended to Jones v. Obenchain, 10 Gratt. 259; "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348; "Assignments for the Benefit of Creditors" appended to French v. Townes, 10 Gratt. 513; "Usury" appended to Coffman v. Miller, 26 Gratt. 696.

b. FUTURE ADVANCES.—A deed of trust, *bona fide* made, may be for future advances by the *cestui que trust*, as well as for present debts and liabilities, and it will be valid between the parties and against subsequent purchasers with constructive or actual notice of the deed of trust, not only as to the indebtedness at the time of the execution of the deed, but also as to subsequent advancements made by the *cestui que trust* upon the faith of the deed subsequent to its execution, to the extent of the amount specified in the deed. McCarty v. Chalfant, 14 W. Va. 581; Alexandria Sav. Inst. v. Thomas, 29 Gratt. 483; Didier v. Patterson, 93 Va. 587, 25 S. E. Rep. 661; Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 501; First Nat. Bank v. Turnbull, 32 Gratt. 695.

And it is not necessary to the validity of a deed of trust given to secure future advances that the amount of the advances should be stated upon the face of the instrument. Alexandria Sav. Inst. v. Thomas, 29 Gratt. 483; Riggs v. Armstrong, 23 W. Va. 760; First Nat. Bank v. Turnbull, 32 Gratt. 695.

3. DESCRIPTION OF PROPERTY AND INDEBTEDNESS.

Must Identify the Property.—Deeds of trust must contain a sufficient description to identify the property intended to be conveyed. But the rule that "that is certain which is capable of being made certain" is applicable in such case. Thus where a deed of trust described the land conveyed as "all the right, title and interest of the said grantor in and to the real estate lying in H. county of which the grantor's father died seised and possessed," it was held a sufficient description. Florance v. Morien, 98 Va. 26, 34 S. E. Rep. 890; Vanmeter v. Vanmeters, 3 Gratt. 148.

But where a deed of trust described a tract of land as "a piece of land near Bacon Quarter Branch" this description was held too vague and indefinite to create a right of property in any particular parcel of land. George v. Bates, 90 Va. 839, 20 S. E. Rep. 828.

A deed of trust which conveys certain designated pianos, and also "all pianos, organs, and all other merchandise owned by the grantor and temporarily stored elsewhere" is sufficient to cover the interest of the grantor in other pianos stored elsewhere. Fischer v. Lee, 98 Va. 159, 35 S. E. Rep. 441. See *post*, "To What Lien Attaches."

Conveyance of Debts Due.—A conveyance by an insolvent firm to a trustee, of all debts due them, was held under the special provisions of the deed, only to pass the balance of a debt, after offsetting a claim, not yet due, held by the debtor against the firm. Fry v. Boyd, 3 Gratt. 73.

And a deed of trust conveying all the property of the grantor, "both real and personal," embraces all the shares owned by the grantor in a national bank. Feckheimer v. Nat. Exch. Bank, 79 Va. 80.

Must Describe the Indebtedness Intended to Be Secured.—A deed of trust to be valid must in some way describe and identify the indebtedness it is intended to secure. Literal accuracy is not required, but the description of the debt must be correct, so far as it goes, and full enough to direct the attention to the sources of correct information in regard to it, and be such as not to mislead or deceive as to the nature or amount of it. Goff v. Price, 42 W. Va. 384, 26 S. E. Rep. 287; Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329.

But it has been held that the validity of a deed of trust executed in good faith is not affected by the fact that the amount of the debt secured is not described with accuracy, though where the amount is not ascertained a court of equity will enjoin a sale until the true amount can be determined. Riggs v. Armstrong, 23 W. Va. 760. See also, Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329.

Recital of Indebtedness Insufficient.—And so a mere recital in a deed of trust, given by a corporation to secure an issue of bonds, that the money derived from the sale of the bonds was to be used to pay the debts of the corporation creates no trust in favor of any creditor of the corporation, either to deliver any of the bonds or to pay over the proceeds thereof to him. Roanoke, etc., Co. v. Hicks, 96 Va. 510, 32 S. E. Rep. 295; Powell v. White, 11 Leigh 309. See also, Watkins v. Dupuy, 87 Va. 87, 12 S. E. Rep. 294.

4. EXECUTION.

Signing.—Since the adoption of the statute of frauds, signing is believed to be indispensable to the validity of a deed; and even in those states which have not adopted the section of this statute which requires signing, it is safer that the deed should be signed, as the tendency of the later cases is to hold that signing is essential to the validity of a deed, even in the absence of a legislative enactment requiring it. Adams v. Medsker, 25 W. Va. 127; American, etc., Co. v. Burlack, 35 W. Va. 647, 14 S. E. Rep. 319. See also, Rauch v. Oil Co., 8 W. Va. 36. See monographic *note* on "Deeds" appended to Flott v. Com., 12 Gratt. 564.

Sealing.—In order to be formally correct, at law, as a deed of trust, and entitled to be recorded as such, it is essential that the deed should be executed under the seal of the grantor. But a paper made for a deed of trust conveying land to secure a debt signed by the grantor, but without a seal, though not effectual as a deed of trust at law, is an equitable mortgage, enforceable in equity, and may be recorded under § 4, ch. 74, W. Va. Code 1868, and when recorded is a lien valid against subsequent purchasers and creditors. Atkinson v. Miller, 34 W. Va. 115, 11 S. E. Rep. 1007 (overruling Pratt v. Clemens, 4 W. Va. 443, and Shattuck v. Knight, 25 W. Va. 590). See also, Ruffners v. Putney, 12 Gratt. 551; Wayt v. Carwithen, 21 W. Va. 516; Rauch v. Oil Co., 8 W. Va. 36.

And to constitute a valid deed of a corporation, the corporate seal must be affixed, and the private seal of the president is insufficient to make the deed that of the corporation. But such an instrument purporting to be a deed of trust of the corporation, though invalid as the "deed" of the corporation, is valid as the mortgage of the personal property of the corporation which it purports to convey. Rauch v. Oil Co., 8 W. Va. 36. See monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

Delivery.—A deed of trust only takes effect from the time of its delivery. What constitutes delivery depends in all cases upon the intention of the grantor. If he executes and acknowledges a deed as his, and either retains it, or delivers it to a third person, though that person be not an agent of the grantee, it is a good delivery in contemplation of law. Hunt v. Brent, 1 Va. Dec. 258; Harman v. Oberdorfer, 33 Gratt. 497; Raines v. Walker, 77 Va. 92; Hardy v. Norfolk Mfg. Co., 80 Va. 404; Tate v. Tate, 85 Va. 205, 7 S. E. Rep. 352; Ferguson v. Bond, 39 W. Va. 561, 20 S. E. Rep. 591.

Thus where a grantor had a deed of trust prepared, conveying all of his property to a trustee to secure his creditors, and the deed of trust was acknowledged for recordation, and would have been recorded, but for the war raging in the section where the deed was executed at the time; and the deed was then, with the trustee's knowledge deposited with a niece of the grantor, who had other important papers of his, and she was told by him of its importance, and asked to take care of it, and the paper remained in her possession until the grantor's death, when it was taken possession of by the trustee, admitted to record by him, and he filed a bill for the proper execution of the deed and a distribution of the funds, it was held that the delivery to the third person was sufficient delivery under the circumstances of the case. Hunt v. Brent, 1 Va. Dec. 258. For a full discussion of delivery, see monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

Acceptance.—The appointment of a trustee takes place at the time of the execution of the deed of trust, and it is not necessary that the trustee should accept the trust; for the acceptance of the grantee is implied in the delivery, and the law presumes that every estate is beneficial to the party to whom it is conveyed, until he renounces it. Bowden v. Parrish, 86 Va. 67, 9 S. E. Rep. 616; Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481; Skipwith v. Cunningham, 8 Leigh 291; Christian v. Yancey, 2 P. & H. 240.

And where the trustee gives a power of attorney to an agent to execute the trust, and institutes a suit to recover the trust subject, acceptance of the trust will be implied. Christian v. Yancey, 2 P. & H. 240.

A delay of ten months by the trustee to accept a deed of trust, and expressions of doubt and hesitation about accepting the trust made to a creditor of the grantor claiming against the deed, are no bar to subsequent acceptance of the trust. Christian v. Yancey, 2 P. & H. 240.

And the acceptance of a trust under a trust deed relates back to the date of the deed; and the title of a trustee, who accepted after a sale of a trust subject under an execution against the grantor in the deed of trust, made after the record of the deed of trust and before the acceptance by the trustee, was held good against a purchaser at such sale. Christian v. Yancey, 2 P. & H. 240.

The acceptance of the trust, by the trustee, estops him from denying the title of his beneficiary, and he cannot afterwards set up a claim to the trust property. Morris v. Morris, 48 W. Va. 430, 37 S. E. Rep. 570.

Acknowledgment.—The object of having a deed of trust acknowledged is to entitle it to be recorded, and to enable it to be admitted in evidence without any further proof of its execution. As between the immediate parties it is immaterial whether a deed of trust is acknowledged and recorded or not, as the object of acknowledgment and recording is to give notice to subsequent purchasers and creditors, and where there are no such claims the rights of the parties are sufficiently protected by the instrument itself. Scruggs v. Burruss, 25 W. Va. 670; Turner v. Stip, 1 Wash. 319; Raines v. Walker, 77 Va. 92; Schmertz v. Hammond, 47 W. Va. 524, 35 S. E. Rep. 945; Cox v. Wayt, 26 W. Va. 807; National B. & L. Ass'n v. Blair, 98 Va. 490, 36 S. E. Rep. 513; Bowden v. Parrish, 86 Va. 67, 9 S. E. Rep. 616; Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. Rep. 878; Barton v. Brent, 87 Va. 385, 13 S. E. Rep. 29; Davis v. Beazley, 75 Va. 491. For full discussion, see monographic *note* on "Acknowledgments" appended to Taliaferro v. Pryor, 12 Gratt. 277.

Recording.—Every deed of trust conveying real estate or goods or chattels is void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such deed may be. Va. Code, § 2465; W. Va. Code, ch. 7465; Bird v. Wilkinson, 4 Leigh 266; Lane v. Mason, 5 Leigh 520; Clark v. Ward, 12 Gratt. 440. For full discussion of the subject of registry, see monographic *note* on "Recording Acts."

IV. THE TRUSTEE.

1. WHO MAY BE TRUSTEE.

An Insolvent Person as Trustee.—Insolvency does not disqualify a person to act as trustee, but if money of the trust fund is to pass through the hands of an insolvent trustee, upon the application of one who is interested in the right disbursement of the money, and who is apprehensive that it may be misapplied or misused, a court of equity ought to require of the trustee security before he is allowed to proceed with the execution of the trust. Terry v. Fitzgerald, 32 Gratt. 843; Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41.

Or, in such case, a court of equity, acting upon the maxim that "a trust shall not be allowed to fail for want of a trustee," will appoint a receiver to administer the trust according to the terms of the trust deed. Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41.

Insane Person.—Where the trustee is insane he cannot do a valid act, either by himself or in conjunction with his *cestui que trust*. Bailey v. Hill, 77 Va. 492.

Agent Presumed to Have Authority to Take Deed of Trust for His Principal's Benefit.—It is not competent for the grantors in a deed of trust to question the authority of an agent to take a deed as security for a debt, due his principal, as this will be presumed until the principal disavows the act. Thus in Sangston v. Gordon, 22 Gratt. 755, bonds were given to the secretary of a voluntary association, and a deed of trust executed to secure them. The secretary was directed by the association to proceed to collect all the debts belonging to them. Though it

was provided by the by-laws that the secretary was to be elected annually, yet as he continued to act as such, and was recognized by the association, it was held competent for him to direct the enforcement of the deed of trust and his authority could not be questioned by the grantors in the deed of trust.

Creditor as Trustee.—Where the deed of trust is made directly to the creditor, as trustee to satisfy his own demands by a sale of the property, this is in legal effect a mortgage to which the equity of redemption is an incident, and the regular course of procedure is to file a bill in equity for his foreclosure, and a sale by the trustee under the power is irregular. Chowning v. Cox, 1 Rand. 306; Taylor v. Chowning, 3 Leigh 654; Floyd v. Harrison, 2 Rob. 161; Breckenridge v. Auld, 1 Rob. 148; Morgan v. Glendy, 92 Va. 86, 22 S. E. Rep. 854.

But if the trustees proceed to sell under the deed and make a conveyance, their grantee takes the legal title, and the transaction, after the lapse of nearly twenty years without objection by any person interested, will be upheld, if the purchase money has been paid and fully accounted for, or if only a small proportion of the purchase money does not affirmatively appear to have been accounted for, and the rights of third parties have intervened, and the circumstances are such as to suggest only a mere possibility of the existence of an outstanding charge upon the land. Morgan v. Glendy, 92 Va. 86, 22 S. E. Rep. 854; Chowning v. Cox, 1 Rand. 306; Taylor v. Chowning, 3 Leigh 654; Floyd v. Harrison, 2 Rob. 161.

Party Interested Other Than a Creditor.—And where a trustee in a deed of trust to secure a debt falling due at different periods, advances to the debtor money to pay the first installment, and takes a transfer of it, he can only subject the property to satisfy him after the balance of the debt is paid; and his interest does not disqualify him to act as trustee. Goddin v. Vaughn, 14 Gratt. 102.

2. APPOINTMENT AND SUBSTITUTION.

Generally—The trustee's appointment takes place from the time of the execution of the deed in which he is named as trustee, and it is not necessary that he should expressly accept the trust as his acceptance will be presumed until he declines it. Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481; Bowden v. Parrish, 86 Va. 67, 9 S. E. Rep. 616; Skipwith v. Cunningham, 8 Leigh 291; Christian v. Yancey, 2 P. & H. 240. See *ante*, "Execution."

Upon the death, or refusal to act, of a trustee named in a deed of trust the court will substitute another in his place, unless it is provided by statute who shall act upon the death, or refusal to act, of the party named. Fisher v. Dickenson, 84 Va. 318, 4 S. E. Rep. 737; Pitzer v. Logan, 85 Va. 374, 7 S. E. Rep. 385; Terry v. Fitzgerald, 32 Gratt. 843.

Appointment of Substitute upon Death of a Sole Trustee.—By statute (Code 1873, ch. 174, § 9), the personal representative of a sole trustee may execute the trust; or the county court may appoint a trustee to execute the trust, and the appointment, when made conformably with the statute, is valid. Fisher v. Dickenson, 84 Va. 318, 4 S. E. Rep. 737; Pitzer v. Logan, 85 Va. 374, 7 S. E. Rep. 385. But if the order of the court appointing the trustee does not show on whose motion it was made, or that the proper parties had notice, or were before the court, the appointment is invalid. Pitzer v. Logan, 85 Va. 374, 7 S. E. Rep. 385; Terry v. Fitzgerald, 32 Gratt. 843. See also, So. Ry. Co. v. Glenn, 98 Va. 309, 36 S. E. Rep. 395; Pettus v. Atlantic, etc., Ass'n, 94 Va. 477, 26 S. E. Rep. 834.

And where the grantor and one of the trustees in a deed of trust are dead, and the other trustee has removed out of the state, on the motion of the creditor secured by the deed, for the appointment of a trustee to execute the trust, it is sufficient to give notice to the personal representative of the grantor and of the deceased trustee, and to the surviving trustee; and it is not necessary to give notice to a subsequent purchaser from the grantor, or his personal representative, if he is dead. Hunter v. Vaughan, 24 Gratt. 400.

Appointment of Substitute Where Trustee Resigns.—Where a trustee has resigned, another may be appointed, by motion, under the statute; but this proceeding to appoint a substitute determines nothing as to the rights of the parties under the deed, or as to the character of the deed itself. Pettus v. Atlantic, etc., Ass'n, 94 Va. 477, 26 S. E Rep. 834.

Appointment of Substitute According to Special Provisions of Deed.—Where a deed given by a railroad company to secure bonds, provided that if the trustee became incapable of acting, any court of record of Alexandria county, upon the application of three-fifths of the holders of the bonds, upon notice to the president or any director of the company, might appoint a trustee, and the trustee, president and directors went into the enemy's lines and remained there during the war, it was held that an order of the court of Alexandria county, substituting another person as a trustee, without notice, was null and void, and a sale made by such trustee was null. Washington, etc., R. Co. v. Alexandria, etc., R. Co., 19 Gratt. 592.

Appointment of Substitute under Special Provisions of Statute.—And where the trustees in a deed recorded in the clerk's office in Richmond have died or removed out of the state, or refuse to act, the circuit court of the city of Richmond has jurisdiction to appoint a trustee in the place of such trustees. Code 1873, ch. 155, 174; Hunter v. Vaughan, 24 Gratt. 400.

Survivorship in Case of Joint Trustees.—Where two trustees bring an action to recover the trust property, and one of them dies, the right of action survives to the other, and he may carry on the suit. Nichols v. Campbell, 10 Gratt. 560; Graeme v. Cullen, 23 Gratt. 266; Hunter v. Johnston, 23 Gratt. 266.

Removal and Substitution by a Court of Equity.—A court of equity has power, for cause, to remove trustees, in trust deeds to secure creditors, and to substitute others in their stead by virtue of its general jurisdiction over its trusts as well as under Code 1873, ch. 155, § 6, as amended by Acts 1874-5, p. 423. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

3. BOND OF TRUSTEE.

Trustee May Be Required to Give Bond on Motion.—The trustee, in a deed of trust to secure creditors, may be required to give bond for the faithful performance of the trust, upon motion of any party interested in the administration of the trust. Va. Code, 1887, § 3420; W. Va. Code, ch. 72, § 6; Dunscomb v. Dunscomb, 2 H. & M. 11; Terry v. Fitzgerald, 32 Gratt. 843; Lackland v. Davenport, 84 Va. 638, 5 S. E. Rep. 540; Thompson v. Halstead, 44 W. Va. 390, 29 S. E. Rep. 991.

But a trustee need not give bond under § 6, ch. 72, Code of West Virginia, before advertising and selling the property mentioned in the trust deed unless required to do so by the grantor or any

cestui que trust. Thompson v. Halstead, 44 W. Va. 390, 29 S. E. Rep. 991. See also, Va. Code 1887, § 3420.

Substituted Trustee May Be Required to Give Bond.—And where a trustee is substituted by an order of court, on motion of which the owner of the property has notice, he is not thereby precluded from applying to a court of equity to require of him bond and security before he proceeds to execute the trust. Terry v. Fitzgerald, 32 Gratt. 843.

Statute Requiring Trustee to Give Bond Is Retroactive.—The statute (Code 1887, § 3420) requiring trustees to whom property is conveyed, to give bond for the faithful performance of their duties, on motion upon ten days' notice by the beneficiaries, applies as well to trust deeds executed before as after its passage, as the effect of such statute is wholly remedial. Lackland v. Davenport, 84 Va. 638, 5 S. E. Rep. 540.

4. AUTHORITY OF TRUSTEE.

Deed Sole Source of Trustee's Authority.—The trustee can only do with the trust property what the deed, either in express terms or by necessary implication, authorizes him to do. Fidelity, etc., Co. v. Shen., etc., Co., 32 W. Va. 244, 9 S. E. Rep. 180; Patch v. Morrisett, 2 Va. Dec. 127; Wilson v. Wall, 99 Va. 353, 38 S. E. Rep. 181; Graeme v. Cullen, 23 Gratt. 266; Heermans v. Montague, 2 Va. Dec. 6.

Thus where a trustee in a deed of trust was authorized, upon default to pay the sum secured by the deed, to advertise the property for thirty days by posting notices in three public places, and sell the same, but, instead of advertising, the trustee made a deed bargain in sale to the beneficiary, upon consideration of one hundred dollars upon the debt, it was held that the deed passed no title. Heermans v. Montague, 2 Va. Dec. 6.

Delegation of Authority.—The relation existing between the trustee and the *cestui que trust* is one of personal trust and confidence, as he is supposed to have been chosen for his integrity, therefore, the trustee cannot delegate his authority to an agent but must act in person. Morriss v. Va. State Ins. Co., 90 Va. 370, 18 S. E. Rep. 848; Smith v. Lowther, 35 W. Va. 300, 13 S. E. Rep. 999; Harvey v. Steptoe, 17 Gratt. 289; Gordon v. Cannon, 18 Gratt. 387.

And where the deed authorizes the trustee to appoint agents, and provides that he shall only be liable for the money that comes into his hands, and shall not be liable for the omissions or defaults of the agents, this does not discharge the trustee from the obligation to select fit agents, and to hold them to a strict and prompt responsibility for their acts. Gordon v. Cannon, 18 Gratt. 387.

No Authority to Change Trust Fund.—A trustee has no implied power to change the trust fund. His authority is derived solely from the instrument creating the trust. Heth v. Rich., etc., R. Co., 4 Gratt. 482.

Possession of Trustee Equivalent to Possession of Court.—The possession of a trustee, acting under the order of the chancery court, in a suit instituted by him for the purpose of administering the trust, is the possession of the court in which the suit is pending. The trustee occupies the same position, in respect to the trust property under his control, as if we were a receiver appointed by the court; and no interference with the possession of such trustee will be tolerated, without the leave of the court first obtained, and any attempt at such interference will be restrained by injunction for that purpose. Ford v. Watts, 95 Va. 192, 28 S. E. Rep. 179.

Authority of Trustee to Retain His Own Debt.—Where the deed of trust authorizes it, the trustee may first pay any debt that is owing to him from the debtor. French v. Townes, 10 Gratt. 513.

Power of Sale Conferred on the Trustee.—The power of sale conferred on a trustee in a deed of trust, or his personal representative in case the former dies before exercising such power, is a power coupled with an interest, and is not revoked by the death of the grantor. The fact that the power of sale and the estate coupled therewith subsequently become separated, the power passing by the express terms of the trust to the personal representatives of the trustee, and the estate descending to his heirs, does not revoke the power. Sulphur Mines Co. v. Thompson, 93 Va. 393, 25 S. E. Rep. 233.

Trustee Is Only Party Who Can Sue for a Conversion of Trust Property.—Where a debtor conveys personal property to a trustee to secure to a creditor the payment of his debt, and a person obtaining possession of the property, sells it, and applies the proceeds to his own use, the *cestui que trust* can maintain no action at law, in his own name, against the party converting the property. The action will only lie at the suit of the trustee. Poage v. Bell, 8 Leigh 604.

Trustees without Authority to Sell the Land—Effect—Land was conveyed in trust, first, that the debts of the grantor should be paid out of the rents and profits; second, for the support of the grantor, his wife and children; third, at his death, to be divided among his children. It was held that the trustees had no authority to make sales of the land conveyed, for the payment of the debts of the grantor, or for any other purpose, however urgent the necessity for such sales. In such case a purchaser from the grantor of the land conveyed in trust, took a conveyance from such grantor and the trustees. It was held that such purchaser had notice of the trust and was bound to know that the trustees had no power to sell the land. Mundy v. Vawter, 3 Gratt. 518.

Trustee Has No Authority to Sell before Obtaining Legal Title.—Real estate was conveyed in trust to secure debts. The grantor had at the time only the equitable title to the property, but he was entitled to have the legal title. The trustee sold the property for one-fourth of its value, without getting the legal title, and the principal creditor secured by the deed of trust became the purchaser. The grantor was not present at the sale, but he had forwarded the money to pay the debts to that place, and it was at the time of the sale in the post-office and not delivered. It was held that the sale by the trustee before receiving the legal title was an abuse of power, and under the circumstances of the case the sale was set aside in equity. Rossett v. Fisher, 11 Gratt. 492.

5. DUTIES OF TRUSTEE.

a. GENERAL STATEMENT OF DUTY.—The trustee must conform to the trust deed and act for the best interests of both the debtor and the creditor, as he is the agent of both parties. But pre-eminent knowledge and uncommon foresight are not required of a trustee. All that is required of him is that he should act in good faith and in the exercise of a fair discretion and in the same manner in which he probably would have acted if the subject had been his own property and not held in trust. His conduct should not be condemned if it flowed from an honest (though uninformed and mistaken) judgment. Elliott v. Carter, 9 Gratt. 541; Davis v. Harman, 21 Gratt. 194; Myers v. Zetelle, 21 Gratt. 733;

Windon v. Stewart, 48 W. Va. 711, 28 S. E. Rep. 776; Jones v. Jones, 86 Va. 852, 11 S. E. Rep. 426; Elliott v. Howell, 78 Va. 307; Wayland v. Crank, 79 Va. 609; Cooper v. Cooper, 77 Va. 204; Hale v. Wall, 22 Gratt. 433; Crouch v. Davis, 23 Gratt. 99; Mills v. Mills, 28 Gratt. 479; Douglass v. Stephenson, 75 Va. 747; Pidgeon v. Williams, 21 Gratt. 251; Thomson v. Brooke, 76 Va. 160; Parsley v. Martin, 77 Va. 381; Dickinson v. Helms, 29 Gratt. 462; Hawthorne v. Beckwith, 89 Va. 790, 17 S. E. Rep. 241; Williams v. Skinker, 25 Gratt. 507; Key v. Hughes, 32 W. Va. 190, 9 S. E. Rep. 79; McClure v. Johnson, 14 W. Va. 447; Lingle v. Cook, 32 Gratt. 262; Watkins v. Stewart, 78 Va. 111; Hartman v. Evans, 38 W. Va. 669, 18 S. E. Rep. 810; Wilson v. Wall, 99 Va. 353, 38 S. E. Rep. 181; Shurtz v. Johnson, 28 Gratt. 657; Rossett v. Fisher, 11 Gratt. 492; Hogan v. Duke, 20 Gratt. 244; Livey v. Winton, 30 W. Va. 554, 4 S. E. Rep. 451; Nelson v. Turner, 97 Va. 54, 33 S. E. Rep. 390.

b. DUTY IN REGARD TO SALE.

General Principles.—In a deed of trust to secure the payment of debts, the trustee is the agent of both parties, debtor and creditor, and should act impartially between them, and in making sale of the trust subject he should use all reasonable diligence to obtain the best price. And if there be any cloud hanging over the title or uncertainty as to the amounts of the debts secured, or of prior encumbrances, or any other impediment to the fair execution of the trust which cannot be otherwise removed, the aid of a court of equity should be invoked by him to remove the impediment before the sale; and if he fail or refuse to resort to the court for that purpose, the parties in interest who may be injured by his default, whether debtor, secured creditor, or subsequent encumbrancer, may apply to the court for relief. Shurtz v. Johnson, 28 Gratt. 657; Rossett v. Fisher, 11 Gratt. 492; Hogan v. Duke, 20 Gratt. 244; Horton v. Bond, 28 Gratt. 815; Cole v. McRae, 6 Rand. 644; Lane v. Tidball, Gilmer 130; Gay v. Hancock, 1 Rand. 72; Chowning v. Cox, 1 Rand. 306; Gibson v. Jones, 5 Leigh 370; Miller v. Argyle, 5 Leigh 460; Wilkins v. Gordon, 11 Leigh 547; Schultz v. Hansbrough, 33 Gratt. 567; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. Rep. 775.

Trustee Must Sell for Best Interests of Grantor.—The trustee must sell for the best interests of the grantor. Thus where it will be to the debtor's advantage to sell the whole property the whole should be sold; and where it will best subserve the debtor's interest to sell only a part of it, or to sell it in separate parcels, it is the duty of the trustee to sell accordingly. Hartman v. Evans, 38 W. Va. 669, 18 S. E. Rep. 810; Morriss v. Va. State Ins. Co., 90 Va. 870, 18 S. E. Rep. 843; Terry v. Fitzgerald, 32 Gratt. 843; Wilson v. Wall, 99 Va. 353, 38 S. E. Rep. 181; Anchor Stove Works v. Gray, 9 W. Va. 469. See *post*, "Enforcement by Sale."

And a deed of trust directing a sale, but not requiring in terms, a subdivision, should be construed with reference to Code 1873, ch. 113, § 6, requiring the trustee, in case of default, "to sell the property conveyed by the deed, or so much thereof as may be necessary"; and if the land will bring a better price by a sale in lots, and the owner so requests it, and the trustee refuses, the owner may control the trustee, in the exercise of his discretion, by application to a court of equity. Morriss v. Va. State Ins. Co., 90 Va. 870, 18 S. E. Rep. 843; Terry v. Fitzgerald, 32 Gratt. 843.

Must Not Deal with Trust for His Own Benefit.—The paramount and vital principle controlling the relation of trustee and *cestui que trust* is good faith, for without it the relation could not well exist. So sedulously is this principle guarded, that all departures from it are deemed frauds upon the confidence bestowed. A trustee, therefore, will not be allowed to put himself in a position antagonistic to his *cestui que trust*, or speculate in the subject of the trust. So it is a well settled principle of equity that trustees, and all persons acting in a confidential character with respect to the subject of the sale, are disqualified from purchasing the property for themselves. The characters of buyer and seller are incompatible, and cannot be safely exercised by the same person. The validity of the sale, in such case, does not depend upon its fairness, but the sale is voidable, and when attacked, must be set aside, although the price was fair, or the best to be had, and the motive pure. Smith v. Miller, 98 Va. 535, 37 S. E. Rep. 10; Harrison v. Manson, 95 Va. 593, 29 S. E. Rep. 420; Tennant v. Dunlop, 97 Va. 241, 33 S. E. Rep. 620; Carter v. Harris, 4 Rand. 199; Howery v. Helms, 20 Gratt. 1; Bailey v. Robinsons, 1 Gratt. 4; Buckles v. Lafferty, 2 Rob. 292; Washington, etc., R. Co. v. Alexandria, etc., R. Co., 19 Gratt. 592.

But where a sale is set aside, solely on the ground that the trust subject was purchased by the trustee at his own sale, the trustee is entitled to be reimbursed the amount paid by him, and may hold the legal title to the trust subject as security for the amount. He is entitled to interest, and the value of his permanent improvements, if any, and is to be charged with rents and profits. Harrison v. Manson, 95 Va. 593, 29 S. E. Rep. 420; Smith v. Miller, 98 Va. 535, 37 S. E. Rep. 10.

Where Sale is on Credit Trustees Must Require Security.—Where trustees sell on credit they must, in all cases, require the purchaser to give security, and the fact that the purchasers are men of wealth is no excuse. Miller v. Holcombe, 9 Gratt. 665.

Effect of Failure to Perform Duty.—Equity will either compel a trustee to perform his duty, or will disregard its omission under the maxim that "equity considers that done which in good conscience ought to be done." Atwood v. Shen., etc., R. Co., 85 Va. 966, 9 S. E. Rep. 748.

And under § 16, ch. 99, W. Va. Code, a court of equity has jurisdiction to compel a trustee to execute a deed to the purchaser of the land sold under the deed of trust. Atherton v. Hull, 12 W. Va. 170.

But a court of equity will not, in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting *bona fide* in the exercise of his discretion. Nor will a suit be entertained to compel a trustee to exercise his power. Cochran v. Paris, 11 Gratt. 348. See *ante*, "Authority of Trustee," and *post*, "Enforcement by Sale."

6. RIGHT TO EXPENSES.

Trustee Entitled to Reasonable Expenses.—It is well settled that a trustee is entitled to the expenses of executing the trust, if the expenses were *bona fide* incurred and were reasonably necessary to the due execution of the trust. Lomax v. Pendleton, 3 Call 538; Miller v. Beverleys, 4 H. & M. 420; Cochran v. Richmond, etc., R. Co., 91 Va. 339, 21 S. E. Rep. 664; Guggenheimer v. Rogers, 95 Va. 711, 29 S. E. Rep. 874; Hogan v. Duke, 20 Gratt. 244.

Expense of Counsel.—And trustees, who in good faith engage the services of counsel to aid them in the exercise of their duties, are entitled to pay them out of the trust fund, or to be reimbursed out of

that fund for all expenses which they have incurred including reasonable fees to attorneys. Cochran v. Richmond, etc., R. Co., 91 Va. 339, 21 S. E. Rep. 664; Guggenheimer v. Rogers, 95 Va. 711, 29 S. E. Rep. 874.

But where a bill of review to a final decree confirming the accounts of a trustee is dismissed, on the trustee's motion, he will not be allowed to open the final decree so as to obtain compensation for the costs of employing counsel. Guggenheimer v. Rogers, 95 Va. 711, 29 S. E. Rep. 874.

Expenses of Auctioneer in Making Sale.—It is also proper to allow compensation for the services of an auctioneer in making a sale ordered by a court under a deed of trust, and also the expenses of a former advertisement of the sale of property by the trustee, which had been enjoined by the debtor, and the injunction dissolved. Hogan v. Duke, 20 Gratt. 244; Womack v. Paxton, 84 Va. 9, 5 S. E. Rep. 550.

Expenses Incurred under Second Deed Have Priority over Debt Secured by the First.—Where horses are conveyed by a deed of trust reserving to the grantor the possession and use of them for one year, and then a second deed of trust is given on the same horses giving the trustee the right to the immediate possession and the right to sell as soon as practicable, the trustee in the second deed of trust is entitled to retain from the proceeds of the sale the expenses of keeping the horses until the sale, the costs and expenses for the sale, and the amount of his commissions provided for in the deed, though the horses do not sell for enough to pay the amount of the debt secured in the first deed and the expenses under the second. Guggenheimer v. Rogers, 95 Va. 711, 29 S. E. Rep. 874.

7. RIGHT TO COMPENSATION.

Trustee Entitled to a Reasonable Compensation.—Besides the expenses *bona fide* incurred, a trustee is allowed a reasonable compensation for his trouble and responsibility. The amount of this compensation is now fixed in Virginia by statute to be five per cent. on the first $300, and two per cent. on the residue of the proceeds of the sale. Miller v. Beverleys, 4 H. & M. 420; Lomax v. Pendleton, 3 Call 538; 2 Min. Inst. (4th Ed.) 343; Va. Code 1887, § 2442; Smith v. Railroad Co., 33 Gratt. 617; Guggenheimer v. Rogers, 95 Va. 711, 29 S. E. Rep. 874.

And where a deed of trust by a railroad company provides that upon a sale of the trust property by the trustees, they shall pay the amount of the proceeds to the bondholders, after deducting the costs and expenses of the sale under the trust, the trustees are entitled to retain compensation for the services rendered in the execution of the trust in preference to the claims of the bondholders. Smith v. Railroad Co., 33 Gratt. 617.

But where only part of the purchase price of land sold under a deed of trust is ever collected, commissioners should only be allowed on that part which is collected, and no extra compensation is allowable for extraordinary efforts to sell the land. Womack v. Paxton, 84 Va. 9, 5 S. E. Rep. 550.

Substituted Trustee Entitled to Same Compensation as the Original.—A substituted trustee whose duties are only such as were imposed upon the original trustee, by the deed creating the trust, is not entitled to any greater compensation for his services than the deed provided for the original trustee, and the court, supervising the settlement of the accounts of the substituted trustee, cannot allow any greater compensation. So. Ry. Co. v. Glenn, 98 Va. 309, 36 S. E. Rep. 395.

Trustee Discharged without Notice Entitled to Stipulated Compensation.—A party having been appointed a trustee upon a specific compensation, and having been discharged by the grantors in the trust deed without his knowledge is entitled to have the compensation which was originally agreed upon for his services. Maury v. Chesapeake, etc., R. Co., 27 Gratt. 698.

But where a trustee accepted the trust with knowledge that the compensation originally agreed upon was to be reduced, he is only entitled to recover the amount after this reduction. Maury v. Chesapeake, etc., R. Co., 27 Gratt. 698.

When Commissions Allowed Cannot Be Objected to.—In Roller v. Pitman, 98 Va. 613, 36 S. E. Rep. 987, the trustees were appointed by a court as special commissioners to sell the incumbered property, and they included a charge for commission in their report. The report being confirmed by the court without any objections by the beneficiary, this was held an adjudication on the amount of the commission allowed which precluded the beneficiary from objecting thereto.

8. LIABILITY OF TRUSTEE.

The Rule of Caveat Emptor Applies to Sales by Trustees.—A trustee to sell, selling such property, and such title only, as is vested in him, according to the terms prescribed, and without warranty or fraud, incurs no responsibility to the purchaser. Sutton v. Sutton, 7 Gratt. 234.

And where the trustee has sold the trust subject, and has faithfully executed the trust reposed in him and disbursed the funds that came into his hands in the payment of the debt secured and the expenses of the sale, he cannot be held responsible for the proceeds of such sale by a prior judgment creditor whatever may be the rights of such creditor against the land itself. Nelson v. Turner, 97 Va. 54, 33 S. E. Rep. 390.

Trustee Who Does Not Receive Funds Not Liable.—And where a person named trustee in a deed to secure debts, unites in sales necessary in the execution of the trusts, and other formal acts, but he receives none of the trust funds, they being received by his co-trustee, and he is guilty of no fraud in relation thereto, he is not responsible for the misapplication of the funds by his co-trustee. Griffin v. Macaulay, 7 Gratt. 476.

Receiving Depreciated Currency.—Where a trustee, in a deed to secure creditors, received in June, 1861, in good money, a part of the trust fund applicable to pay a creditor who was ready to receive payment, his investment of the fund in Confederate bonds, under an order of court made on his motion in a suit which he had brought for the administration of the trust, was held invalid, and he continued liable for the fund. Kirby v. Goodykoontz, 26 Gratt. 298.

Loss of Rents through Delay in Making Sale.—But a trustee is not responsible for estimated rents when he has received none, where his delay in selling the property arose out of the difficulty of finding a purchaser. Griffin v. Macaulay, 7 Gratt. 476.

And where a trust fund has been paid into court by a purchaser of the trust property, but, in consequence of resistance to the payment of proper charges on the fund, it has remained idle in the hands of the court, the loss of interest must fall on the trust creditor who has resisted the charge. Cochran v. Richmond, etc., R. Co., 91 Va. 339, 21 S. E. Rep. 664.

Compromise by Trustee.—A trustee making a com-

promise in relation to the trust subject, though he may purchase the subject for himself, is bound to account as trustee for all of the profits made on the transaction. Miller v. Holcombe, 9 Gratt. 665.

Party Participating in Misappropriation of Funds Liable with Trustee.—And a party participating with a trustee in a misappropriation of the trust fund is liable jointly and severally for the fund so misappropriated. Jones v. Abraham, 75 Va. 466. And where a trustee pays a trust fund to one who receives it knowing that he is not entitled to it, the true beneficiary may bring a suit in equity against both; but the decree should be against the one improperly receiving it as the principal debtor, and against the trustee, treated as his surety, to make good any deficiency. Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 878.

Liability of Trustee's Personal Representative.— A sale was declared invalid long after it was made, and the trustee's representatives were adjudged to pay into court the value of the land when sold, with interest. The debt was then paid from the trustee's estate; but the amount paid was less than the land's value with interest, so it was held that the trustee's representatives must pay the difference into court for the benefit of the debtor's estate. Mosby v. Johnson, 86 Va. 429, 10 S. E. Rep. 425.

9. ACCOUNTING.

How Accounts Are Stated.—While the execution of a trust is in progress, the account of the trustee should be stated on the principle of executor's accounts. But when it is substantially closed, it should be stated on the principle of debtor and creditor, interest to be charged upon each sum received from the end of six months after its receipt, and disbursements first applied to interest while there is any due. Harvey v. Steptoe, 17 Gratt. 289.

Bill Impeaching Account Must Make Specific Charges—Where a bill does not specify errors in the accounts of the trustee regularly settled by the commissioner of a county court and confirmed, but only charges generally that there are errors in them, the court will not direct a resettlement of the accounts. Preston v. Stuart, 29 Gratt. 289.

V. THE LIEN.

1. COMMENCEMENT OF THE LIEN.

As between the Parties.—As between the parties to a deed of trust, its lien commences from the moment of its delivery to the trustee. Before the deed is delivered it has no operative effect and creates no lien upon the property described therein. Hunt v. Brent, 1 Va. Dec. 258; Hockman v. Hockman, 93 Va. 455, 25 S. E. Rep. 534.

As against Creditors and Purchasers of the Grantor.—As against creditors of and purchasers from the grantor for valuable consideration and without notice of the deed of trust, the lien of the deed of trust only commences from the time that it is duly admitted to record: and where two or more deeds of trust, embracing the same property, are admitted to record on the same day, that which is first admitted to record has priority. Va. Code 1887, §§ 2465, 2469; Hockman v. Hockman, 93 Va. 455, 25 S. E. Rep. 534; Skipwith v. Cunningham, 8 Leigh 271.

Consent of Creditors Secured Not Necessary to Its Commencement.—A deed of trust conveying land to secure creditors, which is executed by the maker of the deed and the trustees, and duly recorded before a judgment is obtained against the maker, will intercept the lien of the judgment, although the creditors may not have given their consent to the deed until after the judgment. In such case, even in a court of equity, the equity of the judgment creditor will generally be considered inferior to the equity of the creditors claiming under the deed. Skipwith v. Cunningham, 8 Leigh 271.

2. TO WHAT LIEN ATTACHES.

Machinery on the Premises.—Where the machinery in a factory is permanent in its character and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building, when the building is conveyed by a deed of trust; and whatever is essential to the purposes for which the building is used will be considered as a fixture although the connection between them may be such that it may be severed without physical or lasting injury to either. Shelton v. Ficklin, 33 Gratt. 727; Green v. Phillips, 26 Gratt. 753; Franks v. Cravens, 6 W. Va. 185.

But where the fixtures are removed from the land conveyed in a deed of trust, by the grantor, and sold to a purchaser for value, the purchaser has a good title as against the grantee in the deed of trust. Franks v. Cravens, 6 W. Va. 185.

Crop of Wheat Growing on Premises.—Where a trustee sells land at a public sale, a crop of wheat growing upon it sowed by the owner of the land passes to the purchaser of the land, unless it was reserved; but the reservation need not be in writing but may be proved by parol evidence. But if before the sale there was an understanding between the owner of the land and a person, who, it was expected, would buy it at such public sale, that in making the purchase of the land he was not to get the growing crop of wheat, but that it should continue to be the property of the owner of the land, then such growing crop of wheat would not pass to such purchaser with the land, but it would after such sale continue to be the property of the former owner of the land, and such understanding need not be evidenced by any writing but may be proved by parol. Kerr v. Hill, 27 W. Va. 576.

The Increase of Live Stock.—And the increase of live stock conveyed by a deed of trust passes under the deed, though not specifically mentioned therein. Gannaway v. Tate, 98 Va. 789, 37 S. E. Rep. 768.

Equity of Redemption.—The subsequent deed of a grantor, who has by a prior deed conveyed the legal title in trust to secure a debt, only operates to convey the equity of redemption until such prior deed is released. Southern, etc., Ass'n v. Page, 46 W. Va. 302, 33 S. E. Rep. 336; Bock v. Bock, 24 W. Va. 586.

And though the title under a deed of trust will be subordinate to that under a prior deed of bargain and sale from the same party, for the same land, duly recorded, yet, if it appear that anterior to the deed of trust there was a resale by the bargainee to the bargainor, of which there is proper evidence in writing, equity will hold that the land passes by the deed of trust, subject only to the lien for the purchase money due upon the resale, and thus the rights of the parties will depend upon whether such purchase money has been paid or not. Beverley v. Ellis, 10 Leigh 1.

But where there are several deeds, conveying in succession the same property, and not merely the equity of redemption therein, every successive encumbrance binds all the property not absorbed in satisfaction of the previous valid encumbrance. Lewis v. Caperton, 8 Gratt. 148.

Land Held Adversely.—But a deed of trust purport-

ing to create a lien on land in the adverse possession of another is a mere nullity. Bream v. Cooper, 5 Munf. 7; Early v. Garland, 13 Gratt. 1.

Unpaid Subscriptions to Corporate Stock.—Where a deed of trust executed by a corporation provides that unpaid subscriptions shall be payable to the trustee, the right to collect them passes, and creditors may enforce them by suit; and even though barred by the statute of limitations equity will aid in enforcing their payment as the statute of limitations does not extinguish the right, but only bars the remedy. Hamilton v. Glenn, 85 Va. 901, 9 S. E. Rep. 129.

Deed by a Railroad Company—What Property Covered.—Where a railroad company conveys to trustees all of its property real and personal, including road bed, rails, etc., in trust to secure the bonds, principal and interest, mentioned therein, the old iron rails taken up from the road as unfit for further use, are covered by the deed, and the trustees are entitled to have the same applied to pay interest due upon the bonds, in preference to subsequent execution creditors of the company. First National Bank of Salem v. Anderson, 75 Va. 250.

Property Must Be Identified in Order for Lien to Attach.—A deed of trust which conveys certain designated pianos, and also all pianos, organs, and all other merchandise owned by the grantor and temporarily stored elsewhere is sufficient to cover the interest of the grantor in other pianos stored elsewhere upon which there may be prior liens. Fischer v. Lee, 98 Va. 159, 35 S. E. Rep. 441. See in this connection, Hunter v. Beach, 80 Va. 361; Poindexter v. Burwell, 82 Va. 507. See *ante*, "Description of Property and Indebtedness."

Substance of the Transaction Looked to in Equity.—A debtor may convey for his creditors' benefit, property held by him *nominally* in trust for others, but *equitably* his own, and withhold property *nominally* his own, but which in equity belongs to others. Brown v. Putney, 90 Va. 447, 18 S. E. Rep. 883.

Excess in Quantity of Land.—Where a debtor conveys land to a trustee to secure the payment of debts, no definite price is fixed, and so the estimated quantity of the land is not an element in fixing the price. Consequently, excess in the actual quantity of the land does not entitle the grantor in the deed of trust to a rescission of the conveyance, or to compensation for the excess. Western, etc., Co. v. Peytona, etc., Co., 8 W. Va. 406.

Lien Does Not Attach Where Deed is Defectively Executed.—Where a deed of trust is executed by a married woman and her trustee on her equitable separate estate in land, the deed is void unless her husband joins in the deed. And such deed is not an incumbrance on the rents and profits of the estate. Taylor v. Cussen, 90 Va. 40, 17 S. E. Rep. 721.

Deed by Husband and Wife—Exoneration of Wife's Estate.—And where a debt secured by a deed of trust was the debt of the husband, and the wife's property was only included in the deed of trust as an additional security, it was held that a court of equity would require that the husband's portion of the property should be exhausted before selling the wife's property. Jones v. Thorn, 45 W. Va. 186, 32 S. E. Rep. 173.

Property in Hands of Purchaser with Notice.—Property to which a trust has attached, will be subjected to the trust in the hands of a purchaser for value, who has constructive notice of the trust; and this though it was irregular in the trustee to invest the trust fund in the property. Heth v. Rich., etc., R. Co., 4 Gratt. 482.

After-Acquired Title.—Where a deed of trust is given on an equity of redemption without a clause of warranty the legal estate subsequently acquired by the grantor does not inure to the trustee in the deed of trust. Doswell v. Buchanan, 3 Leigh 365.

Witnesses to Prove to What the Lien Was Intended to Attach.—While the testimony of the grantor in a deed of trust, unsupported by other evidence, is not sufficient to establish the property to which the lien of the deed of trust was intended to attach, yet he is a competent witness to identify the property described in the deed. Carrington v. Goddin, 13 Gratt. 587.

3. FOR WHAT LIEN ATTACHES.

For Undelivered Note.—Where a deed of trust is executed to secure a note, which has not been delivered at the time of the execution of the deed, the deed of trust furnishes a valid security for the debt, if the parties intended it to evidence a *bona fide* debt which existed between them. Eacho v. Cosby, 26 Gratt. 112.

And a deed of trust made to secure existing debts is a valid security for a bond dated subsequent to the date of the deed of trust, but which was given solely for debts existing before the deed of trust was executed. Smith v. Miller, 98 Va. 535, 37 S. E. Rep. 10.

To Secure Unliquidated Damages.—Where a deed of trust was made to secure "all the debts and liabilities of certain firms, and of the individuals composing them," it was held that a mere claim for unliquidated damages for a breach of contract to deliver shares of stock, could not be enforced in equity against the trust deed and the claimants were left to their remedy at law. Witz v. Mullin, 90 Va. 805, 20 S. E. Rep. 783.

For Future Advances.—And a deed given to secure future advance is a valid security, as between the parties, for the amount so advanced. McCarty v. Chalfant, 14 W. Va. 531; Alexandria Sav. Inst. v. Thomas, 29 Gratt. 483; Didier v. Patterson, 93 Va. 537, 25 S. E. Rep. 661; Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 501; First Nat. Bank v. Turnbull, 32 Gratt. 695; Riggs v. Armstrong, 23 W. Va. 760. See *ante*, "Consideration—Future Advances."

And where a deed is executed to secure a party on indorsements made for the grantor, and upon a further trust after paying the notes to pay any other debt which may be owing to the indorser by the grantor, the deed is a valid security, from the time of the maturity of the notes, for any debt which may be existing between the parties at that time, though the notes are paid before the trust property is sold, but after maturity. Mayor v. Carrington, 19 Gratt. 74.

For Debts Not Described in the Deed.—In order for the lien of a deed of trust to attach it is not necessary that the deed should describe the debts intended to be secured; but it will stand as a security for the real equitable claims of the beneficiary, whether they existed at the date of the mortgage or arose afterwards. Riggs v. Armstrong, 23 W. Va. 760; McCarty v. Chalfant, 14 W. Va. 531; Eacho v. Cosby, 26 Gratt. 112; Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329.

But a mere recital in a deed of trust, that the *cestuis que trust* are liable as indorsers for the maker of the deed, and that he is willing and desirous to indemnify and secure them from all loss and damage in consequence of their becoming indorsers, by conveying property for the purpose, does not entitle the indorsers, after the death of the maker, to rank

as specialty creditors, in the administration of his personal assets. Powell v. White, 11 Leigh 309; Roanoke, etc., R. Co. v. Hicks, 96 Va. 511, 32 S. E. Rep. 295.

For Debts of Others Than the Nominal Beneficiary.—And in a transaction for the benefit of several, a security taken by one of them inures to the benefit of all of them, as fully as if they had all been named in the security. Armstrong v. Henderson (Va. 1901), 7 Va. Law Reg. 430.

Recital of Amount of Debts Due Not Conclusive.—A deed of trust to secure creditors reciting the amount of the debts due to the different creditors, is not conclusive, even as against the grantor and his administrator, of the amount of the respective debts. Griffin v. Macaulay, 7 Gratt. 476. In this case the books of the grantor in the deed of trust were held proper evidence of the debts due to the creditors secured by the deed of trust.

And a creditor of the grantor in a deed of trust to secure creditors may show by extrinsic evidence that his debt was intended to be secured under the provisions for another creditor. Griffin v. Macaulay, 7 Gratt. 476.

Interest on Notes Given for Interest Which Is Overdue.—Where a bond providing for the payment of interest annually was secured by a deed of trust, and afterwards, for several years, when the interest was due and payable, interest notes were executed, bearing the same rate of interest as the original bond, it was held that the deed of trust would secure the payment of interest on these new interest notes; but such interest could not avail as against subsequent creditors or purchasers. Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. Rep. 1.

4. DURATION OF LIEN.

Lien Remains until Debt Is Paid.—A deed of trust remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note, or by giving a different instrument as evidence of the debt. Artrip v. Rasnake, 96 Va. 277, 31 S. E. Rep. 4; Criss v. Criss, 28 W. Va. 388; Pitzer v. Burns, 7 W. Va. 63; Paxton v. Rich, 85 Va. 378, 7 S. E. Rep. 531.

And a deed of trust to secure a bond is not affected by a judgment on the bond, since the original debt is not thereby merged, but only the form of the evidence of the debt changed. Gibson v. Green, 89 Va. 524, 16 S. E. Rep. 661.

Lien Will Not Be Merged Unless Interest of Parties Demand it.—And the acquisition of the legal title to land on which one holds a deed of trust does not necessarily merge the lien of the deed of trust. It is a question of intention and in the absence of an express agreement to merge the lien, equity will keep it alive or destroy it, as appears to be to the interest of the purchaser. It will not destroy it if there is any necessity for keeping it alive, such as the existence of another encumbrance, in the absence of an agreement to that effect. Rorer v. Ferguson, 96 Va. 411, 31 S. E. Rep. 817; McClaskey v. O'Brien, 16 W. Va. 791.

Not Affected by Issuance of Receiver's Certificates.—And the lien of a deed of trust cannot be displaced by a subsequent issue of receiver's certificates by a court of chancery, without notice to the creditor secured. Osborne v. Big Stone Gap Colliery Co., 96 Va. 58, 30 S. E. Rep. 446.

5. PRIORITY OF LIEN.

Priority over Dower.—Where a deed of trust is given by a man before his marriage, or after his marriage if the wife joins in the execution of the deed, the lien of the deed of trust is superior to the wife's claim to dower. But, in such case, the wife is entitled to dower in the surplus after paying the debt secured. Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. Rep. 1; Tracey v. Shumate, 22 W. Va. 474; Heth v. Cocke, 1 Rand. 344; Hurst v. Dulaney, 87 Va. 444, 12 S. E. Rep. 800; Coffman v. Coffman, 79 Va. 504; Robinson v. Shacklett, 29 Gratt. 99; George v. Cooper, 15 W. Va. 666; Daniel v. Leitch, 13 Gratt. 195.

But where the husband executes a deed of trust upon his land during the coverture, his wife not joining in the conveyance, she is entitled to dower upon the death of the husband, as he is regarded as dying seised of the land. Tracey v. Shumate, 22 W. Va. 474; Spencer v. Lee, 19 W. Va. 179.

Same—Deed of Trust to Secure Purchase Money.—But this rule does not apply where the deed given by the husband, is given to secure the purchase price of the land in which the dower is claimed, as in this case he is not regarded as acquiring any such seisin or interest as will entitle his wife to dower, or his creditor to subject the lands to his debts, discharged of the deed of trust. In such case, the deed and the deed of trust are regarded as parts of the same contract, and constitute but a single transaction, investing the purchaser with seisin for a transitory instant only. Gilliam v. Moore, 4 Leigh 32; Summers v. Darne, 31 Gratt. 791; Hurst v. Dulaney, 87 Va. 444, 12 S. E. Rep. 800; Straus v. Bodeker, 86 Va. 543, 10 S. E. Rep. 570; Roush v. Miller, 39 W. Va. 638, 20 S. E. Rep. 663; George v. Cooper, 15 W. Va. 666; Wheatley v. Calhoun, 12 Leigh 264, 37 Am. Dec. 654. If both instruments bear date the same day, it will be presumed that they were executed at the same time in absence of proof to the contrary. But even where the deed of trust bore date subsequent to the date of the conveyance, and it appeared that they were acknowledged on the same day and recorded at the same time, it was held that the court might infer that they were executed together and were intended to take effect at the same time. Summers v. Darne, 31 Gratt. 791; Wheatley v. Calhoun, 12 Leigh 264, 37 Am. Dec. 654. On this subject, see monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

Priority as between Debts Secured by Same Deed.—Where a deed of trust secures several debts to the same persons, with different sureties therein, such debts stand equal as liens, and are to be paid out of the property conveyed ratably, if the original creditor owns them, and the rights of assignee are not involved, unless the deed otherwise provides. Farmers' Bank v. Woodford, 34 W. Va. 480, 12 S. E. Rep. 544.

Relation of Liens as Affecting Priority.—It is well settled, as a general rule, that the lien of a judgment upon the land of the debtor relates back to the commencement of a term at which the judgment was obtained, and overreaches a deed of trust on the land executed by the debtor on or after the first day of the term. But the term is not considered as necessarily commencing on the day appointed by law for its commencement. A deed of trust admitted to record on the day appointed for commencing the term, but before the day on which the court actually commences its session, is unaffected by the lien of the judgment rendered during that term. Skipwith v. Cunningham, 8 Leigh 271.

And a decree rendered or a judgment confessed in vacation operates as a lien from the first moment of the day on which the decree is rendered or judgment confessed regardless of the time of day at

which it is actually rendered or confessed, and takes precedence over a deed of trust admitted to record during the same day, though in point of fact the deed of trust may have been recorded before the decree was rendered, or the judgment confessed. The law takes no notice of the fraction of a day as to the lien of a judgment or decree, while a deed, as against subsequent purchasers for value and without notice, and creditors, is only operative from the time it is admitted to record. Hockman v. Hockman, 98 Va. 455, 25 S. E. Rep. 534. See monographic *note* on "Judgments by Confession" appended to Richardson v. Jones, 12 Gratt. 53.

A Second Deed of Trust Has Priority over the First Which Has Been Marked Satisfied—A beneficiary under a second deed of trust on real estate has priority over the *bona fide* holder of negotiable notes secured in the first deed, where it appears that the payee of said notes had marked the first deed satisfied as prescribed by § 2498 of the Code before the execution of the second deed, and that the said beneficiary had no notice that the notes had been transferred, or were still unpaid, or any fraud in the transaction. Evans v. Roanoke Savings Bank, 95 Va. 294, 28 S. E. Rep. 323.

And in a suit to enforce the lien of a deed of trust on real estate in which all the necessary parties are before the court, and there is a prayer for general relief where it appears that the grantor in the deed, and the apparent owner of the debt secured, have fraudulently caused the deed to be marked satisfied, when in fact a debt had been assigned to the complainant, the latter is entitled to a personal decree against such grantor and apparent owner for whatever sum it may appear to be necessary to indemnify him against the loss sustained by reason of the fraud so perpetrated to him. Evans v. Roanoke Savings Bank, 95 Va. 294, 28 S. E. Rep. 323.

Priority as Affected by Improper Execution.—The fact that a deed of trust is not properly acknowledged will not affect the priority as between it and another trust deed, where the owner of the latter has actual notice of the existence of the former. National, etc., Ass'n v. Blair, 98 Va. 490, 36 S. E. Rep. 513.

But where there were two deeds of trust, the first not appearing to have been made with the knowledge of, or to have been ratified by, any creditor or trustee named therein, and under which no claim was asserted until the execution of the second deed, and the application of the proceeds thereunder, and then the claim was asserted by a person not named in the deed, or known to be a creditor, it was held that such creditor was not entitled to relief against the *cestui que trust* in the second deed. Spencer v. Ford, 1 Rob. 648.

Priority of Parties as against Rents and Profits.—Where a mortgage is placed upon land upon which there are already two deeds of trust, and the mortgagee is put in possession, the mortgagee is liable to account to the deed of trust creditors for the rents and profits made during his occupancy of the land, where the land does not bring enough when sold, to pay the creditors secured by the deeds of trust. Bank of Washington v. Hupp, 10 Gratt. 23.

And where the property covered by various deeds of trust which may be enforced at different periods, has been sequestrated at the suit of the judgment creditor of the grantor, when the court disposes of the trust subjects and rents and profits thereof, the creditor will only be entitled to the rents and profits of the different subjects up to the earliest period when either of the valid encumbrances covering such subject was authorized to be enforced. And the different encumbrances will each be entitled to the rents and profits of the subject covered by his deed from the time he was authorized by the terms of the deed to enforce it. Lewis v. Caperton, 8 Gratt. 148.

Where, on a bill by a creditor secured by a deed of trust to subject real estate to the satisfaction of his debt, the party in possession claims to be a purchaser for value without any knowledge of the deed, the lien being enforced, the party in possession may be allowed for his permanent improvements upon the land, but he must account for the rents and profits as an offset to his claim. Wood v. Krebbs, 33 Gratt. 685; Walker v. Beauchler, 27 Gratt. 511.

Where the Intent of the Grantor Was Fraudulent.—Though a trust deed originated in a fraudulent intent on the grantor's part, yet if the trustee and the *bona fide* creditors secured thereby had no notice of such intent, their claims so secured are valid against all other creditors of the grantor. Penn v. Penn, 88 Va. 361, 13 S. E. Rep. 707. See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348.

Deed of Trust Creditor Has Priority over Judgment of Which He Had No Notice.—A deed of trust given on land without notice, actual or constructive, of a prior judgment, has priority over such judgment. Shurtz v. Johnson, 28 Gratt. 657.

Of Two Equitable Claims the Party with Best Right to Call for Legal Title Has Priority.—A purchaser of land, encumbered by a deed of trust for the security of a debt, having bought of a debtor with the consent of the trustee, and paid the purchase money by discharging the debt secured by the deed, and by paying other sums of money, and having also a deed of bargain and sale from the debtor and being put in possession of land, has the best right to call for the legal title, and is therefore to be protected against the claim of a creditor suing in equity upon an agreement on the part of the debtor (bearing date before the purchase but subsequent to the deed of trust) to secure him by a deed of trust on the same land, and of which agreement the purchaser had no notice, when he made the contract and paid the purchase money. Williamson v. Gordon, 5 Munf. 257.

Deed of Trust on Personal Property Subject to Distress.—A deed of trust on personal property given by a tenant is subject to the landlord's right of distress for rent. Jones v. Phelan, 20 Gratt. 229.

Mechanic's Lien Subject to Deed of Trust Already Existing.—A building contract provided that part of the price should be paid in cash when the roof was erected, part in cash when the building was finished, and the balance in notes secured by a deed of trust on the premises. The owner previously obtained a loan on a deed of trust on the premises, and out of it the cash payments were made to the contractor, he having actual as well as constructive notice. On completion of the work, the contractor accepted the notes, but he never called for his deed of trust, which, however, was executed, and held subject to his order. A mechanic's lien afterwards filed by the contractor was held to be subordinate to the lender's deed of trust. Wright v. Vaughan, 2 Va. Dec. 662.

Destruction of Trust Property—Mechanic's Lien—Priorities.—The house on a lot in a city conveyed in trust was burned down; the grantor in the deed

employed workmen to build another house upon an agreement to give them a lien upon the lot and the house for the cost of the building. The workmen were not informed of the first lien, until they had nearly completed the work, though it was duly recorded. It was held that the whole property was subject to satisfy the first lien: and though the builders had obtained a second deed of trust on the property and claimed that only the value of the lot without the house should be applied to satisfy the first lien, it was held that this was not such a cloud on the title as forbade the trustee from selling under the first deed of trust. Graeme v. Cullen, 23 Gratt. 266: Hunter v. Johnston, 23 Gratt. 266.

Trustees and Creditors Secured Entitled to Protection as Purchasers for Value.—The priority of a lien often depends upon whether or not the lienor is a purchaser for value and without notice. It is well settled that the creditors and the trustees secured in a deed of trust are purchasers for value; but it cannot be said that they are in all cases purchasers for value without notice, for whether or not they are affected with notice will depend upon the circumstances of the case. Evans v. Greenhow, 15 Gratt. 153; Bank v. Knox, 19 Gratt. 747, and *note*; Antoni v. Wright, 22 Gratt. 873, and *note*; Shurtz v. Johnson, 28 Gratt. 657, and *note*; Cammack v. Soran, 30 Gratt. 296, and *note*; Williams v. Lord, 75 Va. 404; Witz v. Osburn, 83 Va. 230, 2 S. E. Rep. 33; Throckmorton v. Throckmorton, 91 Va. 47, 22 S. E. Rep. 162; Chapman v. Chapman, 91 Va. 400, 21 S. E. Rep. 813; Cox v. Wayt, 26 W. Va. 817; Harden v. Wagner, 22 W. Va. 365; Duncan v. Custard, 24 W. Va. 737; Western Mining, etc., Co. v Peytona Cannel Coal Co., 8 W. Va. 441; Kimmins v. Wilson, 8 W. Va. 591; Farmers' Bank v. Willis, 7 W. Va. 47; Ruffner v. Mairs, 33 W. Va. 661, 11 S. E. Rep. 7; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 361, 363. See 2 Va. Law Reg. 707. See, in accord, Wickham v. Lewis, 13 Gratt. 427, and cases cited in *foot-note* thereto; Richeson v. Richeson, 2 Gratt. 497; Weinberg v. Rempe, 15 W. Va. 829; Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481; Fischer v. Lee, 98 Va. 160, 35 S. E. Rep. 441; Davis v. Beazley, 75 Va. 491; Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611.

Conflict between Deed of Trust Held as Collateral and Vendor's Lien.—Where a deed of trust is given to a creditor as collateral for a debt, and the property afterwards purchased by the creditor at a sale under the deed of trust, but is subsequently taken from him under a vendor's lien existing against the property when the trust deed was made, the debtor is not entitled to credit on the judgment for the price which the creditor agreed to pay for such property. Deaton Grocery Co. v. Pepper, 98 Va. 587, 36 S. E. Rep. 988.

Appointment of Receiver in Suit.—Where there are conflicting claimants of a trust fund, who are prosecuting separate suits in the same court, to subject it, the appointment of a receiver in one of the suits, on the motion of the plaintiff in that suit, will inure to the benefit of the plaintiff in the other suit, upon the establishment of his superior right to the fund. Beverley v. Brooke, 4 Gratt. 187.

6. NOTICE AS AFFECTING PRIORITY.

Purchaser with Notice of Lien Takes Subject to It.—Where the creditor is charged with notice of a prior lien upon the property conveyed by the deed of trust, he takes subject to that lien. Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813; Vest v. Michie, 31 Gratt. 149: Roanoke, etc., Co. v. Simmons, 2 Va. Dec. 70; Wright v. Vaughan, 2 Va. Dec. 662; Rorer v. Ferguson, 96 Va. 411, 31 S. E. Rep. 817; McClaskey v. O'Brien, 16 W. Va. 791; Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481.

Notice to the Trustee is Notice to the Beneficiaries.—The relation existing between the trustee and the creditors secured in a deed of trust is that of principal and agent, and where the trustee is affected with notice of a lien or an equity affecting the title of the trust property this is sufficient to charge the beneficiary with notice. Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481; Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813; Eubank v. Kirk, 1 Va. Dec. 254; Fidelity, etc., Co. v. Shenandoah, etc., Co., 32 W. Va. 244, 9 S. E. Rep. 180.

And the beneficiaries are affected with notice to the trustee although he did not know of the existence of the deed or an intention to make it until it was recorded, and he then immediately declined the trust. Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481.

A Substituted Trustee is Affected with Notice to the Original Trustee.—The acceptance of the trust by the trustee is presumed until he declines to accept it, and when he refuses to act and a successor is appointed, the successor takes the shoes of the original trustee and is subject to all the rights and responsibilities of the position as if originally appointed by the deed, and the trust in his hands is tainted with all imperfections that attached to it in the hands of the original trustee. Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481.

Notice to One Trustee is Notice to All.—Where property is conveyed to two or more trustees jointly, to secure debts, the estate they take is joint and inseverable, their title joint and indivisible. Hence, notice to one of such trustees is notice to all. There can be no such thing as a purchase partly *bona fide*. Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813.

And where one of two trustees is charged to have had actual knowledge of a title adverse to that conveyed to them jointly, and the other trustee answers, denying the allegations of the bill, but the one charged with knowledge makes no answer, the answer need not be overcome by the testimony of two witnesses, or the testimony of one witness with strong corroborating circumstances. Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813.

Possession as Notice.—The open and peaceable possession of land under a claim of right is notice to all the world of the right or claim of the person in possession; and, where one buys land in the possession of another than his vendor, he is bound to take notice of such possession and all that it imports. It is the duty of the purchaser to inquire into the fact of possession, and he will be affected with notice of whatever right or interest the party in possession may have in the land which such inquiry would have disclosed. Such notice is the same in effect as the notice which is imputed by the recording or registry acts. Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813.

Registry as Notice.—And recordation is, of course, sufficient to charge a purchaser with notice. One may purchase land to which another than his vendor has a deed of conveyance duly recorded according to the statute for the recordation of deeds, but of which the purchaser knows nothing, yet he will be as conclusively charged with notice of such conveyance as if he had examined the record and inspected the deed. He is required for his own protection to examine the records, and the law imputes to him all that such examination would have dis-

closed. Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813. See monographic *note* on "Recording Acts."

Subscribing Witness Not Affected with Notice.—A purchaser of land is not affected with constructive notice of a prior unrecorded deed of trust by the mere fact that he was one of the subscribing witnesses thereto. Vest v. Michie, 31 Gratt. 149.

Recital in Deed under Which a Party Claims Puts Him on Notice.—A grantee assumed payment of ninety-two notes, for $85 each, and in the deed the grantor covenanted "that he had done no act to incumber said land, except the deed of trust above mentioned." No deed of trust was mentioned above, nor was there any on record, but it was held that this recital in the deed put all parties claiming through the grantee upon inquiry. Roanoke, etc., Co. v. Simmons, 2 Va. Dec. 70.

And though the deed creating the trust only conveys personal property, yet if this property is converted into land by the trustee, and this land is sold by the trustee to a *bona fide* purchaser for value, and the title papers show the fact that the land is the substitute of the trust fund, the purchaser will be held to have constructive notice of the trust. Heth v. Rich., etc., R. Co., 4 Gratt. 482.

But where a beneficiary in a deed of trust, not on record, remembers that there was such a deed, but cannot find it, it is insufficient as constructive notice to put one on enquiry as to such deed. Roanoke, etc., Co. v. Simmons, 2 Va. Dec. 70.

Purchaser with Notice Stands in Grantor's Shoes.—Where a decree, which was affirmed on appeal, held a sale of land by a trustee to be *ultra vires* and void, and *cestui que trust* entitled to restitution thereof, a subsequent grantee of the vendee thereof with notice of the trust, can take no more than his grantor had; and where the land was *pendente lite* condemned by a city and a railroad company and the damages paid over to such grantee, the damages remain the charge on the land until paid to the *cestui que trust*. Robinson v. Crenshaw, 84 Va. 348, 5 S. E. Rep. 222.

VI. NATURE OF GRANTOR'S INTEREST.

Liability to Levy.—A deed of trust being, in substance and effect, a mortgage, it necessarily follows that the grantor in such deed, though nominally divested of the legal title, yet retains an equitable interest corresponding to an equity of redemption under a mortgage. This interest is contingent and equitable, and in the absence of statute upon the subject, is almost universally held not liable to be seized and sold on execution, and this is the rule laid down in the earlier Virginia cases. Claytor v. Anthony, 6 Rand. 285; Coutts v. Walker, 2 Leigh 268; Haleys v. Williams, 1 Leigh 140; Buchanan v. Clark, 10 Gratt. 164; Michaux v. Brown, 10 Gratt. 612. But in Spence v. Repass, 94 Va. 716, 27 S. E. Rep. 583, it was held, that where there was a deed of trust on personal property, the equity of redemption in the grantor was not subject to the lien of an execution against him under § 3601, of the Va. Code (referring to property not capable of being levied on), but must be actually levied on under § 3587, before any lien accrues. In other words, that the equity of redemption constitutes property capable of being levied on.

Grantor May Sue after a Conveyance in Trust.—Where an action of *trover* was brought to recover certain property, it was held, that, the giving of a trust deed on the property sought to be recovered, which required the plaintiff to deliver the property to the trustee, did not take from the plaintiff the right to recover from a person not claiming under such deed. Haines v. Cochrans, 26 W. Va. 719.

Equity of Redemption Is Subject to Lien of Judgment.—The equity of redemption in lands conveyed by a deed of trust to secure debts, is subject to the lien of judgments subsequently obtained, in the order of their priority in date. Hale v. Horne, 21 Gratt. 112; Coutts v. Walker, 2 Leigh 268; Haleys v. Williams, 1 Leigh 140; Buchanan v. Clark, 10 Gratt. 164; Michaux v. Brown, 10 Gratt. 612. Thus where the owner of real estate has executed a valid deed of trust upon the same to secure the payment of a loan (which is evidenced by note or bond) contracted to be paid in installments, which have not yet matured, when a creditor obtains a judgment against the grantor in said trust deed, and proceeds to enforce his judgment lien in a court of equity, he can only subject the equity of redemption; and the court has no power to change the terms and conditions of the deed of trust as to the maturity of the loan thereby secured. Wise v. Taylor, 44 W. Va. 492, 29 S. E. Rep. 1003.

Grantor Entitled to Rents and Profits.—Unless otherwise stipulated the grantor in a deed of trust is entitled to the rents and profits of the property conveyed until the trust is foreclosed by a sale, or a decree is entered in the foreclosure suit sequestrating the rents and profits. Cox v. Horner, 43 W. Va. 786, 28 S. E. Rep. 780; Williamson v. Washington, etc., R. Co., 33 Gratt. 624; Gibert v. Washington, etc., R. Co., 33 Gratt. 645; Frayser v. Railroad Co., 81 Va. 388. See Walker v. Beauchler, 27 Gratt. 511. Thus in Frayser v. Railroad Co., 81 Va. 388, a railroad company was under a trust to pay certain debts. At the suit of trust creditors, a receiver was appointed and ordered, after executing the required bond, to take possession of and carry on the railroad. Between such appointment and the execution of said bond, a *fi. fa.* against the railroad company was placed in the hands of the sheriff; and there were funds in bank to the credit of the suit, representing the earnings of the road. It was held that the *fi. fa.* creditor was entitled to have those funds applied to satisfy his debt in preference to the trust creditors.

The Equity of Redemption Can Be Conveyed.—Where land which has been conveyed in trust to secure debts, is afterwards sold by the grantor in the deed of trust to a third party, such purchaser has a good title to the land subject to the trust; and when the trust is discharged, he is, by operation of the statute (Code, ch. 185, § 21), entitled to hold the land at law and in equity, though the trustee has not conveyed it to him. Hale v. Horne, 21 Gratt. 112.

Descends to Grantor's Heirs.—Where a grantor in a deed of trust to secure debts, which conveys real and personal estate, dies intestate before a sale of the trust subject, the *quasi* equity of redemption descends to his heirs, and the surplus proceeds of the real estate, after the trust is satisfied, is applicable ratably to the payment of the debts of the grantor by specialty binding the heirs. If he by will directs the sale of his real estate for payment of debts, such surplus proceeds are equitable assets to be distributed among all the creditors. In such a case the *quasi* equity of redemption in the personal estate embraced in the deed, is legal assets. Harvey v. Steptoe, 17 Gratt. 289.

When a Defence to Action of Ejectment.—By statute (Va. Code, § 2742), the equitable title of the grantor

in a deed of trust is a good defence to an action of ejectment where the whole sum the deed of trust was given to secure has been paid, and the owner is in possession and ejectment is brought by the trustee. Davis v. Teays, 8 Gratt. 283. See monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

When Subject to Dower.—As to when the grantor's widow is entitled to dower in the estate conveyed by deed of trust, or in the equity of redemption, see *ante*, "Priority of Lien." See also, monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

VII. TRANSFER OF DEBT.

Assignment of Debt Secured by Deed of Trust Carries Security.—Where a debt is secured by a deed of trust, the deed of trust is a mere incident of the debt, and a transfer or assignment of the debt carries with it the lien of the deed of trust, for the benefit of the assignee, unless excluded expressly or by fair and reasonable implication. Stimpson v. Bishop, 82 Va. 190; Tingle v. Fisher, 20 W. Va. 497; Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. Rep. 1090; Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 878; Schofield v. Cox, 8 Gratt. 533.

Assignees Take in the Order of Their Assignment.—Where several bonds, secured by a deed of trust, are assigned, it is a well-settled rule, that the assignees are entitled to the benefit of the deed of trust in the order of their successive assignments, unless there is an express stipulation to the contrary. McClintic v. Wise, 25 Gratt. 448; Gordon v. Fitzhugh, 27 Gratt. 835, and *foot-note*; Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. Rep. 1090. Thus in Gwathmeys v. Ragland, 1 Rand. 466, a debtor executed several notes to his creditor, and gave a deed of trust to secure their payment. The first note was duly paid, and the creditor assigned the second note to a third person, without assigning the deed of trust. The third note was then assigned to another person together with the deed of trust. It was held that the assignee of the second note was entitled to the first satisfaction out of the trust fund.

Suit to Subject Land by Assignee—Parties.—An assignor of a bond secured by a deed of trust upon land, the assignment being absolute, is not a necessary party in a suit by the assignee against the vendee of the obligor, to subject the land to satisfy the debt. Omohundro v. Henson, 26 Gratt. 511.

VIII. SUBROGATION.

Party Advancing Money to Pay Is Subrogated to Holder's Right.—A third person who advances money to pay off notes given for the purchase price of real estate secured by a first deed of trust thereon, and who stipulates that he is to have a first lien, and pays to the holder of the notes the full amount thereof, and takes them in uncancelled and holds them by consent of all parties for further protection, and to avoid all contingencies and complication, and also takes a deed of trust on the land to secure a loan, is entitled to be subrogated to the rights of the holder of the notes, and has priority over intervening judgment creditors of the grantor. Bankers' Loan, etc., Co. v. Hornish, 94 Va. 608, 27 S. E. Rep. 459.

And where a son, advances for his father a sum of money to enable him to purchase a tract of land which has been sold under a deed of trust to secure a debt for which the father was primarily liable, and takes a deed therefor in his own name, with full knowledge of the fact that a third party who had no notice or knowledge of the sale by the trustee owned an undivided one-half interest in the land, and that his father owned the other half and was primarily liable for the debt for which the land was sold, he will be deemed to be a mortgagee of the land to the extent of the amount so advanced, for which sum the half interest of his father is first liable; but the father will be deemed to be the sole purchaser for the purpose of redemption, and the original rights of the third party will be restored, subject, however, to the lien of the son for the amount advanced by him. Hall v. Caldwell, 97 Va. 311, 33 S. E. Rep. 596.

When Surety Is Entitled to Subrogation.—A surety, before payment of the debt, has a right to resort to equity against the creditor and the principal debtor, to compel the creditor to collect, and the principal debtor to pay, the debt, out of any fund the debtor has subject to the debt; and when the surety pays it, he has a right to be subrogated to all the rights and securities of the creditor. Kent v. Matthews, 12 Leigh 573; Strayer v. Long, 86 Va. 557, 10 S. E. Rep. 574; Bank of Virginia v. Boisseau, 12 Leigh 387. But a surety cannot be subrogated to the benefit of a deed of trust executed to secure the debt, until he pays the same, and then he is entitled only to such security as the creditor has. Strayer v. Long, 86 Va. 557, 10 S. E. Rep. 574. Thus, where a deed of trust is executed to indemnify a first indorser from loss, and the first indorser is exempted from liability by the failure of the bank to give him due notice of dishonor, neither the bank nor any subsequent indorser, has any claim to rank as creditor on the trust fund under the deed of trust, by subrogation to the first indorser, who was thereby indemnified, but who never sustained any loss. Bank of Virginia v. Boisseau, 12 Leigh 387.

When Lien Will Be Kept Alive by Equity.—A deed of trust for property jointly purchased will be continued for the benefit of one party, so far as he has made payments beyond his just proportion of the debt. Wheatley v. Calhoun, 12 Leigh 264.

And, generally, where a deed of trust creditor purchases the land conveyed in trust from the deed of trust debtor, and such debtor conveys the land to such purchaser, which deed is duly recorded, the deed of trust will be upheld at a subsisting lien, thereon, for the debt and interest thereby secured, for the protection of the deed of trust creditor, to the extent of such debt and interest, against an intervening title or intervening judgment creditors, unless injustice would be done thereby. In such case an extinguishment of the deed of trust lien and debt will not be presumed against the equities of the parties. McClaskey v. O'Brien, 16 W. Va. 791; Rorer v. Ferguson, 96 Va. 411, 31 S. E. Rep. 817.

Equity of Marshaling Worked Out by Subrogation.—The doctrine of marshaling is a familiar one in courts of equity; the rule being that if one party has a lien or interest in two funds for his debt, and another party has a lien or interest in only one of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claim of both parties; provided always that this course does not trench upon the rights or operate to the prejudice of the creditor with the lien on the double fund. In such cases the equity of the creditor having but one fund, is not against the double creditor, but only against the common debtor; that the acci-

dental resort of a paramount creditor to the double fund shall not enable the debtor to get back the second fund discharged of both debts. When, therefore, the paramount creditor is satisfied out of the doubly charged fund, the creditor has a right to be subrogated to all of his rights against the remaining fund. Russell v. Randolph, 26 Gratt. 718; Jones v. Phelan, 20 Gratt. 229; Vance v. Monroe, 4 Gratt. 53; Watkins v. Dupuy, 87 Va. 93, 12 S. E. Rep. 294; Gracey v. Myers, 15 W. Va. 203; Willard v. Worsham, 76 Va. 392.

IX. ENFORCEMENT BY SALE.

1. WHO MAY BRING SUIT TO ENFORCE.

Real Beneficiary.—A bill to enforce a deed of trust may be filed by the real beneficiary under the deed, though his name does not appear in the deed. Castleman v. Berry, 86 Va. 604, 10 S. E. Rep. 884.

Creditor Who Has Bought Debts Secured by Former Deed.—And the mere fact that a creditor has bought the debts secured by a former deed of trust, does not affect his right to enforce a deed of trust executed for his benefit. Curry v. Hill, 18 W. Va. 370.

Judgment Creditor.—But a judgment creditor cannot compel the enforcement of prior deeds of trust before the debts secured by the deeds have matured, as the judgment is a lien only on the equity of redemption and nothing more can be sold to satisfy it. Wytheville Ice, etc., Co. v. Frick, 96 Va. 141, 30 S. E. Rep. 491.

Vendor Who Has a Remedy against Insurance Company.—Where a vendor of property transfers to the vendee an insurance policy upon the property and takes a deed of trust on the property to secure the payment of the purchase money, upon the property being consumed by fire the vendor is not confined to his remedy against the insurance company, but he may file a bill to enforce the deed of trust by sale. Graeme v. Cullen, 23 Gratt. 266; Hunter v Johnston, 23 Gratt. 266

Where Trustees Refuse to Act.—If a trustee in a deed of trust refuses to act, any creditor secured may bring a suit to have the deed enforced, and a court of equity will administer the trust. Reynolds v. Bank of Virginia, 6 Gratt. 174. And if there are two trustees named in a deed and one of them refuses to act, the other may enforce the deed. Graeme v. Cullen, 23 Gratt. 266; Hunter v. Johnston, 23 Gratt. 266.

Specific Performance—Parties.—The *cestui que trust* may bring a suit in chancery for the specific execution of a contract, made by a third party with the trustee in a deed of trust, for a purchase of a tract of land conveyed by the deed of trust, and make the trustee and purchaser of the land and the grantor in the deed of trust defendants, though the more proper mode of instituting such suit would be for the trustee and *cestui que trust* to unite as plaintiffs. Fleming v. Holt, 12 W. Va. 143

Personal Property.—A judgment creditor without suing out an execution, filed a bill in chancery, to get satisfaction out of the real and personal property of the debtor; the whole being conveyed by a deed of trust, executed during the term in which the judgment was obtained, and which provided that the property might be sold by the trustees to answer the purposes of the trust. It was held, that the bill should be dismissed as to the personal property; without prejudice to the plaintiff's right, if any, to the residuary money resulting to the debtor, from the sale of that property, after satisfying the deed; but should direct the trustees to sell the lands, and out of the proceeds thereof, to satisfy the judgment in the first place, and afterwards to perform the trust reposed in them by the deed. Mutual Assurance Society v. Stanard, 4 Munf. 539.

2. WHEN SUIT TO ENFORCE MAY BE BROUGHT.

Generally.—A suit to enforce the deed of trust may be brought when the debt secured by it has become due and remains unpaid, unless the deed of trust provides otherwise. It is competent for the parties to fix the terms of the enforcement in the deed, and this is the usual practice, and when so fixed it will control. Kyger v. Sipe, 89 Va. 507, 16 S. E. Rep. 627.

Time of Enforcement as Controlled by Stipulations—Construction of Clause.—A deed of trust provided, that interest should be paid when due, and if there should be default in the payment of interest for more than six months, and *after demand*, the trustees should sell on the written request of the bondholders; and that in event of such default continued for more than six months, the principal should become due, provided a majority of the bondholders made a written demand. It was held, that all of these provisions were to be construed together, and that default could only be predicated upon refusal to pay on demand, and such default must continue more than six months before the right to enforce accrues, and a sale made before that time was void. Potomac Mfg. Co. v. Evans, 84 Va. 717, 6 S. E. Rep. 2.

Rents and Profits Do Not Affect the Right to Bring Suit to Enforce.—In a suit to enforce a deed of trust the value of the rents and profits of the land are immaterial, as the deed is not a judgment within the meaning of Va. Code, § 3571, which provides "that if it appears to the court that the rents and profits of the real estate subject to such lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to be sold and the proceeds applied to the discharge of the judgment." Kyger v. Sipe, 89 Va. 507, 16 S. E. Rep. 627.

And parol evidence is inadmissible in a suit to enforce a deed of trust, to prove that the bonds and deed of trust were not to be paid and executed according to their terms, but were only to be paid out of the profits of the property for the price of which they were given. Sangston v. Gordon, 23 Gratt. 755.

Remedy Suspended during War.—Where a debtor, whose debt is secured by a deed of trust, occupies the position of an alien enemy towards his creditor, the right to enforce the debt and the security are suspended during the continuance of the war, and an attempt to enforce it is merely nugatory. Walker v. Beauchler, 27 Gratt. 511.

Within What Time Suit Must Be Brought.—As to the time within which a suit must be brought to enforce a deed of trust, see *post*, "Limitations to Right to Enforce."

3. STEPS PRELIMINARY TO SALE.

a. ADVERTISEMENT AND NOTICE.

What Amounts to Reasonable Notice.—Where a court of equity takes charge of the execution of a trust, it should prescribe reasonable notice for the sale of the trust property. No general rule can be laid down as to what will constitute reasonable notice, but ordinarily, advertisement in accordance with the prevailing custom adopted by prudent men in the management of their own affairs or the rule of the courts in relation to judicial sales in the jurisdiction in which the property is situated would be deemed reasonable. Wilson v. Wall, 99 Va. 353, 38 S.

E. Rep. 181, *disapproving* Morriss v. Va. State Ins. Co., 90 Va. 370, 18 S. E. Rep. 843. See monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

When Failure to Give Notice No Ground for Injunction.—But where a party obtains an injunction to a sale which is advertised under a deed of trust, and one of the grounds upon which the plaintiff relies on in his bill is that notice had not been served upon the grantor, such ground will not avail him unless it appears affirmatively that the grantor resides in the county. Walker v. Boggess, 41 W. Va. 588, 23 S. E. Rep. 550.

Matters Which Need Not Appear in Advertisement.—Where neither the deed nor the law requires that the advertisement of the sale should state that "so much of the property should be sold as is necessary to pay the debts secured" it is not necessary that the advertisement should so state, as it may be necessary to the debtor's interest to sell more property than would be necessary to pay the debt. Curry v. Hill, 18 W. Va. 370.

And the failure of a trustee in a deed of trust, who has voluntarily given a bond to faithfully perform his duty as trustee, to append to his notice of sale, a certificate of the clerk that such bond and security has been given is not sufficient ground to enjoin the sale. Sandusky v. Faris, (49 W. Va. 150), 38 S. E. Rep. 563.

Sale Made without Advertising as Required by Deed.—Where the deed requires that the trustee should advertise the property for a certain time before making a sale it is essential that this should be done; and a sale made by the trustee without complying with the deed as to advertising the property is a mere nullity and does pass the legal title. Heermans v. Montague, 2 Va. Dec. 6. But see *dictum contra* in Fulton v. Johnson, 24 W. Va. 95.

Construction of Statute Requiring Publication.—Under ch. 72, § 7, W. Va. Code, providing that "notice of a sale under a deed of trust shall be published in the newspapers once a week for four successive weeks, publication, four times once in each successive week, though the four weeks have not actually elapsed between the dates of the first and the last publication, is sufficient." Sandusky v. Faris, (49 W. Va. 150), 38 S. E. Rep. 563.

Same—What Amounts to Advertisement for "Five Days."—Where the deed provides that a sale be made after advertisement for "five days" in a newspaper, a Sunday between the first and last insertion is to be reckoned one of the five days prescribed. In computing the time of publication in such a case the day of the first insertion is to be excluded and that of the last is to be included. Bowles v. Brauer, 89 Va. 466, 16 S. E. Rep. 356.

Effect of Trustee's Advertising More Property Than Is Necessary.—Where the trustee advertised for sale the whole of the lands comprised in the deed, although the proceeds of one lot alone would have been sufficient to satisfy the claim, it was held that while he was only entitled to sell such portions as were necessary to satisfy the debt, he might properly advertise the whole, as it could not be known with certainty until the property was actually offered, how much it would be necessary to sell. Cleaver v. Matthews, 83 Va. 801, 3 S. E. Rep. 439; Moore v. Barksdale, 2 Va. Dec. 416.

Presumption of Due Advertisement—Virginia Rule.—It being essential to the validity of a sale under a deed of trust that the sale should be duly advertised, the Virginia rule is that where a sale is attacked upon the ground that it was not duly advertised the burden of proof is on the defendant to show due advertisement. Gibson v. Jones, 5 Leigh 370; Norman v. Hill, 2 P. & H. 676.

And where there was no proof that the sale had been advertised as required by the deed, and the deed of the trustee of the purchaser contained a recital that the sale was for cash, while the terms of the sale, specified in the deed of trust, were one-half cash and the other half on a credit of six months, the property having been sold for an inadequate price, a sale was set aside and a resale ordered. Norman v. Hill, 2 P. & H. 676.

Same—West Virginia Rule.—But the rule in West Virginia is that all steps are presumed to have been duly taken unless the contrary appears; therefore, the burden of proof of want of due advertisement, where a sale is attacked upon that ground, rests upon the plaintiff. Fulton v. Johnson, 24 W. Va. 95; Burke v. Adair, 23 W. Va. 139; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. Rep. 775.

When Suit to Set Aside for Failure to Advertise Must Be Brought.—Where a party wishes to have a sale under a deed of trust set aside and declared void because of irregularity in or failure to give due notice of sale, he must proceed without unreasonable delay. Fowler v. Lewis, 36 W. Va. 112, 14 S. E. Rep. 447; Fontaine v. Fitzhugh, 36 W. Va. 112, 14 S. E. Rep. 447.

Witnesses to Prove Due Advertisement.—The trustee in a deed of trust, conveying property to be sold for the payment of a debt, is equally the agent of the debtor and creditor, and a competent witness, in an action of ejectment against the debtor, in behalf of a purchaser from himself, to whom he has made a deed with a warranty against himself and heirs only, to prove that the sale of the property was advertised according to the terms of the deed of trust. Ross v. Norvell, 3 Munf. 170.

b. ACCOUNT OF LIENS.

The General Rule.—It is error to decree a sale of land under a deed of trust before the priorities of the parties have been adjusted, and until it has been ascertained what portion of the debtor's land is included within the deed of trust. Washington, etc., R. Co. v. Alexandria, etc., R. Co., 19 Gratt. 592; Jones v. Phelan, 20 Gratt. 229; Hogan v. Duke, 20 Gratt. 244; Rossett v. Fisher, 11 Gratt. 492; Kendrick v. Whitney, 28 Gratt. 646; Schultz v. Hansbrough, 33 Gratt. 567, and *note*; Alexander v. Howe, 85 Va. 198, 7 S. E. Rep. 248; Daingerfield v. Smith, 83 Va. 81, 1 S. E. Rep. 599; Barton's Ch. Pr. (2d Ed.) 189, 859, 1155, 1156; Marling v. Robrecht, 13 W. Va. 462; Moran v. Brent, 25 Gratt. 104; Simmons v. Lyles, 27 Gratt. 922; Wiley v. Mahood, 10 W. Va. 206; Cralle v. Meem, 8 Gratt. 530; Buchanan v. Clark, 10 Gratt. 165; Livesay v. Jarrett, 3 W. Va. 283; Murdock v. Welles, 9 W. Va. 552; Fidelity Loan, etc., Co. v. Dennis, 93 Va. 504, 25 S. E. Rep. 546; Hutton v. Lockridge, 22 W. Va. 160; Horton v. Bond, 28 Gratt. 815, and *note*; Effinger v. Kenney, 79 Va. 551; Adkins v. Edwards, 83 Va. 300, 2 S. E. Rep. 435; Anderson v. Nagle, 12 W. Va. 113; McClaskey v. O'Brien, 16 W. Va. 793; Scott v. Ludington, 14 W. Va. 387; Hill v. Morehead, 20 W. Va. 429; Trimble v. Herold, 20 W. Va. 602; Rohrer v. Travers, 11 W. Va. 147; Cole v. McRae, 6 Rand. 644; Payne v. Webb, 23 W. Va. 558; Hoge v. Junkin, 79 Va. 220; Iaege v. Bossieux, 15 Gratt. 84; Smith v. Flint, 6 Gratt. 40; Strayer v. Long, 83 Va. 715, 3 S. E. Rep. 372; Houck v. Dunham, 92 Va. 211, 23 S. E. Rep. 238; New v. Bass, 92 Va. 383, 23 S. E. Rep. 747; Laidley v. Hinchman, 3 W. Va. 423; Pecks v. Chambers, 8

W. Va. 210; Bristol Iron, etc., Co. v. Cladwell, 95 Va. 47, 27 S. E. Rep. 838, 3 Va. Law Reg. 460; Sims v. Tyrer, 96 Va. 14, 30 S. E. Rep. 443; 4 Va. Law Reg. 377; Beaty v. Veon, 18 W. Va. 291; Max Meadows Land & Imp. Co. v. McGavock, 96 Va. 131, 30 S. E. Rep. 460.

A trustee cannot file a bill against a particular judgment creditor to ascertain whether his debt has been paid in whole or in part; but he must file a bill in the nature of a creditor's bill to ascertain the liens upon the land, and the order of their priority. Ambler v. Leach, 15 W. Va. 677.

And in a suit to enforce a deed of trust given to secure the purchase price of a lot which is a parcel of a large tract of land, upon which tract there is a prior unmatured deed of trust for a large sum, the payment of which has been assumed by the vendor of the lot, it is not error to refuse a decree for the sale of the lot until the prior deed of trust has been satisfied, or until the amount realized from the sale of the lot can be applied towards the discharge of the prior deed of trust. Max Meadows Land & Improvement Co. v. McGavock, 96 Va. 131, 30 S. E. Rep. 460.

And where a trustee advertised land for sale, and after ascertaining that there were several liens on the land, sold it "free of liens," and reported that fact to the court, and asked that an account of liens be taken before the proceeds of the sale were disbursed, it was held, that the sale being a judicial one was premature and erroneous, in that it was ordered before the liens were ascertained by the court. Alexander v. Howe, 85 Va. 198, 7 S. E. Rep. 248.

Where Parties Have Contracted for a Sale without an Account.—But while this is the general rule, this rule has no application to a decree for the sale of lands made under a deed of trust or mortgage where the parties have contracted for a sale without an account of liens, and no question of priority of liens is raised by answer or otherwise. Artrip v. Rasnake, 96 Va. 277, 31 S. E. Rep. 4.

Where Trustee Is Agent of Grantor.—And the principle that the prior liens must be ascertained and the priorities of debts fixed before a sale can be made by a trustee, does not apply to cases where the trustee is an agent of the grantor, as well as trustee; for as the grantor could sell without having the liens ascertained he can authorize his agent to do the same. Preston v. Stuart, 29 Gratt. 289.

Either Party May Resort to Equity for an Account.—Where a debt secured by a deed of trust appears by the deed to be an uncertain amount, either party may resort to a court of chancery to have the amount ascertained by accounts taken under its direction, and all accounts affecting the amount of the debt ought to be directed; and the trustee cannot proceed to sell the trust subject until the debts are settled and ascertained. Wilkins v. Gordon, 11 Leigh 547.

And it is error to decree the sale of land for the payment of a debt, unless the creditor asking the sale, shall show that the land is legally chargeable in equity, for such payment; and even then, until the amount of the debt shall be ascertained. Thus, where lands were purchased with funds in which a married woman had a separate estate for life, with remainder to her children, the land was conveyed to the woman's husband without her knowledge, and he conveyed it in trust to secure creditors, who knew of the trust which was attached to the property, it was held that the creditors had no right to sell the land under the deed of trust. Smith v. Flint, 6 Gratt. 40.

Where land is subject to the liens of both deeds of trust and judgments, the debts of both trust and judgment creditors ought to be ascertained, and the property sold, if the rents and profits will not satisfy the liens in five years, and a reference, if it does not appear in the papers, ought to be had to determine this latter question. Laidley v. Hinchman, 3 W. Va. 423. For a full discussion, see monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

Contesting Validity of Liens before Commissioners.—And where a bill is filed by the grantor in a deed of trust, and one of the *cestui que trusts* therein, against the trustee, and the other *cestui que trusts* and others, and a reference is made by the court to ascertain and report the amount of the trust debts, due and unpaid to each of the trust creditors, each trust creditor, interested in the subject, and who is a party, should be allowed to appear before the commissioner and be permitted there, if he chooses, to contest the claim of any other creditors, interested in the trust subject, in whole or in part, and such creditor may except to the report of the commissioner, for error therein, in reporting the debt, of such other creditor, and have the ruling or judgment of the court upon such exception, and is entitled to appeal therefrom, where there is error in such ruling or judgment. Feamster v. Withrow, 9 W. Va. 296.

c. REMOVAL OF CLOUD FROM TITLE.

When Application Should Be Made in General.—A trustee is considered as the agent of both parties and bound to act impartially between them, and it is his duty to use every reasonable effort to sell the estate to the best advantage, and to apply to a court of equity where there is a cloud upon the title, or, where there is doubt or uncertainty as to the amount to be raised, or as to prior encumbrances on the trust subject, or where there is a conflict between the creditors, or in any case in which the aid of a court of equity is necessary to remove impediments in the way of a fair execution of his trust. Lane v. Tidball, Gilmer 130; Gay v. Hancock, 1 Rand. 72; Miller v. Argyle, 5 Leigh 460; Wilkins v. Gordon, 11 Leigh 547; Miller v. Trevilian, 2 Rob. 1; Bryan v. Stump, 8 Gratt. 241; Rossett v. Fisher, 11 Gratt. 492; White v. Mech. Building Fund Ass'n, 22 Gratt. 233; Shurtz v. Johnson, 28 Gratt. 657; 2 Min. Inst. 286; 1 Bart. Ch. Pr. 447; Burlew v. Quarrier, 16 W. Va. 108; Muller v. Stone, 84 Va. 837, 6 S. E. Rep. 223.

Thus where an omission of seals or scrolls to a deed raises a cloud upon the title to the land, the same should be rectified and removed by application to a court of equity before a sale is made under the deed. Bryan v. Stump, 8 Gratt. 241.

What Does Raise a Cloud on Title.—A deed of trust was executed to two trustees to secure debts therein described; and afterwards the grantor sold the land and conveyed it to another, who executed a deed of trust upon the land; and the *cestuis que trust* and one of the trustees by deed recorded acknowledged the payment of the debt secured by the first deed of trust, and released the lien. It was held, that the fact that the other trustee did not join in the release deed did not constitute such a cloud on the title as would make it necessary for the trustee in the second deed of trust to resort to a court of equity to have it removed before he could sell. Dryden v. Stephens, 19 W. Va. 1. See *post*, "Injunction to Sale."

4. WHAT PROPERTY MAY BE SOLD.

When There Is a Prior Lien on a Portion of the Land.—Where there is a judgment lien upon a tract of land, part of which is afterwards conveyed by a deed of trust to secure a debt, the land not included in the deed of trust should be first sold and applied to the payment of the judgment; and if insufficient to discharge it, then the lands included in the deeds of trust should be sold, and so much of the proceeds thereof as, with the proceeds of the land not conveyed, amount to a moiety of the proceeds of all the lands, should be applied if necessary to the satisfaction of the judgment. Buchanan v. Clark, 10 Gratt. 164.

What Portion of Subject Should Be Sold.—It is not necessary for the court, before directing the trustee to proceed to sell, first to refer to a commissioner to report how much and what part of the trust subject shall be sold. It is the duty of the trustee to determine that question; and if he finds difficulty in doing so, a reference to a commissioner may be made. It is the duty of a trustee not to sell more of a trust subject than is necessary to satisfy the trust, unless interest of the owner demand it, or he requests it, and whether the interest of the owner requires it, the trustee in the exercise of his discretion must determine. Michie v. Jeffries, 21 Gratt. 334; Curry v. Hill, 18 W. Va. 375; Cleaver v. Matthews, 83 Va. 805, 3 S. E. Rep. 439; Muller v. Stone, 84 Va. 839, 6 S. E. Rep. 223; Morriss v. Va., etc., Ins. Co., 90 Va. 376, 18 S. E. Rep. 843; Rohrer v. Travers, 11 W. Va. 155. See *foot-note* to Michie v. Jeffries, 21 Gratt. 334.

And it is well settled that, if the trustee fails in any such case to apply to a court of equity, the party injured by his default may do so. Miller v. Trevilian, 2 Rob. 1; Muller v. Stone, 84 Va. 834, 6 S. E. Rep. 223.

When Sale Should Be in Parcels.—A trustee is an agent of both parties, and it is his duty to sell the land as a whole, or in separate parcels, as would be conducive to its bringing the most money. If the land will bring a better price by dividing it, and selling it in separate lots, and the owner desires and requests it, and the trustee refuses, the owner may invoke the intervention and assistance of the court of equity, in a proper case, to control the trustee in the exercise of his discretion. Terry v. Fitzgerald, 32 Gratt. 843; Morriss v. Va. State Ins. Co., 90 Va. 370, 18 S. E. Rep. 843.

And where a trustee in a deed which does not prescribe terms other than those prescribed by Code 1887, § 2442, sells the trust property in accordance with the provisions of said section, such sale is valid, though he sells only half thereof; it being sufficient to satisfy the debts secured thereon, and the debtor not requiring the sale of more. Miller v. Mann, 88 Va. 212, 13 S. E. Rep. 337.

When Sale of Equity of Redemption Is Proper—Where the amount of the prior liens is certain and ascertained, the sale of the equity of redemption is proper. Curry v. Hill, 18 W. Va. 370. See *ante*, "Duties of Trustees," and *post*, "Conduct and Validity of Sale."

5. PLACE OF SALE.

Where Deed Fixes a Place.—Where the deed of trust names a place for the sale of the trust property the trustee has no discretion as to the place, but it must be made at the place fixed by the deed. Fry v. Old Dominion, etc., Ass'n, 48 W. Va. 61, 35 S. E. Rep. 842; Morriss v. Va. State Ins. Co., 90 Va. 370, 18 S. E. Rep. 843; Shurtz v. Johnson, 28 Gratt. 657.

Where Deed Does Not Fix a Place.—But where the deed contains no provisions as to the place of sale, the trustee may select one, and either party not satisfied with his decision may apply to a court of equity for instructions prior to the sale. Morriss v. Va. State Ins. Co., 90 Va. 370, 18 S. E. Rep. 843.

Thus where the property on the outskirts of the city of Richmond was to be sold, and the deed named no place of sale, and the trustee selected the city hall as the place of sale, to which the debtor objected, it was held that the debtor's wish should be respected. Morriss v. Va. State Ins. Co., 90 Va. 370, 18 S. E. Rep. 843.

6. TERMS OF SALE.

Law Which Governs the Terms of the Sale.—The law which is in force at the time of the execution of the deed of trust enters into and forms a part of the contract, and a subsequent law providing for a different method of sale from that provided for at the time of the execution of the deed does not apply to deeds of trust executed before its passage. Walker v. Boggess, 41 W. Va. 588, 23 S. E. Rep. 550; Taylor v. Stearns, 18 Gratt. 244. Thus where the law in force at the time of the execution of the deed of trust provided that the sale should be made for cash, and that law was repealed, and a law subsequently passed providing that sales under deeds of trust should be made for one-third cash, and the balance on the credit on one and two years, with interest, it was held that this law did not affect the right of the *cestui que trust* to have his sale made for cash. Walker v. Boggess, 41 W. Va. 588, 23 S. E. Rep. 550.

Sale Must Conform to Trust Deed.—The sale, as to all of its terms, must conform to the deed of trust in order to be valid; and if the deed provides for a sale for cash a sale made by the trustee on credit is invalid. Fox v. Cottage, etc., Ass'n, 81 Va. 677; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. Rep. 775; Fultz v. Davis, 26 Gratt. 903; Wytheville Ice, etc., Co. v. Frick, 96 Va. 141, 30 S. E. Rep. 491; Hogan v. Duke, 20 Gratt. 244; Graeme v. Cullen, 23 Gratt. 266; Hunter v. Johnston, 23 Gratt. 266; Patch v. Morrisett, 2 Va. Dec. 127; Wilson v. Wall, 99 Va. 353, 38 S. E. Rep. 181; Fidelity, etc., Co. v. Shenandoah, etc., Co., 32 W. Va. 244, 9 S. E. Rep. 180; Stimpson v. Bishop, 82 Va. 190; Pairo v. Bethell, 75 Va. 825.

Thus where a deed of trust provides that if, at the time of the sale of the property, any of the notes secured thereby shall not be due, the purchase money necessary to pay the same shall be made payable when such notes mature, the trustee cannot sell for cash to pay a note not due at the time of the sale. Patch v. Morrisett, 2 Va. Dec. 127.

Sale upon Terms Not Authorized by the Deed.—However where the trustee proceeds to sell the property upon terms other than those prescribed by the deed of trust, his deed is valid to pass the legal title to the purchaser. Taylor v. King, 6 Munf. 358; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. Rep. 232.

But this is not true of a sale made by a personal representative of a trustee, where the deed confers upon him the power to sell the property if the trustee dies without executing it. In such case the personal representative is clothed with a mere naked power and unless he complies with all the terms of the deed he cannot convey a legal title to the property; but the burden of proving failure to comply with the terms of the deed is on the purchaser. Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. Rep. 232.

When Terms of Deed Will Be Disregarded.—But where a deed of trust is executed, and at the time of

its execution there are a number of prior judgment liens on the land, and it is necessary to resort to a court of equity for the enforcement of the liens, the court will fix the terms of sale according to the rules of equity, without regard to the terms of sale fixed in the trust deed. Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. Rep. 1.

Sale in Accordance with the Statute.—Where a deed of trust prescribed no other terms than those provided for by the Va. Code 1887, § 2442, it was held that a sale of the trust property according to the provisions of said section was valid, though only half of the property was sold, it being sufficient to satisfy the debts secured thereon, and the debtor not requiring the sale of more. Miller v. Mann, 88 Va. 212, 13 S. E. Rep. 337. See also, Michie v. Jeffries, 21 Gratt. 334.

Decree for Sale Must Conform to Deed.—And so when a decree is made for the sale of real estate for the payment of a debt secured by a deed of trust, the decree must be for the sale of the property upon the terms of the deed; and a decree upon terms other than those named in the deed is erroneous. Fultz v. Davis, 26 Gratt. 908; Wytheville Ice, etc., Co. v. Frick, 96 Va. 141, 30 S. E. Rep. 491; Hogan v. Duke, 20 Gratt. 244; Fox v. Cottage, etc., Ass'n, 81 Va. 677; Patch v. Morrisett, 2 Va. Dec. 127; Wood v. Krebbs, 33 Gratt. 685.

But, where a deed of trust was in the form provided for by statute, it was held that a decree directing the trustee to proceed to sell under and by virtue of the deed, upon the notice and terms stated in the decree, in effect embodied in it the provisions of the deed of trust, except in so far as they were altered by the provisions of the decree, and the trustee was bound to sell accordingly. Michie v. Jeffries, 21 Gratt. 334.

Omission to Give Day to Redeem in Decree.—Where the decree ordering a sale under a trust deed omits to give a day to redeem, or to require bond of the trustee before sale, in case of an injunction by the debtor to restrain a sale by the trustee no other creditor being involved, this is not a reversible error. Watterson v. Miller, 42 W. Va. 108, 24 S. E. Rep. 578.

And though the time given in a decree of sale for the payment of a deed of trust was fixed in the decree at only fifteen days, it was held that the appellate court would nevertheless presume that the discretion of the lower court had been properly exercised, as no application appeared to have been made to that court for an extension of the time. Weinberg v. Rempe, 15 W. Va. 829.

Decree Protecting Wife's Dower Right Where Wife Joins in Deed.—Where a wife joins in a deed of trust and there are prior and subsequent liens on the land, the wife has no contingent right of dower except in the surplus after the trust lien is paid in full, and a decree ought to provide that the land should be sold clear of the wife's contingent right of dower, if it appear at the sale that it is necessary to pay the full amount of the trust lien, otherwise it should be sold subject to the dower. Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. Rep. 1.

Grantor's Right to Sale Unaffected by Injury to Property.—Where the grantors in a deed of trust injured the trust property by the removal of buildings situated thereon, it was held that they did not thereby forfeit their right to have the property sold upon a credit provided for in the deed of trust. Patch v. Morrisett, 2 Va. Dec. 127.

Personal Decree.—Where a suit is brought to enforce a deed of trust, the court may give a personal decree against those liable therefor, for any balance left unsatisfied by the sale of a trust subject. Whitlock v. Gordon, 1 Va. Dec. 238; Watkins v. Dupuy, 87 Va. 87, 12 S. E. Rep. 294.

7. CONDUCT AND VALIDITY OF SALE.

Trustee Must Be Present at Sale and Conduct it in Person.—A trustee in a deed of trust, where required to sell thereunder, must be personally present at the time and place of sale, and supervise the same, and cannot delegate his powers to a stranger, even with the consent of the grantor and the *cestui que trust*, unless authorized so to do by the deed of trust. Smith v. Lowther, 35 W. Va. 300, 13 S. E. Rep. 999; Morriss v. Va. State Ins. Co., 90 Va. 370, 18 S. E. Rep. 843; Harvey v. Steptoe, 17 Gratt. 289.

Sale by Substituted Trustee.—But a sale of land under a prior trust deed by a substituted trustee to whom the purchase money is paid by the purchaser, and who has received a conveyance from the former, is valid, and is unaffected by the decree in the suit to enforce a subsequent judgment lien, in which suit it is alleged that the deed of trust is fraudulent and void, where neither the trustee nor the purchaser is a party to the suit. Fisher v. Dickenson, 84 Va. 318, 4 S. E. Rep. 737.

Effect of Illness or Death of Debtor at Time of Sale.—The fact that the debtor was ill at the time of the sale and died very soon thereafter is no ground to set aside a sale made under a deed of trust, which is otherwise valid. And a court of equity will in no case set aside a sale simply because made subsequent to the death of the grantor. Bowles v. Brauer, 89 Va 466, 16 S. E. Rep. 356; Spencer v. Lee, 19 W. Va. 179.

Sale under Defective Deed.—Where a deed of trust is invalid because defectively acknowledged, a sale made by the trustee is a mere nullity, and the deed given to the purchaser in pursuance of the sale conveys no title. Schmertz v. Hammond, 47 W. Va. 524, 35 S. E. Rep. 945.

Trustee as Purchaser.—It is a well-settled principle of equity that a purchase of the trust property by the trustee is fraudulent, and no matter how pure the trustee's motive, or how fair the sale, it will be set aside when attacked. Smith v. Miller, 98 Va. 541, 37 S. E. Rep. 10; Harrison v. Manson, 95 Va. 593, 29 S. E. Rep. 420; Tennant v. Dunlop, 97 Va. 241, 33 S. E. Rep. 620; Carter v. Harris, 4 Rand. 199; Howery v. Helms, 20 Gratt. 1; Bailey v. Robinsons, 1 Gratt. 4; Buckles v. Lafferty, 2 Rob. 392; Washington, etc., R. Co. v. Alexandria, etc., R. Co., 19 Gratt. 592. See *ante*, "Duties of Trustees."

Purchase by Trustee for Creditors.—Where a trustee sells land and bids it in for the creditor, but no conveyance or memorandum in writing of the purchase is made, nor possession taken, but the possession remains in the former owner, under an agreement, as it is said, with the trustee, who is the agent of the grantor, that the said owner shall take it at the bid, the purchase is invalid, and the creditor will not be charged with the land at the price at which it was bid in. William & Mary College v. Powell, 12 Gratt. 372; Hope v. Salt Co., 25 W. Va. 789.

Sale by the Grantor after Making Deed of Trust.—A purchase by one of the trustees from the grantor in the deed of trust, and others supposed to be joint owners with him, of a part of the trust property, which the trustees had no authority to sell, was invalid, and the conveyance was held wholly nugatory. Mundy v. Vawter, 8 Gratt. 518.

Postponed Sale—Loss of Part of the Trust Property.—

Land and slaves were conveyed to trustees, in trust to secure a debt, the slaves to be sold first, and if the amount thus raised was not sufficient to discharge the debt, then, the land was to be sold. The sale was postponed by the trustees at the request of the debtor, and the slaves were emancipated as a result of the war. It was held, that as the debtor had requested the postponement of the sale, the loss of the slaves fell upon him, and the trustee could proceed at once to sell the land. Thurmond v. Woods, 27 Gratt. 727.

Undivided Interest—Inadequate Price.—In James v. Gibbs, 1 P. & H. 277, it was held, that it was improper for a trustee to sell under a deed of trust, for a very inadequate price, an undivided interest in real estate, on the day after a decree in a suit for partition had been rendered for a sale of the whole subject, by which the grantee's interest was precisely ascertained.

Sale Invalid—Liability of the Representatives of the Trustee.—A sale under a trust deed was declared invalid long after it was made, and the trustee's representatives were adjudged to pay into court the value of the land when sold, with interest. The debt was then paid from the trustee's estate; but the amount paid was less than the value of the land, with interest. It was held that the trustee's representatives must pay into court the difference for the benefit of the debtor's estate. Mosby v. Johnson, 86 Va. 429, 10 S. E. Rep. 425.

When Sale is Invalid.—Where a bill in equity, charging that the creditors secured by a deed of trust knew of a prior trust attaching to the property, is taken for confessed it is error to decree a sale of the land for payment of their debts. Smith v. Flint, 6 Gratt. 40.

And when a suit is brought by a judgment creditor to enforce his lien on land, and that of other lienors under § 7, ch. 139, Code, and the creditor and trustee under a deed of trust are formal parties, pending this suit, a sale cannot be made under the deed of trust. Parsons v. Snider, 42 W. Va. 517, 26 S. E. Rep. 285

Setting Aside Invalid Sale.—To set aside a sale for inadequacy of price, irregularity in or want of sufficient notice of sale, or because of incumbrances over the land at the time of sale, a party must proceed without unreasonable delay. Fowler v. Lewis, 36 W. Va. 112, 14 S. E. Rep. 447; Fontaine v. Fitzhugh, 36 W. Va. 112, 14 S. E. Rep. 447.

Where a sale was made under a deed of trust, and the grantee under the deed from the trustee, had sold the land to an innocent purchaser for value, it was held that the sale would not be set aside on the ground that the price for which it was sold was inadequate. Dryden v. Stephens, 19 W. Va. 1; Spencer v. Lee, 19 W. Va. 179.

Void Sale—Reconveyance and Resale.—A sale of land made by a trustee under a deed of trust did not comply with all of the provisions of the trust deed, so the purchaser reconveyed the land to the trustee, who proceeded to make a second sale in accordance with the deed of trust. The party who purchased the land at the first sale became the purchaser at the second sale. It was held that the second sale, complying with all the requirements of the deed of trust, was valid, whether the first was void or not. Fulton v. Johnson, 24 W. Va. 95.

Acquiescence by Person Other Than Trustee Works No Estoppel—One of three administrators of a creditor in the trust deed, being present when the sale was made under the deed of trust, and not objecting to the sale, even if his conduct was fraudulent, is no defence to an action at law brought by the creditors to recover the trust property, as the title to the property not being in the administrators, but in the trustees in the deed, the act of the administrator could not divest the title of the trustees. Nichols v. Campbell, 10 Gratt. 560.

8. INJUNCTION TO SALE.

a. WHEN INJUNCTION WILL LIE.

Usurious Deed of Trust—Where a deed of trust is given to secure a usurious contract, a court of equity will enjoin a sale under the deed of trust, at the instance of the debtor, until the amount of the usurious interest is ascertained and a proper deduction made from the debt therefor. Cabaness v. Matthews, 2 Gratt. 325; Watterson v. Miller, 42 W. Va. 108, 24 S. E. Rep. 578; Edmunds v. Bruce, 88 Va. 1007, 14 S. E. Rep. 840; Meem v. Dulaney, 88 Va. 674, 14 S. E. Rep. 363. For a full discussion, see monographic *note* on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

But in case of a pure bill of injunction to restrain a trustee from selling land under a deed of trust to secure a debt, on the ground of usury, where it appears that there is no usury in the debt, the injunction should be dissolved and the bill dismissed so that the creditor may enforce his right under the trust, no other creditors being interested in the case. Watterson v. Miller, 42 W. Va. 108, 24 S. E. Rep. 578.

Unsettled Condition of Title.—Where a vendee of land obtains an injunction to stay the sale thereof under a deed of trust securing a residue of unpaid purchase money thereon, and at the date of the deed therefor to the vendee the vendor's title to a portion of the land is defective, and the vendor after the injunction is granted procures a deed of release from a third party for such portion, an order granting the injunction is proper until the title is settled, but the procuring and having recorded a deed of release by the vendor is a sufficient settlement of the title to allow the vendor to proceed to collect the unpaid purchase money by a sale of the land, and an order dissolving the injunction after such release is right, but upon further proceedings in the court below the vendee ought to recover his costs there. Lovell v. Chilton, 2 W. Va. 410; Richardson v. Donehoo, 16 W. Va. 687; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. Rep. 775.

Where land is sold with general warranty, and a deed of trust given on the land itself, to secure the payment of the purchase money, if an adverse claim to the land is afterwards discovered, a court of equity will enjoin the sale, under the trust deed, until such adverse claim is regularly decided. Gay v. Hancock, 1 Rand. 72.

A court of equity should enjoin a sale by trustees, where the title to the property is disputed, and full value could not probably be had for it, even if that fact was known to all the parties to the deed when executed. Lane v. Tidball, Gilmer 130; Miller v. Argyle, 5 Leigh 460.

An injunction granted to a sale under a deed of trust because of doubt existing as to the amount due, may be dissolved and the bill dismissed where all doubt is cleared up; or the court may retain the cause, and have the sale made by the trustee under its directions. Michie v. Jeffries, 21 Gratt. 334.

Injunction to a Sale of Part of Property.—Equity will enjoin the sale of a portion of the property where such sale would render the residue of the property valueless, and the circumstances require

that the property should be sold as an entirety. Anchor Stove Works v. Gray, 9 W. Va. 469.

Court May Stay Proceedings in One of Two Suits and Cause Them to Be Consolidated.—A creditor having two distinct liens on two subjects, as a deed of trust and judgment for the same debt, but binding different properties, may proceed upon both at the same time, although he is entitled to but one satisfaction. Under some circumstances, however, as where several creditors' bills are filed to subject the same property, a court of equity may stay proceedings in one or more suits and require them to be heard with another having priority in time and right. Miller v. Byers, 99 Va. 163, 37 S. E. Rep. 782.

Agreement to Extend Time—Injunction to Sale.—Where an injunction is obtained upon a bill alleging a parol contract for the extension of time for the collection of a debt secured by a deed of trust, and the proof does not, in the opinion of the court, establish such a contract as would be specifically enforced by a court of equity, it will not be held, that the circuit court erred in refusing to direct an issue to be tried by a jury to ascertain whether such contract was in fact made. Craig v. McCulloch, 20 W. Va. 148.

b. WHEN INJUNCTION WILL NOT LIE.

When There Is a Complete Remedy at Law.—The trustee as *cestui que trust* cannot go into a court of equity to enjoin a sale of trust property where there is a complete and adequate remedy at law. Kuhn v. Mack, 4 W. Va. 186. See also, Bowyer v. Creigh, 3 Rand. 25; Sheppards v. Turpin, 3 Gratt. 373; Franks v. Cravens, 6 W. Va. 185.

And where, in a suit to restrain a sale under a deed of trust given to secure purchase money, the plaintiff claimed a credit for damages for cutting timber upon the land, it was held that the cutting was a mere trespass, the subject of an action at law, and that the fact that the vendor was insolvent was not sufficient to give equity jurisdiction of the case. Cleaver v. Matthews, 83 Va. 801, 3 S. E. Rep. 439.

Existence of a Small Lien No Ground to Enjoin Sale.—The existence of a lien for a small paving tax, is not such a cloud upon the title as to warrant an injunction to a sale under a deed of trust given to secure the purchase money of the land, as the trustee can be compelled to pay the tax out of the purchase money. Patch v. Morrisett, 2 Va. Dec. 127.

And a sale will not be enjoined because upon a part of the same contract, though not upon the same land conveyed by the deeds, a family burying ground was reserved by a previous grantee, there being sufficient land remaining in the seller (beneficiary in the trust deed) to afford ingress to the burying ground and egress therefrom without touching the land conveyed by a deed of trust. Patch v. Morrisett, 2 Va. Dec. 127.

Advertisement of Whole Property Where Only Part to Be Sold.—And a sale of property under a deed of trust will not be enjoined because the trustee has advertised to sell all the property, consisting of several lots, while the law authorizing the sale of only so much as is necessary to satisfy the debts secured, the presumption being that the making the sale the law will be followed. Moore v. Barksdale, 2 Va. Dec. 416.

Stipulation Hastening Payment No Ground for Injunction.—In Mayo v. Judah, 5 Munf. 495, it was held that a stipulation in a bond or deed of trust that upon the debtor's failing at any time to pay the annual interest the principal sum should be considered due, was in the nature of a penalty against which it was the province of a court of equity to relieve. And in such case, the payment or tender of the interest at any time before the sale under the deed of trust authorized a debtor to call upon a court of equity to prevent the sale. But this case is no longer law, and it is now held that the time of payment of the principal of a debt may be lawfully hastened for a failure to pay installments of interest as they mature. Nickels v. People's, etc., Ass'n, 93 Va. 380, 25 S. E. Rep. 8.

Scarcity of Money No Ground.—An injunction will not lie to prevent a sale on the ground that money is scarce, and that, in consequence of the large cash payment required, a sale at that time will result in great if not irreparable injury to the owner of the property. Nor will an injunction lie because the deed provides for a sale for cash and at the time of the sale a great financial depression exists. Muller v. Bayly, 21 Gratt. 521; Muller v. Stone, 84 Va. 834, 6 S. E. Rep. 223; Caperton v. Landcraft, 3 W. Va. 540; Morgan v. Otey, 21 Gratt. 619.

Failure to Give Grantor Notice of Sale No Ground to Enjoin.—A failure to give notice of the sale to the grantor is no ground for an injunction unless the grantor resides in the county. Walker v. Boggess, 41 W. Va. 588, 23 S. E. Rep. 550.

Personal Property.—Equity will not enjoin a sale under a deed of trust conveying personal property, but will leave the parties to their remedy at law. Poage v. Bell, 3 Rand. 586.

Collateral Claim No Ground for Injunction.—An injunction will not lie to prevent the sale by a trustee of a tract of land conveyed by a deed of trust, where the title to the land offered for sale and the debt for which it is about to be sold are both undisputed, merely because the debtor claims that he is entitled to a conveyance from the creditor of an adjoining parcel of land. To entitle him to an injunction, in such case, he must further allege that the land offered for sale will not bring a fair price unless sold in connection with the adjoining parcel, and also, that he is unable to pay the debt. Shonk v. Knight, 12 W. Va. 667; George v. Cooper, 15 W. Va. 666; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. Rep. 775.

Assignment for Benefit of Creditors.—Where the grantor conveys all of his property to a trustee for the benefit of his creditors with power to sell the same immediately, he will not be permitted to enjoin such sale merely because the amount of his debts, their priorities, and the persons to whom they are due and owing have not been ascertained, the amount to be raised by such sale is uncertain, and the legal title is outstanding in trustees in prior deeds of trust. Sandusky v. Faris, 49 W. Va. 150, 38 S. E. Rep. 563.

Injunction Does Not Lie to Sale Where Time Has Been Extended to One of Several Debtors.—In Legrand v. Rixey, 83 Va. 862, 3 S. E. Rep. 864, in order to prevent a sale under a deed of trust the husband of one of two obligors and his wife assigned their interest in a judgment to the obligee, agreeing that in consideration of an extension of time the husband should at stated times make payments; and if these were not made that there should be a sale under the deed of trust. Upon the failure of the husband to make these payments the trustee advertised a sale which was enjoined by the other obligor and the husband. It was held that the agreement did not release the other principal debtor, nor postpone

the liability of her interest to be sold under the deed of trust, and the injunction was dissolved.

Want of Consideration No Ground for Injunction after Assignment.—The obligee in a bond secured by a deed of trust, makes a deed transferring the bond and deed of trust for the benefit of his creditors. Afterwards, at the request of the obligor, the obligee signs a receipt stating that on the day of the date thereof he received the amount of the bond. The bond was in fact executed without consideration, and the receipt was in fact given without any payment. The creditors for whose benefit the bond was assigned had no notice of its being without consideration until after the assignment; but the obligor knew of the assignment when he took the receipt. In a suit between the obligor and those claiming under the assignment, an injunction awarded to restrain the sale of the property conveyed to secure the bond was dissolved, and the court of appeals affirmed the order of dissolution. Terrell v. Imboden, 10 Leigh 321.

Allegations of Injunction Bill in Conflict with Record.—When the allegations in a bill to enjoin a sale under a deed of trust are in conflict with the record in the case, the bill will be dismissed. Wilton v. Peerce, 5 W. Va. 437.

Inadequacy of Price No Ground for Injunction.—A court will not enjoin a conveyance by a trustee of lots sold by him under a deed of trust on the ground of inadequacy of the price bid and because the lots were offered together in bulk, where no fraud is shown, and it does not appear that the sale was not open and fair, and made in accordance with the trust deed, nor that any one else would have bid more had the lots been offered separately. Old Dominion Investment Co. v. Moomaw, 2 Va. Dec. 419.

c. PROCEDURE AND DISSOLUTION.

Parties.—Where a bill is brought by an administrator to enjoin a sale on the ground that the indebtedness was paid by the intestate in his lifetime, the heirs, being the owners of the real estate and directly interested in the result of the controversy, are necessary parties. Stewart v. Jackson, 8 W. Va. 29.

Power of Court Pending Injunction.—Where a trustee, enjoined from selling trust property, is afterwards made party to another chancery suit involving the same property, which causes are heard together and are referred to a commissioner to ascertain and report the value of the property, and the debts for which it is liable, and the interest of the persons claiming said property, it is not error to decree a sale of the perishable property, or to appoint receivers to preserve and rent out the trust property, nor is it error to dissolve the injunction, as the court has acquired jurisdiction over both trustee and trust property, and he was powerless to exercise his functions as trustee without an express order to proceed, and there was no such order in these causes. Maddux v. Triplett, 89 Va. 318, 15 S. E. Rep. 897.

Injunction No Bar to Action at Law by Trustees.—An injunction to inhibit the sale of property by trustees, is not a bar to their bringing an action at law to recover the trust property; and even if they are guilty of contempt, that is to be redressed by the court of chancery, acting upon the parties, and will not prevent the maintenance of the action at law. In such case the pendency of the injunction will not mitigate the damages which the plaintiffs are entitled to recover. Nichols v. Campbell, 10 Gratt. 560.

When Injunction Should Be Dissolved.—Where the allegations of the bill upon which an injunction is obtained, restraining a sale of real estate under a deed of trust, are fully denied by the defendant's answer, and are not supported by evidence upon the hearing, the injunction should be dissolved. Arbuckle v. McClanahan, 6 W. Va. 101. But where it is necessary to ascertain the amount due from the debtor and for which the sale should be made, it is regarded as premature to dissolve an injunction restraining a sale, although the grounds upon which it was granted are not maintained, and the injunction should be retained until such amount is ascertained. White v. Mechanics', etc., Assoc., 22 Gratt. 233.

Retention of Cause upon Dissolution of Injunction.—If a court of equity dissolves an injunction granted to restrain a trustee from selling property, it cannot retain the cause for the purpose of ordering a sale under its own supervision. Hyre v. Hoover, 3 W. Va. 11. See also, Richardson v. Donehoo, 16 W. Va. 687; Michie v. Jeffries, 21 Gratt. 334.

And where on a bill to enjoin a sale of land by the trustee, the answer denies all the grounds of equity stated in the bill, and there is no ground to sustain them, the court may dissolve the injunction and dismiss the bill; or it may dissolve the injunction and have the sale made, and the proceeds distributed under its direction. But if the trustee had been declared a bankrupt it is especially proper for the court to retain the cause, and have the trust administered under its directions, and to require the trustee to give security for the faithful performance of his duties. Hogan v. Duke, 20 Gratt. 244.

And where an injunction has been awarded to stay a sale until certain accounts have been settled, the court may proceed to full relief and render a personal decree for the balance due from the debtor, beyond the sum realized by the sale under the deed of trust. Beecher v. Lewis, 84 Va. 690, 6 S. E. Rep. 367.

Power of Court.—Where a debtor who has given a deed of trust, enjoined the sale of the property, and pending the suit the trustee dies, the chancellor, upon dismissing the bill, may direct the property to be sold by his marshal. Pate v. McClure, 4 Rand. 164.

9. DISPOSITION OF PROCEEDS OF SALE.—Where a deed of trust is made to secure the payment of a just debt, the property conveyed is first liable to pay the debt, and if any surplus remains after paying the debt, and executing the trust, that surplus is a fund to which the creditors of the grantor have a right to resort, but it cannot be reached by execution before a sale under the deed, because it is an equitable and contingent interest. Claytor v. Anthony, 6 Rand. 285.

In Iaege v. Bossieux, 15 Gratt. 83, it was held that where the wife of the grantor joined in a deed of trust to secure a building fund company, the property should be sold out and out and first applied to the payment of the debt due the company. But where she had a contingent dower interest in the equity of redemption, and was a party to the suit and therefore bound by a decree in the cause, the court should make a proper provision to compensate the interest out of the surplus proceeds of sale, if any, before any part of it was paid over to the assignee of the building contract.

If one co-parcener purchases the tract received by another in partition, and contemporaneously with the deed to him gives a deed of trust thereon and on his original tract received in such partition

to secure the purchase price, and also to secure other debts, upon a sale thereafter by the trustee where it appears that the tracts were offered separately and then as a whole, and the latter offer was accepted, the price obtained should be apportioned between the two tracts in the same proportion that the prices bore to each other when offered separately, and the value of the tract so purchased should be first applied to the payment of the purchase price thereof. It is error to divide the fund equally merely because the tracts are supposed to have been of equal value in the first instance. Crockett v. Woods, 97 Va. 391, 34 S. E. Rep. 96.

Creditor Seeking to Attach Does Not Forfeit Right under Deed.—Where a creditor, secured by a deed of trust with others, sues out a foreign attachment against his debtor, and seeks to subject the property conveyed in the deed to the payment of his debt, in preference to the other creditors, and fails in the attachment proceedings, this does not preclude him from his right to claim under the deed his ratable proportion of the trust fund. Clark v. Ward, 12 Gratt. 440.

Preferred Creditors—Construction.—A deed of trust was made to secure certain creditors, for some of whose debts sureties were bound. The deed directed trustees so to dispose of the trust property that no surety in the said debts should suffer or be injured on account thereof. It was held, under these provisions of the trust deed, that the debts for which sureties were bound were preferred debts, and to be first satisfied. Miller v. Holcombe, 9 Gratt. 665.

10. LIMITATION TO RIGHT TO ENFORCE.

Statute of Limitations Does Not Operate Directly but Only by Analogy.—The right to enforce the lien of a deed of trust against the trust property being an equitable and not a legal remedy, the statute of limitations has no direct operation on such right; but the general rule adopted by courts of equity as to the limit for the enforcement of such lien is by analogy to the right of entry at law, under the old statute of limitations—21 Jac. 1, ch. 15—that twenty years' possession by the grantor, after default of payment of the trust debt by the terms of the deed, without any acknowledgment or recognition of a subsisting lien, is a bar, unless the beneficiary is within some of the exceptions made for disabilities. Ross v. Norvell, 1 Wash. 14; Pitzer v. Burns, 7 W. Va. 63; Camden v. Alkire, 24 W. Va. 674.

In some of the states in which the limitation of the right of entry on lands has been fixed at a period longer or shorter than twenty years, courts of equity in those states, following the analogy of those statutes, have made the time within which the lien of a deed of trust or mortgage will be enforced the same. But in Virginia and West Virginia this rule is not followed, and the period of twenty years has been adhered to, notwithstanding the time fixed by our statutes for the entry on land has been made less than twenty years. Camden v. Alkire, 24 W. Va. 674; Pitzer v. Burns, 7 W. Va. 63; Ross v. Norvell, 1 Wash. 14; Paxton v. Rich, 85 Va. 378, 7 S. E. Rep. 531.

The Fact That Debt Is Barred Does Not Extinguish Lien.—The statute of limitations to a suit to enforce a debt bars the remedy but does not extinguish the debt; and, therefore, if the debt be secured by a deed of trust, though the action for its recovery be barred, the enforcement of the lien by deed of trust is not affected by any lapse of time short of a period sufficient to raise a presumption of payment. Criss v. Criss, 28 W. Va. 388; Pitzer v. Burns, 7 W. Va. 63; Smith v. Washington, etc., R. Co., 33 Gratt. 617; Paxton v. Rich, 85 Va. 378, 7 S. E. Rep. 531; Bowie v. Poor School Society of Westmoreland, 75 Va. 300; Tunstall v. Withers, 86 Va. 892, 11 S. E. Rep. 565; Hanna v. Wilson, 3 Gratt. 248; Coles v. Withers, 33 Gratt. 186; Gibson v. Green, 89 Va. 524, 16 S. E. Rep. 661.

The Fact That Lien Is Barred Does Not Extinguish Debt.—And in equity a deed of trust is always regarded merely as a security for the debt and the debt as the principal thing; therefore, so long as a recovery at law on the bond or note given for the debt is not barred by the statute of limitations, the right to enforce the lien of the trust continues and may be enforced. Camden v. Alkire, 24 W. Va. 674; Paxton v. Rich, 85 Va. 378, 7 S. E. Rep. 531.

A deed of trust to secure a debt is in legal effect a mortgage and is governed by the same legal principles as to the rights growing out of it in regard to the lapse of time as well as in many other respects. Camden v. Alkire, 24 W. Va. 674; Paxton v. Rich, 85 Va. 378, 7 S. E. Rep. 531.

When Presumption of Payment Arises.—Where a period of more than twenty years has elapsed since the executing of a deed of trust upon real estate, before a bill filed by a subsequent vendee deriving title from the party executing the trust, enjoining the collection of purchase money on the ground of defect in a title, it must be presumed that the debt secured by the trust deed has been paid, especially where it is not alleged in the bill that it is claimed to be unpaid, or that the creditor threatens to cause the land to be sold under the trust. Edwards v. Chilton, 4 W. Va. 352. See also, Opie v. Castleman, 32 Fed. Rep. 511, decided on the West Virginia statute. See also, Pickens v. Love, 44 W. Va. 725, 29 S. E. Rep. 1018; Paxton v. Rich, 85 Va. 378, 7 S. E. Rep. 531; Gibson v. Green, 89 Va. 524, 16 S. E. Rep. 661.

And where one buys land that is under a recorded deed of trust, given by the owner from whom the purchase is made, the possession of such purchaser is not adverse to the right of the grantee in such trust deed, and possession will not save the land from liability, and the statute of limitations will not run against the deed of trust debt, though it will be barred by the presumption of payment after twenty years, unless that presumption be repelled; but if repelled, so as to keep the trust alive as to the maker of the deed of trust, it will continue alive as to such purchaser. Pickens v. Love, 44 W. Va. 725, 29 S. E. Rep. 1018.

Presumption of Payment from Possession.—While the general rule is that the possession of notes and bonds and the deed of trust for the security thereof by the maker raises the presumption of payment, still it is equally well settled that this presumption may be rebutted. Therefore where the possession of notes and a deed of trust by the maker, was not inconsistent with the continued existence of the debt, it was held, that the presumption of payment, which arose from the possession by the maker, was satisfactorily rebutted. Mynes v. Mynes, 47 W. Va. 681, 35 S. E. Rep. 935.

Presumption of Payment Rebutted.—In Bell v. Wood, 94 Va. 677, 27 S. E. Rep. 504, it was held, that the common-law presumption as to payment of a deed of trust which arose on the lapse of twenty years, was repelled by a partial payment of the debt secured by the deed of trust within the twenty years.

A deed of trust to secure a debt was made and re-

corded in June, 1841. There had been repeated sales of the land since, by the grantor and those claiming under him, and the purchasers had had no actual notice of the deed of trust until 1876. It was held that the presumption of payment from the lapse of time was repelled by the circumstances proved in the cause. Bowie v. Poor School Society of Westmoreland, 75 Va. 300.

When Limitation Does Not Run.—A deed of trust given to secure a debt provided that the grantor should hold the possession of the property until a certain day. Before that day the grantor made an agreement under seal with a third person, by which he agreed to take a certain price for the property, and if the money with interest was not returned within twelve months, the agreement was to stand as a bill of sale; and he delivered possession of the property. The trustee who had no notice of this agreement, took possession of the property and sold it within five years from the time to which the grantor was entitled to hold it, and within five years of the time which the agreement gave the grantor to return the purchase money; but not within five years of the time of the sale and delivery of the property to the party under the agreement. The title of the purchaser of the grantor was held not to be protected by the lapse of time, and the trustee was entitled to take possession and sell under the deed of trust. Colvin v. Menefee, 11 Gratt. 87.

Right to Have Lien Barred Marked Satisfied.—Sec. 2498 of the Code of Virginia, providing a summary remedy for having deeds of trust marked satisfied of record when payment or satisfaction has been made of the debt secured, on proof that the debt has been paid or discharged, does not entitle persons to have such liens marked satisfied because liable to be defeated by presumption of payment, or because barred by the statute of limitations. Turnbull v. Mann, 94 Va. 182, 26 S. E. Rep. 510.

X. EXTINGUISHMENT.

Express Release Generally Necessary.—Where a debt is secured by a deed of trust no change in the time or mode of payment, or in the form of the evidence, will operate to discharge the deed of trust, but it is necessary that there should be an express release. Stimpson v. Bishop, 82 Va. 190.

Discharge of Debts Discharges Lien.—But if the owner of a tract of land executes a deed of trust, conveying his land to a trustee to secure certain debts, and afterwards a judgment is rendered against him, which is duly docketed, and he then makes a contract with a third party to advance for him the amount secured by the deed of trust, and to secure such advance, mortgages this land to the person advancing the money for him, and such mortgagee pays off the debts secured by the deed of trust, it would be a complete satisfaction of these debts both in law and equity; the deed of trust becomes wholly inoperative, and the mortgagee cannot be subrogated to the rights of the *cestui que trust* and have the deed of trust kept alive for his benefit, thus securing priority over the judgment debtor. Hoffman v. Ryan, 21 W. Va. 415.

Release a Question of Intention.—Whether or not a particular transaction amounts to a release of a lien on real estate is a question of intention on the part of the releasor. In a doubtful case such intention will not be implied; but, when it is clear that such was the intention, a court of equity will enforce the release, although no formal release has been executed. Stribling v. Splint Coal Co., 31 W. Va. 82, 5 S. E. Rep. 321.

Indorsement of a Credit on Bond Secured a Release of the Lien to That Extent.—A credit properly indorsed on a bond secured by a deed of trust, of an unconditional payment made by the trust debtor, and so entered at his instance, extinguishes the debt and lien to that extent; but it may be erased by the express agreement of a creditor, the debtor, and the party to whom the bond is then assigned; but the question whether the benefit of the deed of trust also passes thereby, the assignment being silent on this subject, is open to independent proof. Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 878.

Release Made to a Purchaser of Grantor Instead of to the Grantor Is Valid in Equity.—Where a trustee executes a power of attorney to a third person with authority to release the trust deed, and the latter does so by and in the name of a trustee, and the land is released, not to the grantor in the trust deed, but to a purchaser under him, the deed of trust will be treated as duly and regularly released. Bryan v. Stump, 8 Gratt. 241.

Release by Administrator.—And an administrator has full control of the personal estate, and may sell the choses in action if the exigencies of the estate require it, or he may exchange a bond due to the estate for the note of a third person, and release the lien on real estate by which such bond is secured, and if done without fraud the transaction will be binding upon the administrator and those whom he represents. Stribling v. Splint Coal Co., 31 W. Va. 82, 5 S. E. Rep. 321.

Release by a Beneficiary Who Has Assigned His Interest.—But a release of a deed of trust made by a beneficiary who has assigned his interest in the debt to a third person is inoperative, and a court of equity has jurisdiction of a suit brought to annul and set aside such release. Fleshman v. Hoylman, 27 W. Va. 728.

Extinguishment by Sale of Land for Taxes.—Where land sold for taxes has been conveyed to the purchaser, and his tax deed duly recorded, if before the land was so sold, it had been conveyed to a trustee to secure a debt the title vested in the trustee by the deed of trust is extinguished by the tax deed. Summers v. County of Kanawha, 26 W. Va. 159.

Extinguishment by Novation.—A slave conveyed by a deed of trust was sold, in the absence of the trustee, by the debtor with concurrence of the trust creditor, to another creditor not secured by the deed, for a consideration compounded of the balance remaining due upon the trust, other debts claimed by the trust creditor, and a debt due to the purchasing creditor. It was held, that by this arrangement the trust deed was discharged, and the title of the trustee, so far as concerned the personal property embraced in the deed was divested; for in the conveyance of chattels personal the law disregards mere formalities of instrument, and the payment of the debt secured completely extinguished the incumbrance. Tavenner v. Robinson, 2 Rob. 280.

Release of Property Primarily Liable—Effect.—Ordinarily, when the equities of the various owners of land subject to a deed of trust are unequal, so that their respective parcels are liable in the inverse order of alienation, if the deed of trust creditor, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases those parcels which are subsequently liable in the

order of their several liabilities, from an amount of the deed of trust debt equal to the value of the parcel released. Bridgewater Mills v. Strough, 98 Va. 721, 37 S. E. Rep. 290; Lynchburg, etc., Co. v. Fellers, 96 Va. 337, 31 S. E. Rep. 505.

Effect of Release by Purchaser Who Has Assumed Payment of Deed of Trust.—If the purchaser of real estate assumes the bonds of his vendor as a part of the purchase price, and secures the same by a deed of trust on such real estate for the protection of his vendor, the said bonds being already secured by a prior deed of trust on the same real estate, the release of the first deed of trust operates as a release of the second deed of trust also. Building Ass'n v. Blair, 98 Va. 490, 36 S. E. Rep. 513.

Dedication of a Street by the Grantor without Consent of the Cestui Que Trust—Release.—But it is not in the power of the grantor of land in a deed of trust to secure the payment of purchase money to dedicate the streets and alleys laid off by him on the land conveyed by him to the public use, so as to destroy or release the trust lien thereon without the concurrence of the *cestui que trust*. Walker v. Summers, 9 W. Va. 533.

Release—Refusal of Court of Equity to Enforce.—In Fitzhugh v. Fitzhugh, 11 Gratt. 210, money lent by a bachelor uncle to his nephew, to secure which a deed of trust upon slaves was executed, was held, under the circumstances of the case, to have been forgiven and released by the uncle to the nephew so that a court of equity refused to enforce the trust at the suit of the executors of the uncle.

Money Paid for a Release—Mistake of Law—Where a member of a building and loan association voluntarily pays more money than the building and loan association could require, in order to obtain a release of a deed of trust, he will not be allowed to recover his money back, where it appears that he paid it with full knowledge of the facts, and was mistaken only as to the law. Haigh v. United States Bldg., etc., Ass'n, 9 W. Va. 793.

Burden of Proving Release.—The purchaser of a part of a tract of land, who has full notice or knowledge of a deed of trust on the whole, must assume the burden of proving, if he asserts it, that the trust debt has been released in whole or in part. The burden is on him to show that the trust creditor, with notice of his equities, has done some act to his prejudice. Lynchburg, etc., Co. v. Fellers, 96 Va. 337, 31 S. E. Rep. 505.

Evidence to Show Extinguishment.—The declarations of a trustee to a third person that the debt secured has been paid, cannot be received as evidence against the *cestui que trust* as tending to prove the payment of a trust debt or for the purpose of estopping the *cestui que trust* from asserting his debt against the property conveyed by the deed of trust, where the property has not been sold under the deed of trust. Calwell v. Prindle, 19 W. Va. 604.

And evidence, that, when a trust deed was given by the son of a judgment debtor to the creditor, the parties knew that there had been a vendor's lien on the property, but that the debtor insisted that it had been extinguished, is admissible, but not conclusive, to determine whether the transfer was for security or was a novation. Deaton Grocery Co. v. Pepper, 98 Va. 587, 36 S. E. Rep. 988.

In an action of detinue for slaves, the plaintiff claimed as a trustee in a deed to secure debts, and the defendants claimed as a purchaser under a subsequent trust deed from the same grantor. The defendant offered a witness to prove that the debts secured by the plaintiff's deed had been paid by the sale of the slaves by the grantor in that deed to the beneficiaries therein, to which evidence the plaintiff objected, and to sustain his objection, introduced the record of a chancery cause between the grantor and the beneficiaries, in which it had been decided that the price of these slaves had been, by agreement between the parties, applied in part discharge of another debt. The defendant's evidence was held inadmissible as the decree upon the question was conclusive. Nichols v. Campbell, 10 Gratt. 560.

Lapse of Time Does Not Amount to Extinguishment.—The fact that the right to enforce a deed of trust is barred by the statute of limitations does not entitle the debtor to have it marked satisfied of record, as lapse of time does not extinguish the right but only bars the remedy. Turnbull v. Mann, 94 Va. 182, 26 S. E. Rep. 510.

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*BETWEEN 190

SARAH HOOE, who survived her husband Gerrard Hooe, and John Alexander and Elizabeth his wife, *plaintiffs*,

AND

MARY KELSICK, who survived her husband, Younger Kelsick, and Jonathan Beckwith, who survived his wife Rebecca, *defendents*,

BETWEEN

JONATHAN BECKWITH the surviving husband, and Jennings Beckwith and others the children, of Rebecca Beckwith, and Mary Kelsick, *plaintiffs*,

AND

SARAH HOOE, and John Alexander and Elizabeth his wife, *defendents*,

AND BETWEEN

JONATHAN BECKWITH, *plaintiff*.

AND

JOHN ALEXANDER and Elizabeth his wife, *defendents*.

March, 1793.

1. **Wills—Execution of Testator's Declared Intention Though Contrary to Codicil of Will.**—R. B., intended to divide the remainder of his estate nearly equally between his daughters; and made known that intention to them, and especially to such as were seeking alliances with his family. He made a will accordingly, and made it known to his son-in-law, Beckwith and his wife, to assure them of his said purpose. HELD, that this intention should be executed, notwithstanding codicils to his will more favourable to some of the daughters than the rest; and the altered relations of some of the parties. The other points decided were chiefly incident to this.

2. **Same—Fraud in Procurement.**—R. B. bequeathed slaves to his wife for her life, empowering her to dispose of them among his daughters or some of them. Her will was set aside for fraud in its procurement.

THE facts thought to deserve attention in these causes, which were heard together the 8 day of march, 1793, will appear in the following

OPINION AND DECREE, with the notes:

That Richard Barnes, (a) having made

(a) He was the father of M. Kelsick, R. Beckwith, S. Hooe, and E. Alexander; and by his testament 15

all the provision which he intended to make for his only son by a marriage contract, after thus forisfamiliating that son, intended to distribute the remainder of his estate among his daughters, in equal
191 or *nearly equal portions, the distribution to take effect perhaps partly before and partly after the death of himself and his wife; and that this intention was declared published, by him in such a manner that it must have been known, and designed by him to be known, to his children, and to those who frequented his house, and especially such as were wooing for alliances with his family; these facts appear to the court, not only naturaly presumable, but moreover indisputably proven by testimony of witnesses, (b) of whom several are unexceptionable.

And the court is of opinion that the declaration by Richard Barnes of his intention to make such a distribution, and the communication of his testament, (c) congruous with that intention to Jonathan Beckwith and his wife, purposely to satisfy them that he designed to fulfill it, as appeareth by the letters among the exhibits which passed between Jonathan Beckwith and Richard Barnes, in the month of january, 1758, and in consequence of which an attempt by Jonathan Beckwith and his wife to assert their right to what he and her representatives are now claiming at an earlier day when that assertion might have been less difficult, was possibly declined, the said Richard Barnes in equity was bound to bestow on his daughter Rebecca, the wife of Jonathan Beckwith, the land slaves, and other estate devised and bequeathed to her by the said testament, as effectualy as he could have been bound by a formal compact to do so;—and this notwithstanding (d) the said Jonathan Beckwith had justly incurred the displeasure of the said Richard Barnes; —because the ill behaviour of Jonathan Beckwith, if it could have deprived him of his own right, which however is not admitted, could not have deprived his wife of her right, his wife, who, if she offended her father by her marriage, the only instance wherein her conduct towards him is pretended to have been culpable, was cordialy forgiven by him for it, as is proven by infallible documents.

192 *The case of Mary Kelsick appeareth to the court to be distinguishable from the case of her sister Rebecca by no circumstance less favourable to the former; for the communication of his testament by Richard Barnes to Jonathan Beckwith and his wife, which possibly prevented a suit meditated in one case, is countervaled by the circumstance in the other case of Younger Kelsicks suit actually commenced, and discontinued probably in consideration of the matters mentioned in the section next following.

And the court is of opinion, that the acceptance by Gerrard Hooe and John Alexander of the slaves allotted to them for their wifes portions according to the testament of Richard Barnes; their acquiescence under that allotment for almost eight years, without disclosing in the mean time a purpose to assert their title to more by the codicils; (e) and the letters among the exhibits to Younger Kelsick from Gerrard Hooe dated on the 23 day of march, 1762, and the other the 12 day of february, 1767 by the former of which the author disavoweth his design or desire to establish the codicil, confessing his opinion to be that the establishment of it was impossible, and his wish to be that it had not been annexed to the will, and by the latter desireth to know when he should receive his wifes part of some cash from the estate of Richard Barnes; whence Younger Kelsick, who did not afterwards prosecute (f) a demand instituted for recovering his wifes marriage portion, and Jonathan Beckwith might conclude with reason that their clames by the will unrevoked would not be controverted: these topics supply arguments sufficient to prove that Gerrard Hooe and John Alexander were bound to abide by the testament and consequently that the codicils annexed to it, so far as they contravene the devises and bequests thereby to Mary Kelsick and Rebecca Beckwith, are void.

But the court is of opinion that the money mentioned in one of the codicils to have been advanced by the testator to

day of july, 1754, had devised lands to these daughters, and bequeathed twenty negro slaves to his wife Penelope Barnes during her life, empowering her to dispose of them among his daughters, or some of them, and bequeathed one slave to each daughter, and the residue to be divided among them all.—Note in edition of 1795.

(b) The fame of John Belfield one of the principal witnesses to prove the declarations of Richard Barnes could not be the least soiled by the foul aspersions with which the tongue of slander was long employed to blemish it.—Note in edition of 1795.

(c) John Alexander in his answer to one of the bills wherein he is a defendent seems confident that Jonathan Beckwith had seen the codicil of july, 1757, to the testament of Richard Barnes; but that he did not see it is thought to be much more probable.—Note in edition of 1795.

(d) Between Richard Barnes and Jonathan Beckwith the vicissitudes of harmony and discord, friendly intercourse and spiteful objurgation, which appear by some exhibits and the narratives of several witnesses, shew them to have been sudden and quick in quarrel, yet not implacable after quarrel. however, the behaviour of Jonathan Beckwith was far more reprehensible than that of his wifes father.—Note in edition of 1795.

(e) Richard Barnes made three codicils to his testament, dated,—the first the 10 day of july, 1757, another 10 day july, 1759, and the third 30 day of june, 1760. by them the alterations of the testament were favourable to the daughters Sarah and Elizabeth. the codicils upon a contestation by Thomas Barnes the heir, were adjudged void and set aside by Richmond county court, the 7 day of july, 1761; and this sentence, upon a proceeding, in nature of an appeal, was reversed and the codicils established by the general court, the day of 17 . —Note in edition of 1795.

(f) That a suit was commenced is admitted by all parties; but the precise object of it, none of the proceedings being among the exhibits, doth not appear: that it was however to recover either a marriage portion, or what was devised and bequeathed by the testament is not denied by any party.—Note in edition of 1795.

(g) This money is mentioned in the codicil of july, 1757, and said to be nearer four than three hundred pounds.—Note in edition of 1795.

193 Younger *Kelsick ought to be deemed a satisfaction (g) for the tract of about 400 acres of land devised by him to the said Mary Kelsick and said to have been taken up and patented by him lying near unto the poison old fields likewise devised to her.

And the writing (h) proved and admitted to be recorded as and for the testament of Penelope Barnes in the general court, in which court the validity of that act was not contested, because the fabricators of it, if this failed, had another not more beneficial to Younger Kelsick ready to supply the place of it; a writing which, upon a full investigation of its validity before the county court, to whom parties and witnesses were probably better known than they were to the other court, was rejected; a writing which instead of being the affectionate valediction of a tender parent to her nearest kinsfolk, on whom, taking her last leave of them, she would wish to bestow a blessing before she died, the phrases and sentiments of it evince to have been the machination of those who were contriving to sanctify gain, already made, and to appropriate to themselves and their families almost the whole of what the testatrix had power to give, and desiring to palliate the odium to which they would otherwise be obnoxious by inserting in the writing an apology for the pretermission of a daughter, which apology must have stung that daughters sensibility by upbraiding her husband; a writing inconsistent with the former declarations of the testatrix, and with a testament made by her when she was not unduly influenced; which circumstances render credible most of the facts narrated by the witnesses examined to prove the malversation of those who transacted the business; this writing appeareth to the court to have been iniquitously procured to be executed.

And the court is of opinion that neither the probate of the said writing, nor Younger Kelsicks confession of error in the sentence of Richmond county court rejecting it, ought to preclude the application of Mary Kelsick to a court of equity to set aside the said writing; and therefore the court doth annul the same for the fraud practised in obtaining it.

And upon the whole matter the court doth adjudge order and decree, that the said John Alexander and Elizabeth his wife do convey to the said Jonathan Beckwith for and during the term of his natural life, and after his death to the before named 194 children *of the said Rebecca, the land (i) recovered by the said John Alexander and Elizabeth his wife against the said Jonathan Beckwith, and deliver possession thereof to him, and pay to the said Jonathan Beckwith the profits of the said land since that recovery, and that the injunction (k) obtained by the said Jonathan Beckwith to stay execution of the said John Alexanders judgement for the mesne profits be perpetual; and that the said John Alexander do pay to the said Jonathan Beckwith as well the costs expended by him in defending the action of ejectment for recovering possession of the land, and the action of trespass for recovering the mesne profits, as the costs recovered against him by, and paid to, the said John Alexander in both these actions; that the said Jonathan Beckwith do release the 500l. legacy to him by one of the aforesaid codicils; that the said Mary Kelsick do release her right in and to the tract of about 400 acres of land said to lie near the poison old fields devised to her by the testament of her father; and that the division of the slaves among the daughters of Richard Barnes the testator made pursuant to the order of Richmond county court be confirmed; and that the court doth order and direct that all the other surviving slaves of which the said Richard Barnes and Penelope his widow died possessed respectively with the increase of the females be divided into four equal parts to be allotted one to Jonathan Beckwith the father and to each of the said Mary Kelsick, Sarah Hooe, and Elizabeth Alexander; that an account of the profits of the said slaves, so to be now divided, and of such of that stock as are dead, which have been received by all or any of the parties and by Gerrard Hooe in his life time, since the death of Penelope Barnes, be made up; that the said Jonathan Beckwith do make up an account (l) of his administration of Richard Barnes; and that the said John Alexander and Sarah Hooe do make up an account of such estate of the said Richard Barnes and Penelope Barnes, exclusive of the slaves first divided, as came to the hands of the said Gerrard Hooe and John Alexander and their wives. and the court doth appoint commissioners to make the said division of slaves and to examine, state, and settle the said accounts and report the same with any matters 195 thought *pertinent by themselves or required by the parties to be specialy stated, to the court, authorizing any or more of the commissioners to act and to procede in the absence of any party failing to attend them after notice of the time and place appointed for that purpose, and for information upon the subjects of reference to examine any of the parties in a solemn manner.

(h) This writing. upon a contestation, was rejected by the county court of Richmond. but that sentence was reversed and the writing established for the testament of Penelope Barnes by the general court. the 4 day of may, 1769.—Note in edition of 1795.

(i) This land by the testament was devised to Rebecca Beckwith, and by the codicil of 30 day of june, 1760, supposed to be devised to Elizabeth the wife of John Alexander.—Note in edition of 1796.

(k) John Alexander had recovered the mesne profits.—Note in edition of 1795.

(l) The administration of the estate of Richard Barnes had been first committed to his widow Penelope Barnes, and afterwards to Jonathan Beckwith in conjunction with her.—Note in edition of 1795.

BETWEEN

DANIEL LAWRENCE HYLTON, *plaintiff*,

AND

ADAM HUNTER and Abner Vernon executors of James Hunter, *defendents*.

Bonds—Purchase of*—Case at Bar.—Plaintiff purchased of Defendents several bonds due their testator. They agreed that in case any part of said bonds had been paid to certain attornies, said sums should be refunded to the said purchaser. In a bond given by the defendents for the due execution of the contract—the sum then due on said bonds is recited, and that "all which bonds together with the interest accruing thereon, still remained due and unpaid." The attorneys referred to had received £920. 14s. 11d.; but refused to pay the interest on it which was demanded. The amount due by the assigned bonds having been reported less than above recited, one of the defendants agreed to make a deduction therefor, and a referee stated said deduction erroneously. The plaintiff agreed to rectify mistakes. Judgments at law were obtained v. the plaintiff on his bonds given for the purchase money of the bonds sold him; and he made no claim for the deduction aforesaid; but afterwards obtained an injunction. The defendants in a suppletory answer retracted their agreement to made the deduction aforesaid. HELD, by the H. C. C.

1. **Same—Same—Same—Right of Purchaser to Reduction.**—That the purchaser was not entitled to any deduction; and that the sum due on the bonds was in fact greater than that stated in the agreement; and the defendants were credited by the excess. The Court of Appeals, however, allowed the deduction.

2. **Same—Same—Same—Right of Purchaser to Interest on Sum Received by Attorneys.**—That the purchaser is not entitled to interest on the sum received by the said attorneys; the interest stated to be due being only that on the bonds before any of them were paid. The agreement was to assign said bonds, "with the interest which had accrued thereon;" and the purchase money was to be paid so any months "after the date of the assignment."

3. **Same—Same—Same—When Interest on Purchaser's Bonds Began.**—The purchaser claimed the postponement of the time for charging interest on his bonds, because of a delay in executing the assignment; but held that the interest commenced when his bonds became due according to their terms.

4. **Same—Same—Same—Expenses of Second Powers and Assignment.**—The first effort at authenticating the assignment, &c., was ineffectual. Held that the expenses of the second powers and assignment, should be borne by the plaintiff,—the purchaser. The Court of Appeals divided them equally.

196 *5. **Same—Same—Same—Costs.**—The defendants being successful except as to one small claim, were allowed their costs in Equity. But denied them by the Court of Appeals.

*__Bonds—Sale—of—Legality.__—To the point that a sale of bonds is not unlawful, the principal case is cited in Gibson v. Fristoe, 1 Call 78. The principal case was distinguished in this same case at page 82.

On the subject of bonds, see generally, monograpic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

[The appeal does not appear to have been reported.—Ed.]—Note in edition of 1852.

JOHN DIXON (a) of Jamaica, 30 july, 1762, had executed 15 bonds for payment of money to James Hunter, at successive yearly payments, with interest at six per cent from the days of payment. and for securing principal and interest had executed a mortgage of an estate called Salem in Jamaica. The bonds and mortgage were deposited with Hibbert and Jackson residing in Jamaica attorneys of James Hunter. the principal and interest due by the 1, 2, 3, 4 and 5, bonds had been received by James Hunter. no part of the principal or interest due by the other 10 bonds was ever paid to the executors of James Hunter; but Hibbert and Jackson had received the whole of the principal money and interest due by the 6 bond, and part of the principal money and interest due by the 7 bond, which they retained, and on which R. Hibbert, their representative, refuseth to account for interest.

25 day of april, 1785, Adam Hunter the heir, residuary legatee, and one of the executors, of James Hunter, entered into the following agreement with Daniel L. Hylton:

'Memorandum of agreement with Daniel L. Hylton, esquire, the subscriber, executor to the will of James Hunter, deceased, bargaineth to assign over to the said Hylton all his right and title in nine bonds, granted by John Dixon, esquire, of the island of Jamaica, for the sums under mentioned, viz.

			Jamaica currency
1 bond, dated 30 july, 1762, payable		1 august, 1775, for	700
1 ditto	ditto	1 august, 1776,	700
1 ditto	ditto	1 august, 1777,	700
1 ditto	ditto	1 august, 1778,	700
1 ditto	ditto	1 august, 1779,	700
1 ditto	ditto	1 august, 1780,	700
1 ditto	ditto	1 august, 1781,	700
1 ditto	ditto	1 august, 1782,	700
1 ditto	ditto	1 august, 1783,	1747 1 3

also his right in a mortgage granted to James Hunter, by the said Dixon, on an estate, called Salem estate, in Hanover, formerly the propery of John Campbell, esquire, in said island, as collateral security for payment of said bonds. in consideration whereof, the said Hylton agrees to pay the said Hunter the sum of 5500 pounds, current money of Virginia, in gold and silver, at the rates now current, 197 to say, guineas, &c.; at *the following terms of payment, viz: 18331. 6s. 8d. six months after the date of assignment; 18331. 9s. 8d. fifteen months after date, and 18331. 6s. 8d. in twenty seven months after date; for which respective sums the said Hylton shall execute bonds with such security as the said Hunter shall approve. Adam Hunter. Daniel L. Hylton. Richmond 25 april, 1785. N. B. in case any part of the within mentioned bonds have been paid to messieurs Hib-

(a) In one of the exhibits called James Dickson.—Note in edition of 1795.

berts and Jackson, of Kingston, the attornies of the said James Hunter, the said sums to be refunded to the said Hylton. Adam Hunter. Daniel L. Hylton. witnesseth in presence of W. Foushee.'

27 day of april, 1785, Adam Hunter and Abner Vernon, the two executors of James Hunter, executed a bond, in the penalty of 20000 pounds, of current money of Virginia, payable to Daniel L. Hylton and to William Hylton, in Jamaica.

To this bond, after a recital, 'that John Dixon on the 30 day of july, 1762, had executed 14 several bonds to James Hunter, 9 of which still remain due and unpaid, and amounted, in the whole, to 14794l. 2s. 6d. Jamaica currency, to be discharged by payment of 7347l. 1s. 3d. at several days of payment, as would fully appear by reference to the bonds, and all which bonds, together with the interest accruing thereon, still remained due and unpaid;—that John Dixon had executed to James Hunter, as a further security for payment of the moneys due by the bonds, a mortgage for the estate of John Dixon, called Salem, in Hanover, in Jamaica, formerly the property of John Hodges Campbell;—and that it had been agreed between Adam Hunter and Abner Vernon, on the one part, and Daniel L. Hylton, and William Hylton, on the other part, that they Adam Hunter and Abner Vernon, would, by their attorney to be made by them for that purpose in Jamaica, for a valuable consideration, which they acknowledged themselves to have received, transfer and assign to Daniel L. Hylton, and William Hylton, as soon as their attorney should be required so to do, all the before mentioned obligations, with the interest which had accrued thereon, as also the mortgage aforementioned,' was annexed a condition, 'that if Adam Hunter and Abner Vernon should comply with the above mentioned agreement, then the bond should be void.'

21 day of june, 1785, Daniel L. Hylton executed a bond, in the penalty of 20000 pounds, of current money of Virginia, payable to Abner Hunter and Abner Vernon.

To this bond, after recital, 'that Adam Hunter had sold to Daniel L. Hylton a debt, which was due from John Dixon, of Jamaica, on account of John Camp-
198 bell, formerly of Spotsylvania, *in Virginia, and, to secure the payment of that debt, had executed, 30 day of july, 1762, 14 bonds, 5 of which had been paid to James Hunter, the other 9 amounting to 7317l. 11s. 2d. of Jamaica currency, and that Adam Hunter, with consent of his co-executor, had, for the consideration of 5500 pounds of current money of Virginia, to Adam Hunter paid by Daniel L. Hylton, made the sale to him;—and that, as there was a risque to run in collecting the money due by the 9 bonds, with the interest thereon, Daniel L. Hylton, had agreed to have no recourse against the estate of James Hunter, or against the persons or estates of his executors,' was annexed a condition, 'that, if Daniel L. Hylton should abide by that agreement, and should not resort to the estate of James Hunter, in case any part or the whole of the 9 bonds should not be collected, nor resort to Adam Hunter and Abner Vernon, in case of such failure, then the bond should be void.'

On the day when this latter bond was executed, the following written statement was signed by Adam Hunter and Abner Vernon:

Richmond, june 21, 1785.

'Statement of nine bonds from John Dixon, of the island of Jamaica, to James Hunter, esquire, deceased, sold messieurs William Hylton and Daniel L. Hylton, viz.

1775, august 1.	6 bond of this date	700 pounds	
1776 august 1	9 years and 8 months interest on ditto	406	1106
	7 bond of this date	700	
1777 august 1	8 years and 8 months interest on ditto	364	1064
	8 bond of this date	700	
1778 august 1	7 years and 8 months interest 6 per cent	322	1022
	9 bond of this date	700	
1779 august 1	6 years and 8 months interest	280	980
	10 bond of this date	700	
1780 august 1	5 years and 8 months interest	238	938
	11 bond of this date	700	
1781 august 1	4 years and 8 months interest	196	896
	12 bond this date	700	
1782 august 1	3 years and 8 months interest	154	854
	13 bond of this date	700	
1783 august 1	2 years and 8 months interest	112	812
	14 bond of this date	1717 11 2	
199	1 year and 8 months interest	171 15 0	1889 6
	Jamaica currency		9561 6 2

witnesses
JOHN M'KEAND. } ADAM HUNTER. } exec-
JAMES BUCHANAN.' } ABNER VERNON } utors.

1 day of august, 1785, Daniel L. Hylton, with Francis Eppes and John Tayloe Griffin, his sureties, executed three bonds, each in the penalty of 3666l. 13s. 4d. with conditions for payment of 1833l. 6s. 8d. of current money of Virginia—one the 16 day of february, 1786, another 16 day of november, 1786, and the third 16 day of november, 1787.

William Hylton, then in Jamaica, had demanded from the forenamed R. Hibbert interest for the money before mentioned to have been received by those whom he represented; to which demand he gave this written answer: 'Kingston, 19 november, 1785, i inclose you a sketch of the account, balance 920l. 14s. 11d. which as i have never made use of it, and have been constantly ready to pay it, i shall not allow one six pence interest on it, even if no legal representative appears for twenty years to come, so far from it, i think an allowance ought to be made to me, for the

risk i have run, in preserving them from five hurricanes, and for such a length of time. our state of bonds must be right, because it agrees with the bonds themselves, and mortgage. no. 7 has due upon it 5061. 14s. with interest from 26 july, 1777, and no. 8 to no. 14 are for 700 pounds each, and are intire, as is no. 15, which is for 11091. 17s. 7d.

copy of account.

The estate of James Dickson esquire to James Hunter of Virginia dr.

1777 july 26	to balance of bond no. 7 due this date	506	14	
	interest from this date to 1 april 1784	203	2	
august 1	to principal of bond no 8 due this day	700	0	
	interest from this date to one april 1784	280	0	
	cost of suit	4	16	5
1778 august 1	to principal of bond no. 9 due this day	700	0	
	interest from this date to 1 april 84	238	0	
	cost of suit	4	16	6
1779 august 1	to principal of bond no. 10 due this day	700	0	0
	interest from this date to april 84	196		
	costs of suit	5	14	
1780 august 1	to principal of bond no. 11 due this day	700		
	interest from this date to april 84	154		
	costs of suit	5	14	
1781 august 1	to principal of bond no 12 due this day	700		
	interest from this day to april 1784	112		
1782 august 1	principal due this day no. 13	700		
	interest from this day to april 1784	70		
1783 august 1	principal no. 14 due this day	700		
	interest from this day to april 1784	28		
1784 august 1	principal no. 15 due this day	1109	17	7
		(b) 7815	14	7'

200 *Adam Hunter, to whom the state of the account immediately preceding had been communicated on the 27 of february, 1787, consented to make a deduction for the supposed difference between the money due by the bonds, assigned to Daniel L. Hylton and William Hylton, and the money realy due from the obligor in those bonds, out of the money to be paid for them by the Hyltons; which difference was erroneously stated, by one to whom the parties referred the matter, to be 1055 pounds. current money of Virginia; and Adam Hunter accordingly indorsed credit for 5271. 10s. on the second bond, and the same on the third bond, given by the Hyltons.

Adam Hunter, having discovered the error, mentioned it in a letter to D. L. Hylton, who in answer thereto, by letter, dated 18 of september, 1788, assured Adam Hunter every mistake should be rectified. and the correction of this mistake was referred by the parties no less than three times, as if it had been a question of difficulty, first to Henry Banks and William Hay, then to Jerman Baker and John Marshall, and lastly to George Weir.

After this affair was adjusted, the executors agreed with D. L. Hylton not to commence suits against him, for some time, on pretense that the assignment of the bonds and mortgage, and the power to collect the money due thereby, were insufficient.

A few days before this time expired as to one of D. L. Hyltons bonds, in the county court of Henrico suits were commenced, upon all of them, against him, who suffered judgments to pass, without claiming the deduction for the 1055 pounds.

Afterwards, in the same court in chancery, he brought a bill for an injunction, which was granted. in answer to that bill, the executors of James Hunter admitted to be just the claim for a deduction, such as, at that time, they thought right. a motion was made to dissolve the injunction, which was nevertheless continued for the whole.

The cause being afterwards removed, by certiorari, into the high court of chancery, the defendents, by a suppletory answer, retracted their consent in the former answer, for reasons which will be stated in the following

OPINION AND DECREE:

'This cause came on the last term, and again this 25 day of may, in the year of our lord 1793, to be heard on the bill,
201 *answers, exhibits, examinations of witnesses, and report of the commissioner, persuant to the oder of the 28 day of may, in the year 1791, with exceptions to the report by the plaintiff, and was argued by counsil: on consideration whereof the court doth now deliver its opinion, under the articles controverted between the parties, as followeth:

ARTICLE I.

A deduction of 1055 pounds from the 5500 pounds, to pay which, at three installments, the plaintiff had given his bonds; for which, deduction he clameth a credit, alleging that the Jamaica debts assigned did not amount to so much money as the parties supposed at the time of the agreement; and excepteth to the commissioners report for disallowing the clame. the plaintiff in the references, among the exhibits, first to Henry Banks and William Hay, and afterwards to Jerman Baker and John Marshall, supposed the sum of the Jamaica debts, agreed to be assigned, to be 95611. 6s. 2d. and the deficiency to be 7791. 8s. 5d. and in the reference to George Weir, also among the exhibits, supposed the sum of debts, agreed to be assigned, to be the same, but the deficiency to be 8211. 6s. 8d.

Which ever it was, the deduction could not be 1055 pounds. if the former were the deficiency, 95611. 6s. 2d.: 55001. :: 7791. 8s. 5d.: 4481. 7s. if the later were the deficiency, 95611. 6s. 2d.: 55001. :: 8211. 6s. 8d : 4721. 9s. 2d., and the deficiency ought to have been 1833 pounds, to intitle the plaintiff to the 1055 pounds.

Yet he persisteth in the clame, and would justify it, in his remarks on the commissioners report by propounding the question, and giving to it the answer, following; 'if 5500 pounds is to produce 9596 pounds, what must 821 pounds produce? answer,

(b) here is a miscasting.—Note in edition of 1795.

'Jamaica currency 1055 pounds,' saith he; supposing the deficiency now to be 9596, instead of 95611. 6s. 2d.; on which is observed: first the four terms in the question and answer are not, as they ought to be, geometrical proportional; for the product of the extreme terms is not equal to the product of the mean terms. secondly, the fourth term, the deduction, is Jamaica currency; whereas the deduction claimed in Virginia currency. thirdly, the first term is Virginia currency, and the others are Jamaica currency; whereas the first ought to have been of the same denomination with the third. fourthly, if the question propounded by the plaintiff be resolved by the problem, by which questions of that kind are usually resolved, that is, by dividing the product of the second and third terms by the first term, and if the deficiency had been more than it was supposed
202 *to be, the assignors would have been bound to make good more than 9596. for example: if the deficiency had been 1000, instead of 821, the defendents must have made good 0340: for 5500: 9596:: 1000: 1744, and 9596—1000 † 1744=10340. if the deficiency had been 2000, instead of 821, the defendents must have made good 11085, instead of 9596: and so on; the money to be made good increasing as the sum of the debts assigned decreased.

But enough hath been said on the ratio, by which the deduction ought to be adjusted, and to have said any thing of it was unnecessary, if the opinion, the foundation of which shall now be explained, namely, that the plaintiff is not intitled to any deduction, be correct. every part of the agreement made the 25 day of April, 1785 which Adam Hunter had bound himself to perform, was effectually performed by him. first he assigned his right and title in John Dixon's nine bonds, and also in one other bond, which, although not enumerated in the list, which forms part of that agreement, was transferred by assignment of the mortgage, to Daniel Laurence Hylton; secondly, the sum of the principal moneys, which had been due by the ten bonds, exceed the 73471. 1s. 3d. which were supposed by the agreement to be due on the nine bonds; and thirdly, the money due upon the first of the nine bonds, that is number 6, and part of the money due upon the second of the nine bonds, that is number 7, which had been paid to Hibbert and Jackson, the attorneys of James Hunter, was refunded to D. L. Hylton, that is, was paid for his use, and by his authority, to his brother William Hylton.

But the representative of Hibbert and Jackson refuseth to account for interest of the money so received by them—for this interest the plaintiff clames the credit, which he would have deducted from the 5500 pounds, the principal money due by his own bonds.

He must be intitled to it if intitled to it at all, either by the agreement of 25 of april, 1785, or some other agreement posterior to it.

1. Not by the agreement of 25 of april, 1785,—by that Adam Hunter bargained to assign his right and title in certain bonds; if he had a right and title to interest upon the money which had been due by those bonds, or any of them, the plaintiff, by the assignment had the same right and title; and therefore might have recovered the interest from those who were accountable for it. if Adam Hunter had not a right and title to interest the money, which had been received by Hibbert and Jackson, the attorneys of James Hunter, the
203 plaintiff had no right *or title to the interest; because by the agreement it was not bargained to be assigned to him; but Adam Hunter was bound by the agreement only that, in case any part of the bonds had been paid to Hibbert and Jackson, the sums should be refunded to Daniel L. Hylton; not that they should be refunded with interest; so that by the agreement of 25 of april, 1785, the plaintiff is not intitled to the deduction clamed.

II. Is he intitled to it by any posterior agreement?

1. In the condition of the bond, executed by Hunters executors, 27 of april, 1785, obliging themselves to make the assignment, is contained a recital, that of John Dixons bonds to James Hunter, nine, amounting to 73471. 1s. 3d. with the interest accruing thereon still remained due and unpaid. these words, 'with the interest still remain due and unpaid,' are understood by the plaintiff to refer, as well to the interest on the bonds, of which one had been wholy, and the other partly, discharged by payments to Hibbert and Jackson, as to the interest on the other bonds. but this exposition is rejected, because it is inconsistent with the agreement, made two days before; an agreement which doth not appear to have been set aside by the parties, but, on the contrary, is supposed to be the agreement recited in the same condition; and to be the agreement in execution of which this bond was granted; and therefore to be still in force.

The inconsistency of the exposition is manifest; for the agreement supposed part of the bonds might have been paid to Hibbert and Jackson, because it had, in that event. provided that the sums which had been paid to Hibbert and Jackson, should be refunded to Daniel L. Hylton, not that more than the sums paid to Hibbert and Jackson should be accounted for to Daniel Laurence Hylton.

The words, 'all which bonds, together with the interest accruing thereon still remain due and unpaid,' in the recital, therefore, ought to refer to the agreement, and, congruously with it, to be understood thus: all which bonds, together with the interest accruing thereon, still remain due and unpaid, notwithstanding any act of the obligors; and if, by act of Hibbert and Jackson, any of the bonds had been paid, in that case, the sums paid to them should be refunded.

The plaintiff, in his remarks, saith 'in

case Hibbert had received the whole, and witheld or failed in any respect to pay it to the plaintiff, the defendents were obliged to make it good.' if by, 'the defendents were obliged to make it good,' be meaned the defendents must have refunded, or were obliged to make good, the whole which Hibbert had received, the proposition is
204 *admitted to be true; but the plaintiffs inference, that the defendents must not only have refunded what Hibbert had received, but have paid interest for it, is denied to be deducible from that proposition.

2. By a statement, 21 june, 1785, to which are the signatures of Adam Hunter and Abner Vernon, the nine bonds with interest are supposed to amount to 95611. 6s. 2d. to this statement, as well as to another paper hereafter to be mentioned, the plaintiff is believed to allude, where, among the questions, preliminary to his remarks upon the commissioners report, he propounded the following: 'have the defendents not convenanted and warranted to make a title to a certain interest, specifying a fixed sum to be due therein, at the time of agreement, with a condition annexed to refund whatever was short of this sum?' to which question the answers are: first, the statement containeth no express terms by which the defendents convenanted to do any thing, or warranted any thing; and seemeth designed, not to make a new agreement, as to the amount of the debts assigned, but only to give the plaintiff the best account, which the books of the defendents testator enabled them to give, of the bonds, the money due by which he or they had not received. and secondly, the warranty, which might be perhaps implied in the term, 'sold,' in the statement, if a formal agreement had not been made, ought not to be further obligatory on the defendents than the agreement on the 25 of april preceding, the extent of which hath been defined: because this very sale was contracted by that agreement; because the same agreement is mentioned in the condition of the plaintiffs bond to the defendents, of the same date with the statement, and appeareth thereby to have been considered by the parties as a pact not invalidated, nor altered; and because by the terms of the agreement recited in the condition of that bond, of the 21 of june, 1785, compared with the agreement of 25 of april, the defendents were liberated from obligation to make good any deficiency, refund any money, or allow any deduction, more than the money which Hibbert and Jackson had received, and that money, not with interest.

3. A paper, introduced by the plaintiffs counsil at the hearing last term, called an extract from the record of an assignment, enrolled in the secretarys office of Jamaica, seemed relied upon to prove, that 'the defendents had covenanted and warranted a title to a certain interest, specifying a fixed sum to be due on the bonds, at the time of assignment.' this paper is not authenticated, and therefore not allowed to be a proper exhibit; but, if it were a proper exhibit, it would not prove the money, actualy assigned, to be so much as the defendents admit it to be.
205 *4. The endorsements on the plaintiffs second and third bonds, by Adam Hunter, acknowledging the plaintiff to be a creditor on each bond for 5271. 10s. or one half of the deduction of 1055, clamed by the plaintiff, are relied upon as proofs of an agreement to allow that deduction. but that agreement ought not to bind the defendents; because, at that time, they did not know that ten bonds, instead of nine, by the assignment of the mortgage had been transferred to the plaintiff; and because, if consent, yielded under a misapprehension, were ordinarily binding, this case should be an exception to the rule, the plaintiff in his letter to Adam Hunter, dated the 18th day of september, 1788, having assured him, 'that every mistake should be rectified.' and

5. The defendents first answer is also relied upon by the plaintiff to prove the agreement to make a deduction for some deficiency. but the defendents ought not to be bound by their concession in that answer, for the reasons stated in the next preceding section; especially the defendents having retracted that concession in a supletory answer.

ARTICLE II.

The defendents clame a credit for 62l. 16s. 4d. of current money of jamaica, the money due by the ten bonds, whereof the plaintiff had the benefit, by so much exceeding the amount of the money, supposed to be due by the nine bonds, enumerated in the agreement of the 25 april, 1785. and if the foregoing opinion be correct, the defendents seem intitled undoubtedly to this credit, reduced to Virginia current money, by the ratio of that agreement, with interest.

ARTICLE III.

Exception by the plaintiff to the commencement of interest on his bonds, at periods too early, that is, at the times when, by the conditions of the bonds, the principal moneys were payable. the legal title to interest generally commenceth when the time, limited by the contract, for payment of the principal expireth. by the agreement of the 25 of april, 1785, the terms of payment were for one third of the 5500 pounds, six months, for another third, fifteen months, and for the remaining third, twenty seven months, after the date of assignment. the defendents, as appeareth by a recital in the condition of their bond to the plaintiff, executed two days after, had agreed that they would, by their attorney, to be made by them for that purpose in Jamaica, transfer and assign to the plaintiff and William Hylton the bonds and mortgage, so soon as their attorney should be required so to do. the day when the assignment was made doth

206 *not appear. but the plaintiff in his bill admitteth it to have been made before the 16 day of august, 1785; and probably the business was done the first day of that month, because, on this day, the plaintiff executed his three bonds, for payment of the consideration money by instalments, at about a fortnight more than the before limited terms of payment. to shew why interest should not be computed from those times, the plaintiffs objections urged before the commissioner, and contained in the remarks upon his report, may be resolved into two. the one, that the powers given by the defendents to their attorney in Jamaica were defective; and the first assignment ineffectual; to which, either of two several answers is thought satisfactory: first, the instruments, committing the powers, and evidencing the assignment, are not exhibited, and therefore the court cannot decide whether they were exceptionable, or not; and to shew them to have been exceptionable, otherwise than by his own word, was incumbent on the plaintiff. secondly, the plaintiff, having accepted the instruments, and having executed bonds for payment of the consideration money, by which the defendents legal title to interest became perfect; the defendents having done every thing required of them, towards perfecting the plaintiffs right to the money due in Jamaica; and the plaintiff not appearing to have sustained any, or but inconsiderable, damage by the pretended defect of powers, or insufficiency of the assignment; to suspend the defendents right to the whole interest of the Virginia money seems asked with no grace, in a court of equity, by the plaintiff, who during that whole time, hath been receiving interest, at six per centum, for all the Jamaica money to which he was intitled; —a court of equity, with whose principles such a rigour seemeth inconsistent, and which would rather amand the plaintiff to his remedy by action at common law. The other objection, urged by the plaintiff, to the commencement of interest is founded on the endorsements on the plaintiffs second and third bonds, and is thought to be utterly groundless from the terms of the endorsments themselves.

ARTICLE IV.

Expenses incurred by the plaintiff in authenticating the second powers and assignment, for which the plaintiff clameth a credit, and expenses incurred by the defendents in procuring the execution of those second powers and assignments, for which the defendents clame a credit: the rejection of the former and the admission of the later by the commissioner are approved: because the insufficiency of the
207 first powers and assignment doth *not appear, as hath been observed, and ought to have been made to appear, before the plaintiff can justly clame the one, or the defendents ought to be burthened with the other.

ARTICLE V.

Half the expenses incurred by the defendents, in negotiation of the plaintiffs bill on Shoolbred and Moody, with part of which half only the plaintiff, in his remarks on the commissioners report admiteth himself to be chargeable. the charge of half the expenses is allowed; because the report stateth the parties to have agreed to divide between them the expenses, that is, to divide the whole expenses equaly.

ARTICLE VI.

Costs of suit on the third bond, with which the plaintiff, excepting to the report, allegeth he ought not to be charged because the action was commenced a few days before the time, when it ought by the agreement, endorsed on the bond, to have been commenced. this exception it disallowed, because, if the commencement of the action were premature, the plaintiff might have pleaded it, and he waved it, by not pleading it, and because the money was confessedly due before the judgement was rendered.

Therefore the court, upon the whole matter, disallowing the plaintiffs exception to the report, and approving the same report corrected, and by the supplements thereto accommodated to the preceding opinion, doth adjudge order and decree that the injunction, to stay execution of the defendents judgements, be perpetual, as to the whole of the first judgement, and as to so much of the second judgement as excedes 9481. 0s. 3d. and the costs, with interest upon 9361. 8s. 2¾, from the 24 day of november, in the year 1791, and that the said injunction be dissolved, as to the said 9481. 0s. 3d. with costs, recovered by the second judgement, with interest upon the said 9361. 8s. 2¾ from the 21 day of november, in the year 1791, and also be dissolved, as to the third judgement, which was to be discharged by the payment of 18331. 6s. 8d. with interest thereon, from the 16 day of november, 1787, and the costs; and that the plaintiff, who appeareth to have complained against the defendents without just cause in every instance, except where they controverted the credit clamed by him for his order on James and Macomb, and who appeareth to have delayed the defendents unrighteously, do pay unto the defendents the costs expended by them in their defence, both in the county court, and in this court.'

208 *The court of appeals, before whom the cause was carried by the plaintiff, on the 31 day of october, 1794, delivered the following

OPINION AND DECREE.

'The court is of opinion that there is no error, in so much of the said decree, as disalloweth the clame of the appellant, to suspend the commencement of interest on his bonds, contrary to the terms of them, on account of the supposed delay in the transfer of the subject purchased, nor in the allowance to the appellee of half the expenses only in negotiating the bill on

Shoolbred and Moody, nor in awarding the appellant to pay all costs in the suits at law, nor in allowing the appellant a credit for his order on James and Macomb; but that the said decree is erroneous, so far as it disallows the clame of the appellant, for a deficiency, in the subject assigned, of what it was stated to be, at the time of the contract, and allowing the appellee for a supposed surplus in the transfer, beyond the said first state; on which subject this court is of opinion that there was a deficiency in the assignment of what it was stated to be of 14351. 11s. 7d. from which, deducting the sum of 9201. 14s. 11d. received of Hibbert by the appellant, which is all the appellant ought to be accountable for on that occasion, there remains a balance of 5141. 16s. 8d. for which, with interest from the 1 day of april, 1785, the appellant is entitled to a credit against his bonds, without recourse to any rule of proportion for increasing or diminishing the sum, so as to throw either gain or loss upon the appellant; that the said decree is also erroneous, in this, that the court disallowed the appellants expenses, in the execution of the second power, and allowed the appellee his expenses, on that occasion, since neither of the parties appearing to be more in fault than the other, in producing the defect in the first power, the expenses of both ought to be allowed, and being added together equaly borne by the parties; and also in this, that the appellant is decreed to pay the whole costs in equity, whereas being relieved partly in the said court of chancery and more extensively in this court, he ought to recover his costs in equity, as well in the said court of chancery, as in the county court; and that the account, stated by the commissioner, so far as it is inconsistent with this decree, ought to be set aside, and stand as to the residue. therefore it is decreed and ordered, that the said decree, so far as the same is above stated not to be erroneous be affirmed; that the residue thereof be reversed and annulled, and that the appellee, out of his testators estate, in his hands to be administered pay to the appellant his costs by 209 *him expended in the prosecution of his appeal aforesaid here. and it is ordered that the cause be remanded to the said court of chancery, for that court to have the account between the parties reformed, and a decree entered, according to the principles of this decree.'

REMARKS.

1. The principal question controverted by the parties was, whether James Hunters executors were bound, by their contract, to account with Daniel Laurence Hylton for the interest of that money, which Hibbert and Jackson had received, and for which they refused to pay interest whilst they retained it? which question was resolved into this other, in the language of the court of appeals, whether a deficiency was in the subject assigned by the executors to D. L. Hylton?

The judge of the high court of chancery, in a lengthy perhaps tedious discussion, which preceded his decree, endeavored to prove the executors not bound, or in other words, to prove no deficiency.

This is refuted by the court of appeals, after mature deliberation, in the following terms:

'The court is of opinion that the said decree is erroneous, so far as it disallows the clame of the appellant for a deficiency, in the subject assigned, of what it was stated to be, at the time of the contract * * on which subject, this court is of opinion, that there was a deficiency, in the assignment, of what it was stated to be, of one thousand &c.' that is, this court is of opinion the said decree is erroneous, in disallowing a clame, which this court is of opinion ought to have been allowed.

This specimen of refutation seemeth not less happy than compenduous. 1, it is oeconomical, for by it are saved the expenses of time and labour requisite, in a dialetic investigation, which is sometimes perplexed with stubborn difficulties. 2, it is a safe mode; for fallacy, if it exist in the refutation, cannot be detected. 3, it prevents unimportant discussion; for a detection of fallacy would be nugatory, the doom of judges in appeal being fate.

2. The allowance of a surplus to the executors is confessed to be erroneous, if the subject assigned, instead of being superabundant, were deficient.

3. The rule of proportion, at a recourse to which in the reversed decree, the reversing decree seems to glance, as if it had been impertinent, was not introduced, as is there supposed, for increasing or diminishing the sum so as to throw either gain or loss upon the appellant, which 210 would have been truly ridiculous, *but upon the supposition that the appellant was intitled to any allowance for a deficiency, to shew the arithmetic, by which he clamed for that deficiency so much as to 1055 pounds, to be false. and for that purpose a recourse to the rule of proportion was not impertinent.

4. In defence of that part of the decree, which disallowed the appellants expenses in execution of the second power, and allowed the appellee his expenses on that occasion, and which is condemned of error, the author of that decree propounds for examination these questions: 1, whether any proof hath been exhibited of defect in the first power? 2, whether every purchaser doth not prepare the acts by which the right to the thing purchased is transferred? 3, if the purchaser, who hath accepted a transfer, and bound himself to pay the purchase money, discovering a defect in the transfering act and desiring it to be supplied, ought not to pay the expenses incurred thereby?

5. In many cases, determined by the high court of chancery, the plaintiff, partly successfull, hath recovered only part of the costs, in some hath recovered no costs, and in some hath been condemned to pay all

the costs; and the present judge of that court will feel grievous distress, if he is to understand these words in the reversing decree: the appellant being relieved partly in the court of chancery he ought to recover his costs in equity, to be the canon, prescribed for his regulation in awarding costs in future, from which no circumstance can justify a deviation—however that the plaintiff is intitled to his costs in this case, as much as he is intitled to the extensive relief afforded to him by the court of appeals, the judge of the h. c. c. will admit without hesitation.

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*BETWEEN 211

CARTER PAGE executor of Archibald Cary, *plaintiff*,

AND

EDMUND PENDLETON and Peter Lyons, administrators of John Robinson, and other creditors of Archibald Cary, and Benjamin Wilson, *defendents*.

1. **British Creditor—Discharge of Debt**—A debt due to a British creditor was not discharged by payment in paper money into the loan office, under the Act of 1788, which enacted that such payments should have that effect.
2. **Confiscation—Debt Due Enemy.**—The right to money due to an enemy can not be confiscated.

IN this cause, upon the following question, whether payments by the plaintiffs testator, a citizen of this commonwealth, into the loan office, of paper money, in satisfaction of his debts to creditors, who were british subjects, discharged the debitor; a statute, by the legislature of the commonwealth, having enacted that such payments should have that effect? the court, on the 3 day of may, 1793, after premising (a) that a controversy between a british creditor or debitor, and his american debitor or creditor, discussed before a tribunal in the country of either party, should be decided by those principles, which ought to govern the decision, if the same controversy were discussed before a tribunal in the country where both parties were aliens, published an opinion in these terms:

212 *That, after, by the declaration of independence, the united states of America was dismembered from the british empire, the rights of war and peace between those two nations, which, by that event, became distinct politic bodies, were equaly vigorous with those rights between nations never dependent either on the other;—

That a war, of itself, doth not extinguish the rights, and, consequently doth not discharge the obligations, which existed before the commencement of it, between members of the different belligerent societies, although, during the continuance of the war, forensian assertions of the one, that is, the rights, and exactions of performance of the other, that is, the obligations, are not permitted in that country where the clamants are aliens;—

That the right to money due to an enemy cannot be confiscated; (b) because only things whereof manual occupation may be, to which class a right, being incorporeal, doth not belong, are confiscable; insomuch that perdition of the hostile proprietors right is not effected by his captivity, or even slaughter, but, in the latter event, his representative succeeds to it;—

That, by the act of general assembly, passed in the year one thousand seven hundred and seventy-seven, intituled an act for sequestering british property, and enabling those indebted to british subjects, to pay off such debts, and directing the proceeding in suits wherein such subjects are parties, the legislature of this commonwealth hath admitted, that the law and

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(a) A judge should not be susceptible of national antipathy, more than of malice towards individuals—whilst executing his office, he should be not more affected by patriotic considerations, than an insolated subject is affected by the electric fluid in the circumjacent mass, whilst their communication is interrupted. what is just in this hall is just in Westminster hall, and in every other prætorium upon earth. some judges in the westindian islands have been execrated, by citizens of the united american states, for several late sentences against the latter, in favour of british subjects, in certain maritime causes; justly execrated, if fame hath not misreported their conduct. none of those citizens, surely, can wish to see the tribunals of their own country so polluted; for which pollution the men who sit in them would, perhaps, deserve the punishment related by Herodotus to have been inflicted on the corrupt Sisamnes, for the allusion to whose story, among the devices on the seal of the Virginia high court of chancery, the present judge of that court acknowledgeth his obligation to the ingenius B. WEST. If one ask why is this premised? let him be informed that when, some months before this opinion was delivered, a similar case was argued in another court, a stranger, who heard the rhetoric copiously poured forth, on that occasion, in order to prove, that an american citizen might honestly as well as profitably withold money which he owed to a british subject, and who observed what conviction, caresses, addresses, admiration, adulation, adoration, followed, such a man might have suspected that one of the cardinal virtues, as they are called, either is not cultivated in America, or is not understood to be the same there as it is in all other civilized countries. to such a stranger this proemium would not appear improper.—Note in edition of 1795.

(b) If this seem contrary to what is called authority, as perhaps it may seem to some men, the publisher of the opinion will be against the authority, when, in a question depending, like the present, on the law of nature, the authority is against reason, which is affirmed to be the case here. in truth, acquirement by conquest is a relic of barbarism. capture and detention of an enemys goods is just only where members of one community, injured by those of another, had not been able to obtain reparation otherwise than by reprisal. and there the reparation ought to be commensurate to the injury. to accede that measure would be more rigorous in this than in ordinary instances; because they who are forced to make the reparation seldom or never happen to be those who had been perpetrators of the injury. peiracy is now generally denominated hostility to mankind, although it was esteemed, as Thucydides ralates, by those whom he calleth antients, both of greeks and barbarians, not approbrious but, honourable, and is so esteemed at this day no doubt by some people on the african coast of the mediteranian sea. but is privateering, which many of the present enlightened age seem to think justifiable, any thing but piracy licensed imperialy, and can such a license consecrate it? a commission authorizing reprisals would seem like a license for robbing Peter to pay Paul, if the members of a whole community, when, without their knowledge, some of their fellow-citizens or fellow-subjects act unjustly, be not involved in the guilt. a commission for privateering seems a license to rob Peter for enriching Paul.—Note in edition of 1795.

usages of nations required that the debts of british subjects should not be 213 *confiscated, before their sovereign should, by his example, have provoked and justified such a retaliation, on the part of this commonwealth;—and thereby (c) the legislature recognized the obligation of that law and of those usages;—that this recognition, to the efficacy whereof diplomatic ceremony or a pragmatic sanction was unnecessary, did sufficiently declare, and was equivalent to an explicit and solemn pact yielding, the consent of the legislature, and the consent of the people of this commonwealth too, if the legislature could bind them in that instance, to observe the praecepts of that law, and conform to those usages;—a people who, before their separation from the british empire were, and ever since have been, in the habits of such observance and conformity;—and a legislature who, by an act passed in 1779, constituting the court of admiralty, hath adopted into its statutory code the laws of nature and nations;—

That the legislature could not retract their consent to observe the precepts of the law, and conform to the usages of nations; for the act, by which the consent was testified, although it be in form of a statute, the existence of which generally begins, continues, and ends, with the will of its creator, was indeed a convention in which the legislature was but one party; and the king of great britain not having authorised the confiscation of debts, owing by his subjects to the citizens of this commonwealth, the legislature of the commonwealth could not confiscate debts owing to british subjects, without violating the public faith; that money, in the hand of a debitor, due to an enemy, cannot be confiscated, upon the principle, that it is the creditors property, for such money remaineth the property of the debitor, and doth not become the property of the creditor, before a payment of it to himself, or a payment to his representative acting by virtue of a prior authority, or a payment to an officious stranger ratified by posterior consent of the creditor; and

That the acts of general assembly, on the subject of confiscation, may be so expounded, without contravening the principles of sound criticism, (d) as not to purport that effect, and that by such an exposition the dignity of the commonwealth and honour of its legislature would be consulted.

That the right to money due, which is concomitant with the person of the creditor, cannot be extinguished by the legislature of the debitors country, if, at the time of the legislative act, by which the extinguishment was intended to be 214 wrought, the *creditor were not a citizen or a subject of that country, or, being a foreigner, were not a resident or had not a domicilium therein; (e) because such a creditor was not subject 215 to the *authority of that legislature, and consequently not bound by its acts. if the parliament of Great-britain should, by an act, declare the rights of creditors, of any other, or all other countries, to money due from british subjects, to be extinguished, all courts, perhaps those of Westminster hall not excepted, would adjure such legislative omnipotence, arrogated by the parliament. but that parliament hath not less power than any other legislature:—

Here is excepted the case, in which, by legislative authority, remedies are provided for condemning the credits and effects 216 of *an absentee to the payment of his own debts to his creditors; which the laws of nature and nations permit for preventing a failure of justice.

That it the creditors right to money due from his debitor, of another country cannot be extinguished by a legislative act of that country, the debitors obligation to pay the money cannot be absolved by a legislative act of the same country; because the legislature, which is at most only the representative of the debitor, and hath not more power than its constituent had, could not do that which the debitor could not have done; but the debitor could not by any act of its own, other than the payment to the creditor, or to some other empowered by him to receive the money, dissolve the obligation to pay it; and although, during

(c) The whole of what is stated in this and the next following paragraph is believed to be incontestible.—Note in edition of 1795.

(d) This is submitted to censure.—Note in edition of 1795.

(e) The position in the sixth article of our bill of rights, namely, that men are not bound by laws to which they have not, by themselves, or by representatives of their election, assented, is not true of unwritten or common law, that is, of the law of nature, called common law, because it is common to all mankind. the prohibition to kill or wound our fellow men, to defame them, to invade their property, the praecepts to deal faithfully, to make reparation for injury, and others, are perceived intuitively to harmonize with our innate notions of rectitude, so that every man, not under the temptations of revenge, lust or avarice solicited by opportunity, feels the obligation to obey those prohibitions and precepts, more forcibly than if the duties were capable of demonstration. these laws of nature are, as Antigone says to Creon, in Sophocles, v. 463.

——————unwritten laws divine,
Immutable, eternal, not like these
Of yesterday, but made e'er time began.
Franckiin.

They are laws which men, who did not ordain them, have not power to abrogate.

Neither is the position true of instituted laws, if it be literaly understood, that is, if it be applied to individuals, in the cases of those who were not in being at the institution of the law, nor even in cases of the greater number of those who were in being at that epocha.

Women, infants, and many others, deprived of suffrage, cannot, either by themselves or their representatives, be truly said to yield their assent to any law. they would not be permitted, if they should be willing, and even offer, with any ceremony whatever, to declare their assent; and yet they are bound by the law. the obligation of the law, therefore, did not derive its force from their consent. if the obligation of a statute, upon some who were confessedly bound by it, derived not its force from their consent explicitly declared, that such an obligation can derive force from their implied or tacit consent is denied.

Again, a man is confessedly bound by a statute, enacted when he was a foetus, or an embryo, or before he was either. but, according to this article of the bill of rights, understood literally, he is not

a war between the nations or creditor and debitor, the former cannot compel the later, by a judiciary sentence in his own country, to pay the money, such a sentence may be obtained during the war, in another country, if the debitor be found there;—

That, for reason before explaned, the legislature of any nation hath not power to substitute a different thing for the money which their people had before obliged themselves to pay to the people of another nation: if the british parliament should enact, that the money due from british subjects might be discharged by delivering malt, to the creditors, such an act would here, and perhaps, every where else, be adjudged void, as to all creditors, who were not british creditors.

That the legislature, by their act, passed in january, 1788, having declared that the commonwealth shall, in no event or contingency, be liable to any person or persons whatsoever, for any sum, on account of payments made by american debitors into the loan office, other than the value thereof when reduced by the scale of depretiation, that is, other than the true value of the paper money, when it was paid, could not believe, that to compel 217 *british creditors to allow more value, if compellable to allow any value, for payments, without their authority, against their consent, and never accepted, than those would allow for them, who pretended to authorize the payments, receive the money, and apply it to their uses, would be thought just, by any men, except the debitors, thus enriched by discharging debts, incurred for things of real value, with paper money, of little or no value (f) for any other purpose; and therefore the general assembly may be presumed to have intended, by their several acts on this subject, and those acts compared together may be so interpreted, as to intitle the debitor to retribution from those by whom he was encouraged to deposit his money in their funds; which seemeth to be the least exceptionable mode of adjusting this matter;—

That the provisional articles and definitive treaty of peace between the united states of America and the king of Great-britain, after the ratifications thereof, if they be valid, abrogated the acts of every state in the union, tending to obstruct the

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bound by the law because he did not consent to it.

If obligation of the statute be said to derive its force from assent subsequent to the institution, and one ask, at what age the assent can be yielded, and by what acts it may be indicated? to define either satisfactorily, in answering the question, will be difficult, perhaps, impossible.

That laws, of civil institution, derive their obligation from consent of those, who were members of the community, when the laws were instituted, must be admitted. but, if the obligation cease with the existence of those individual legislators, which must be the consequence of denying the obligation of the law upon individuals, who did not consent to it, the laws could not be perpetual, as many laws are said to be, nor catholic, as all laws ought to be. besides, many laws are enacted against the consent of great part of the community.

The vigor of instituted laws, if it survive the original legislators, must be continued, not by consent of succeeding generations, declared individualy, but by some other principle: and that is natural reason.

Without society, mankind, if they could exist and propagate, would be wretched: their native rights would be frequently violated; the enjoyment of acquired rights be precarious; nor could society be preserved without civil institutions and regulations. hence the obligation to observe and conform to those institutions and regulations, by the law of nature, devolves upon men, who could not consent to them.

This doctrine is not derogatory to rational civil liberty, which is to be free from all civil obligation, except such as laws, enacted by consent of the society, or representatives of their election, had created; and to be free from those obligations, when the same society, of representatives, shall signify their will to abrogate the laws, which did create the obligations.

But what is the same society? for no nation, at the end of an hour, consists of those individual men of whom it consisted at the begining of that period.

By national identity must be meaned a mystical union of members by successive generations, whereof one imperceptibly renovates the decay of another, a kind of immortality being one of the attributes of a nation, in like manner as (to compare small things with great) in place of soldiers who were removed, by any mean, from the macedonian lochos athanatos, and the roman legio immortalis, others were surrogated, so as to perpetuate them.

This identity is familiar to us in ordinary discourse. When the romans are said to have expelled the Tarquins, and to have conquered Perseus, by romans are understood the same nation, although between those two events more than three hundred years had passed.

National identy hath been represented by sensible images;—by a river; the Potowmac, for example, which is called the same river, although not a drop of the water, which covered its bed, when it was first distinguished by that appellation, had flowed or ebbed in its chanel for many by past ages:—by a tree; as in the episode of the iliad, Z. containing the dialogue between Diomede and Glaucus; by a ship, which is called the same ship, when, from decays and reparations, not one atom of the materials, with which it was launched, remains about it.

But no image, perhaps, can represent national identity so completely as a mans self. in the course of his life, such changes happen both in body and mind, that Pythagoras, at ninety years of age, seemed no more than to be the Pythagoras, of nine days, nine months, or nine years old, than he was Euphorbus, Collides, Hermotimes or Pyrrhus, each of whom he supposed himself, by the metempsychosis, successively to have been. and with no less propriety than Pythagoras may be called the same man, notwithstanding the changes which happened to him, may the nation, whose social compact hath not been dissolved, be called the same nation, for any period of time.

If those, who enacted the laws, and those, who, several ages afterwards, abolished them, can be called the same nation, the laws may be truly said to begin and end by the same authority. and men considered, not as individuals but, as a nation may be truly said not to be bound by any laws, of civil institution' except those to which they, that is the nation, had given their consent. in this sense, the position before said to be in our bill of rights is admitted to be true; and in the like sense only this proposition of chief justice Hobart, in the 256 page of his report, namely, an act of parliament hath every mans consent as well TO COME as present, can be free from anachronism.

Upon these principles, men are bound by statutes of the country, whereof they are members, although, considered as individuals, they did not, by themselves, or representatives of their election, consent to the statutes.

Aliens are bound by the laws of the country in which they reside in consideration of the protection enjoyed by the government.

But that laws of civil institution cannot bind the persons of men, who are not members of the society, nor resident within its territory, is believed to be an irrefragable truth.—Note in edition of 1795.

(f) These payments, if they must be called payments, into the loan office, were made, when the paper money had so depretiated that, according to the statutory scale, 70 pounds, in some instances, and 1000 pounds, in other instances, were worth no more than one pound.—Note in edition of 1795.

recovery of british debts from the citizens of those States: and that the treaty admitted to have been once valid, hath been rendered invalid by the failure of the british king to perform the articles thereof (g) this court hath no more power (h) to declare
218 *than it hath to declare the british king and the united states of America to be in a state of war; and

Finaly that, if this court be restrained from making decrees, by which british creditors in the time of peace may recover money due to them from the people of this commonwealth, the judge of this court, who hath sworn in obedience to legislative injunction, an oath, with which no human power can dispense, that he will do equal right to all manner of people, ought not to make decrees by which Virginia creditors may recover money due to them from the people of Great-Britain;—

And therefore the court, upon the principles before stated, being of opinion that the payments into the loan office, made by the plaintiffs testator, did not discharge his debts to his british creditors, directed the plaintiff in distributing the assets of his testator, not to distinguish british creditors, on account of their nation, from other creditors.

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*BETWEEN 219
PHILIP AYLETT, *plaintiff*,
AND
CALLOHILL MINNIS, William Dandridge Claiborne and Thomas Butler, of whom the first is surviving husband of Mary, widow and executrix, and the two others are executors, of William Aylett, hereafter designated by the appellation, grandson, and Alexander Moore and Elizabeth his wife, William Aylett, Mary Aylett, Anne Aylett, and Rebecca Aylett, of whom the four last named are with the plaintiff, children of the said William Aylett, the grandson, *defendents*.

May, 1793.

Wills—Construction—Devise of "All Lands in Certain County"—What Passes—Leasehold Lands.—*W. A.'s* will said: "I give to my son (the plaintiff) the plantation on which I at present live, and *all my lands in King William*, also my land in D. and in J. C., to him and his heirs:" and after other devisees of land, and declaring that his wife should hold and enjoy any part of the aforesaid lands, during widowhood, added, "all the residue of my estate, of what kind soever, I give and bequeath to my wife aforesaid, and my children, to be equally divided among them." At his death besides his fee simple lands in *K. W.*, he was entitled to lands there demised for 999 years, and had brought suit to recover possession of a part thereof withheld: his executors obtained it. HELD, by the chancellor, that by the above devise said leasehold lands also passed to the plaintiff. He states that it does not appear that the testator knew that said lands were only leasehold: but the contrary is more probable, so that he must have intended to embrace them. But his decision was based chiefly upon a denial of the authority and reasoning of the case of *Rose v. Bartlett*, Cro. Car. 1, 292, which he here reviews. But the Court of Appeals reversed his decree. 1 Wash. 300.

WILLIAM AYLETT, the grandson, was seised in fee simple of a lage tract of land in Kingwilliam county, of which part was his dwelling plantation, and other parts were occupied by tenents; was seised in fee simple of lands in James city, Warwick and Bedford, counties;—and was intitled to fourteen hundred acres, part of a tract of land, likewise in the county of Kingwilliam, which had been demised for 999 years, (a) of this term, if the lease were made, as it is supposed, for it is not among the exhibits, to have been made, since the settlement of this country by europeans, perhaps 900 years, or more, remained unexpired, at the time of his death. for recovering possession of part of the leasehold land, witheld by the husband of John Ayletts widow, or one claming under him, an action of trespass and ejectment had been commenced by William
220 Aylett, the grandson, *in the name of his lessee. he died before the trial. afterwards a case, made by agreement between his representatives and the other party in that action, instead of a special verdict, stating the facts, was argued, and a judgement given, affirming the title of the lessor of the plaintiff; in consequence of which his executors obtained the possession.

That William Aylett, the grandson, knew his title to the leasehold land to be a term for years only doth not appear. the contrary is more probable, because his grandfather William Aylett, who owned all the demised land, in his testament, calleth it, several times, 'land bought,' doth not once mention a lease, and, after devising the greater part of the tract to three of his sons, namely, Philip, John, and Benjamin,

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(g) Upon this point the argument urged on behalf of american debitors may be exhibited in this form: the british king, by his garrisons, retaineth certain posts within the territorial limits of the united american states dominion, and also hath not restored or paid the value of slaves which his troops plundered from some of our fellow-citizens, in which articles he hath been a league-breaker. the two nations, by these breaches, are in a state of war: every article in the treaty of peace being a condition, so that by non performance of any one the whole act is annulled. in that state of war every man woman and child of each nation is an enemy of every man woman and child of the other nation. property taken from an enemy is lawful prize—becomes by seizure the property of the captor. americans, paying the money due to british subjects, may take it from them, being enemies. if reprisal of money paid would deprive the creditor of his right, detention of the money unpaid ought to extinguish the creditors right; and the rather, because this saves to the debitor the trouble and danger of a conflict to recover the money paid, and to the creditor the mortification of a tantalism.—Note in edition of 1795.

(h) The question here discussed is depending, perhaps at this time, before the circuit court. what they may determine the judge of this court will not take the liberty to conjecture. if a solitary judge of a subordinate court in one state, should circumscribe the jurisdiction of the supreme american tribunal, he would seem to act as irrationaly, as if one with a radius, equal to the semidiameter of the orbit of a satelles, should attempt to describe the orbit of its primary planet.—Note in edition of 1795.

(a) This terrier is taken from the answer of the defendents.—Note in edition of 1795.

devised 1200 acres the remainder of it, to four daughters severaly, and to the heirs of their respective bodies, with remainders in default of such heirs, annexing slaves to every parcel, and, in two of those devises, declaring that the slaves so annexed should DESCEND pass and go, as part of the FREEHOLD. and John Aylett, in his testament, by which William Aylett, the grandson, claiming under his father, derived the title asserted by the judgement aforementioned, doth not appear to have supposed his title to be less than a fee simple.

William Aylett, the grandson, by his testament, in april, 1780, without taking any notice of a lease, devised in these words: 'i give to my son, Philip Aylett,' who is the plaintiff, 'the plantation on which i at present live, and ALL MY LANDS IN KING-WILLIAM, also my land in Drummonds neck, in James city county, to him and his heirs,' and after devising his lands in Warwick and Bedford to his son William Aylett, one of the defendents, and declaring his will to be, that his wife should hold and enjoy any part of the aforesaid lands, during her widowhood, to employ thereon certain slaves, to be alloted to her, added these words: 'all the residue of my estate of what kind soever, i give and bequeath to my wife aforesaid and my children, to be equally divided among them:' and died so seised and intitled.

The plaintiff, after he had, by some events not necessary to be now stated, become intitled to the estate devised to him, brought his bill in the high court of chancery, claming the leasehold land, to which his father had been intitled, and praying a decree for the possession and profits thereof.

The defendents by their answer, objected, that William Aylett, the grandson, had no power to devise the leasehold lands, because he had a right to them only, without the possession, at the time of his death, which bare right, being a chose in action, 221 *was said to be not transferable by law; and, if it were transferable, the defendents insisted that it was not comprehended, in the devise to the plaintiff; and that the words, 'all my lands,' therein were satisfied by the part of them whereof that testator was seised in fee simple; and that the leasehold land was included in the residuary bequest to the wife and children.

The cause was heard, on the bill, answer, and exhibits, the 13 day of may, 1793.

The court, in the decree, slighted the first objection, supposing to be indisputable, first, that a chose in action is assignable in equity, and secondly, that one may bequeath that which he can assign;* and the defendents counsil not urging the objection, or urging it so faintly as to betray a consciousness that it was not maintainable.

Upon the other point, the counsil for the defendents only quoted and applied the resolution, by the court of kings bench, of the first question stated in the case of Rose versus Bartlett, in trinity term, 7 Car. 1.

The case to be found in the 292, 3 and 4, pages of reports of cases adjudged during the first sixteen years of the reign of king Charles the first, collected and written in french by George Croke, and after his death revised and published in english by Harbottle Grimston, was

'Ejectione firmae. of the demise of John Rose and Elizabeth his wife, of forty acres of land, and two acres of meadow, in Burnham, for three years. upon not guilty, a special verdict was found, that Philip Schudamore was seised in fee of the land in the declaration, anno 44 Elizabeth,' and by indenture demised it, by the name of four closes of pasture in Burnham, for a hundred years, to Richard Batyne; and that Richard Batyne entered and was possessed, and being so possessed, and seised in fee of other lands and tenements in Burnham, afterwards, viz. duodecimo aprilis, tertio Caroli, made his will in writing, which is found in haec verba: 'i will that my wife Elizabeth shall have Burnhams and the lands thereunto belonging, being three half acres in Lentfield. and my will is, if she do marry, my son Nicholas shall have Burnhams, and three half acres lying in Lentfield. item i will my son Bartholomew shall have for his maintenance out of the land 5l. yearly, as long as she keepeth herself unmarried. item i will and bequeath to my said wife Elizabeth all the rest of my lands, lying in the parishes of Burnham and Hitcham, during the time of her life, and afterwards to my son Bartholomew. also i make my wife my 222 full *and whole executrix of all my cattle, corn, and moveable goods: except such as i have appointed to be sold for payment of legacies,' prout per le volunt, &c. they find that Richard Batyne died, and the said Elizabeth proved the will in the prerogative court, quodque administratio omnium bonorum, jurium accreditorum dictum Richardum Batyne et ejus testamentum qualitercunq' concernent' by the judge of the prerogative court, was committed to the said Elizabeth, that she afterwards took to husband the defendent, whereby they were possessed of the said lease: and that the said Bartlett assigned that lease to Richard Hammond, upon the condition for the payment of 30 pounds, at a day certain, who, failing of the payment thereof, reassigned afterwards that lease to the defendent; that the said Elizabeth died, and afterwards the said Bartholomew died, and that Elizabeth, the wife of Bartholomew, obtained letters of administration de bonis Richardi Batyne non administrat' by Elizabeth the wife of Richard Batyne, who took John Rose to husband, and they let to the plaintiff, and the defendent ousted him, and if, &c.

This case was argued by Calthorp for the plaintiff, and by Germin for the defendent.

The first question was, whether this lease for years be devised to Elizabeth for life,

*[Mr. Green has here referred to Prec. in Chan. 142, Blake v. Johnson.—Ed.—Note in edition of 1852.

remainder to Bartholomew? and all the justices (absente Richardson) resolved, that if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee simple lands passed only, and not the lease for years; and if a man hath a lease for years, and no fee simple, and deviseth all his lands and tenements, the lease for years passeth; for otherwise the will should be merely void.

Secondly, they all agree, that if one deviseth his land, which he hath by lease, to his executor for life, the remainder over, that there ought to be a special assent thereto by the executor, as to legacy, otherwise it is not executed: and there was not here any special assent.

Thirdly, Jones and myself were of opinion, that it appears here that he had other lands in fee, which he devised to his wife, durante viduitate; and other lands which he devised unto her, for life, the remainder over, and then that devise may not extend to that lease. but Berkley to the contrary, because it may be that land devised, as long as she is unmarried, is the sole land which he had in fee: and the other land devised absolutely is the lease for years; but it was thereto answered, that the devise is unto her, for life, of the lands in Burnham and Hitcham, and clearly no part of the lease land extends into Hitcham; so as it is clear, it extends not to lease lands, but to freehold lands.

223 *Fourthly, Richard Batyne making his wife his sole and whole executrix of all his cattle, corn, and moveable goods, and not mentioning what shall be done concerning the residue of his estate; whether the wife be absolute executrix quoad all his estate, or only particular executrix quoad his cattle, corn, and moveable goods, and not quoad his leases, and his debts? and as touching that point we all agreed, that one may make several executors; the one quoad things real, the other quoad things personal, and may divide their authority; yet quoad creditors, they are all executors, and as one executor, and may be sued as one executor, 19 H. 8. 8. Dy. fol. 3. 32. H. 8. Br. Exec. 155. but Jones justice and myself conceived, as this case is that she is sole and absolute executrix for the whole estate, as well leases as debts, and other things; for when he saith, that she shall be his sole and whole executrix of his cattle, corn, and moveable goods, it is but an enumeration of the particulars, and no exclusion of any, especialy when he doth not make any other executor, for the residue: and catalla in latin extends to all things. and it may be intended, that so was the intent, when he made not any other executor. but Berkley justice conceived, that she is a special executrix quoad the things enumerated, and no general executrix.

The fifth question was, admitting that she is no absolute executrix quoad all the estate, but quoad the particulars specialy named, and she proving the will, and it being found, that administration was committed unto her omnium bonorum, &c. prout antea, whether that be a general administration committed or only an administration of the goods whereof she was made executrix? and Berkley held, that it is but a special administration because it is bonorum, jurium & creditorum praedict' Richard Batyne et praedict' testament' concernent' and that coupled to the testament; so that it extends no further than the will. but Jones and myself were of opinion, that it was a general administration committed; for juriumet credi torum are general words, and the word et should be expounded as aut, and it cannot be tied only to the testament; for there be not any words of debts, as creditorum imports; and they be as general words, as are useful in general letters of administration; wherefore upon all the matter. justice Jones and myself were of opinion against the plaintiff, that he should be barred. but justice Berkley e contra, per quod adjournatur.'

And the counsil for the defendents in the principal case relied upon the authority of that resolution of the first question in the case cited, which as he thought, favoured the right clamed by his clients, not less than if the case had been, for that purpose, contrived by himself. and

224 *That judge of the high court of chancery, for reasons hereafter assigned, not allowing the authority of the resolution quoted to be more decisive than if the case had been so contrived by the counsil, although that resolution had been quoted in Westminsterhall half score of times, without disapprobation, and once or twice with approbation, delivered this opinion: 'that the plaintiff, by the testament of his father, was intitled to the leasehold land clamed by the bill, but that the said land was subject as a specific legacy, to payment of that testators debts;' and the court decreed the defendents, who were executors, to deliver to the plaintiff possession, and to account with him for the profits, of the said leasehold land, upon his entering into bond, with surety, for payment of his proportion of those debts to which a specific legacy is liable.

In justification of this opinion and decree what followeth is submitted to censure.

A man, not acquainted with law cases, to whom, after reading the testament of William Aylett, the grandson, and being informed of the facts before stated, was propounded the question, whether Philip Aylett, the devisee, was intitled to all his fathers lands in the county of Kingwilliam, and, among them, to the lands which he had a right to hold for 900 years only? after recovering from the surprise, which a controversy upon such a devise, in which doth not occur an ambiguous sentence, an equivocal word, or a technical term, must occasion, would probably not haesitate to answer the question affirmatively, if he did not think it too trifling to be asked or answered, observing that the fee simple lands and the leasehold lands both were the testators lands, although one were his for an indefinite time, and the other were his

for a definite time;—that by the complexion of the testament, he, who made it, seems to have intended to divide all his landed property between his two sons, and out of his other estate to raise portions for daughters, which is the most usual mode of provision for a family of children;—and that the presumption in favour of the devisee Philip is the stronger, if the testator knew not that his title to the leasehold land was less than a fee simple. he would probably have observed further, if the testator had said, 'i give to my son Philip Aylett all my lands freehold and leasehold,' the terms 'freehold and leasehold' would not have been any thing more than enumeration of the species, whereof lands was the genius; and that a devise of the genius includeth all its species. and that if William Aylett, the grandson, had been seised moreover of lands holden for the life of another, where the cestuy que vie survived the testator, these lands would have been
225 comprehended *in the devise, as well as those holden in fee simple, and for term of years, because included equaly in the generical term.

A man, not altogether unacquainted with law cases but, emancipated from a servile obsequiousness to the authority of adjudications in some particular instances, to whom was propounded the same question, in verification of the affirmative answer to it, will endeavour to shew the only true meaning of the devise in the testament of William Aylett, the grandson, to the plaintiff to be, that he should have the leasehold as well as the fee simple lands in Kingwilliam county, and that, in such a case as this, authority ought not to prevale against that intention.

I. The true interpretation of the devise will appear from these considerations.

1. Translation, ex vi termini, imports motion, and consequently change of place. for philosophers, of whom some have attempted to define motion, and others have denied motion to be defineable, however they differ in that, have all agreed change of place, to be either an essential part, or a necessary concomitant, of motion. and, if to moral entities we may, by analogy, attribute place, which naturaly signifieth the part of space occupied exclusively by a body, dominion, right, property, may, when it is transferred, be said to change place i. e. to change the owner.

2. Translation of dominion, right, property, by testament, is perfect, at furthest, so soon as the devisee or legatary consenteth to accept the subject devised or bequeathed, (b) and according to the opinion of some, at the death of the testator.

3. If the place of the subject transferred be changed, by the transferring act, and the translation be perfect, so soon as the subject of it is accepted; the subject transferred is not the thing in which the dominion, right, property, is exerciseable: for the place of the land, if that be the thing, is not changed; the slave, horse, piece of furniture, garment, library, philosophica apparatus, if that be the thing, may remain where it was, and yet the dominion, right, property, thereof may be perfectly transfered,—the place of the dominion, right, property, may be changed. so that,

4. When one saith, he deviseth land, or bequeaths any other thing, the terms are eliptical; some words are left out which are understood; and, in such a case, the testator must mean that the devise or bequest shall have, not a sensible immediate operation upon the land or other thing said
226 to be devised or bequeathed, *but a mystical operation on his dominion, right, property, over to, in, the land, or other thing.

Thus Justinians compilers, Bracton, who followed their method, and other exact writers, intitule their tractates upon such subjects de acquirendo rerum DOMINIO.*

He, who may incline to ask, by way of objection to what is here stated, do men never on such occasions, speak or write, without shrouding, by a figure, half of what they mean, is desired to consider the quotations in the note. (c)

Some may ask too, if translation in general do not operate immediately upon the thing said to be transfered, what, in the particular cases of a feoffment of lands, and a gift of moveable goods, do livery of seisin, in one, and tradition, in the other, mean? to which question the answer is, those ceremonies are images of the transition of dominion, right, property;—possession of a thing is presumptive evidence of the possessors dominion, right, property; delivery of the possession is a symbol representing a change of the dominion, right, property,

5. The most unerring mode of interpreting a testament, the terms of which are supposed to be equivocal or ambiguous, is by inserting the words necessarily understood:

(b) See Rutherforth on Grotius b. 1. c. VI. s. V.—Note in edition of 1795.

[*Mr. G. here refers to Plowd. 448.—Ed.]—Note in edition of 1852.

(c) 'This first aim of language is to communicate our thoughts; the second, to do it with dispatch. the difficulties and disputes concerning language have arisen almost intirely from neglecting the consideration of the latter purpose of speech, which, though subordinate to the former, is almost as necessary in the commerce of mankind. * * * words have been called winged; and they well deserve that name, when their abbreviations are compared with the progress which speech could make without these inventions; but, compared with the rapidity of thought, they have not the smallest claim to that title. philosophers have calculated the difference of velocity between sound and light, but who will attempt to calculate the difference between speech and thought? what wonder then that the invention of all ages should have been upon the stretch to add such wings to their conversation as might enable it, if possible, to keep pace in some measure with their minds.' Epea pteroenta, or the diversions of Purley, by John Horn Tooke, who, in a note there, hath transcribed from m le Presidente de Brosses, these pertinent words: L'esprit humain veut aller vite dans son operation; plus empresse de s'exprimer promptement, que curieux de s'exprimer avec une justesse exacte et reflechie. s'il n'a pas l'instrument qu'il faudroit employer, il se sert de celui qu'il a tout pret.—Note in edition of 1795.

For example: in this case, where the testator, who had one tract of land, holden in fee simple, and was intitled to another tract of land, holden for term of years, both tracts in Kingwilliam county, devised all his land in Kingwilliam to his son Philip Aylett, the man, whose wonderfull sagacity enabled him after diligendy exploring the devise, to smell or spy out in it an equivoque or an ambiguity, would perhaps admit that it vanished, if the words right to, which are proved to be necessarily
227 understood, *were supplied; with which supplement the devise would be read thus: 'i give to my son Philip Aylett all my right to lands in Kingwilliam: in which case,

6. That the devisee would have been intitled to the leasehold lands in question, as well as to the fee simple lands, is affirmed, with confidence, because the conclusion is believed to be undeniable, and, if so, the decree was correct. but

It is said to be proved, by authority, that is by the forementioned case of Rose versus Bartlett, to be erroneous; and truth, reason, justice, and indisputable principles of law, conspiring together, will sometimes no more enable a demand to stem the torrent of authority than a fair wind, aided by concurrent tides, will be able to drive through the syrtes the bark

Illisam vadis atque aggere cinctam arenæ.

II. On this part of the case, observations will tend to shew

1. That judicial determinations of questions not legal in their nature, although they must, so long as they remain unreversed, be definitive in the cases wherein the questions were necessarily discussed, and determined, ought not to be precedents of decisive authority, when similar questions occur in other cases, if judges in the latter discover the determinations in the former to have been erroneous.

2. That a false judicial interpretation of one mans testament, if the words be not law terms, of a meaning in that science different from their meaning in ordinary discourse, ought not to be a precedent authorising a like interpretation of like words in the testament of another man.

3. That the case of Rose versus Bartlett is not a precedent of decisive authority in this case, if in any other.

1. That questions, which cannot be called questions of law, are frequently brought before courts of judicature the experience of every day sheweth.

The determinations of such questions by those courts ought not to be precedents of decisive authority, unless every judge of them were equal to the man whom Juvenal describes, Sat. III v. 77. (d)—unless every judge were such a prodigy of genius and learning as the man, hight 'the admirable Chrichton,' who, inviting all the literati, whithersoever he went, to dispute with him, and undertaking to answer rightly every question, which could be propounded, in any art or science, an in any of twelve languages, and this either in verse or prose, at the choice of the autagonist or querist, is reported to have astonished the auditors at all the trials by proving himself not to be a vain boaster.
228 *But such phænomena are less frequent than comets. (e) and therefore the authority of sentences by judges of law, who certainly are not always perfect adepts in every science, may be, in many cases, disallowed by their successors, if these, better informed, discover the sentences to be erroneous. And this the english judges scruple not to do, even in cases where the questions were purely legal, as well as in other cases.

If a man had devised a tract of land, on one side of a determinate line, to be laid off in a triangle, of which the other sides should be such that the sum of their squares should be equal to the square of the given line; and if any court had determined upon such a devise that the angle subtending the hypotheneuse should be an oblique angle; ought that determination to authorise a similar sentence in another case, where the same question occurred, although, in discussing the latter, should be demonstrated, as may be demonstrated, that the angle, which alone can answer the conditions of the question, is a right angle?

If such a disputes as Archimedes rightly decided between Hiero, king of Syracuse, and the mechanic, who was accused of pilfering some of the gold delivered to him for making a crown, and of supplying the place of what was withdrawn by baser metal, coming before courts of law had been determined by a mode known to be fallible; would not a court of law now, disregarding any number of those determinations, resort to the hydrostatic experiment, which is infallible?

In adjusting the proportion, which a tenent for life ought to have of the purchase money, for which an estate of inheritance should be sold, would a court, at this day, regard the rule observed in such cases by the courts formerly, or have recourse to the problems and tables invented and formed for that purpose by the accurate Demoivre, Halley or Price?

In a question concerning the legitimacy of a posthumous child, which is a physiological question, depending upon the time

(d) Grammaticus, rhetor, geometres, pictor, aliptes, Augur, schoenobates, medicus, magus; omnia novit.—Note in edition of 1795.

(e) Quintilian, who would have a youth, intended to be an accomplished orator, to be instructed in the arts (and what he supposed necessary to the orator must be no less necessary for qualifying a judge to decide rightly questions of every kind which may be discussed before him) so ut efficiatur orbis ille doctrinae, quam graeci encyclopaediam vocant. expected some might ask, quid ad agendam causam, dicendamve sententiam, pertinet scire quemadmodum in data linea constitui triangula aequis lateribus possint? aut quo melius vel defendet reum vel reget consilia, qui citharae sonos nominibus et spatiis distinxerit? to which he answers thus: non eum a nobis institui oratorem, qui SIT, aut FUERIT, sed imaginem quandam concepisse nos animo perfecti illius, ex nulla parte cessantis.—Note in edition of 1795.

of birth after a husbands death, ought a court to regard the authority of opinions, by which former judges of law had 229 limited *the time of gestation, so much as the opinion of Hunter, the eminent anatomist and accoucheur?

If the mother had taken another husband, so soon, after the death of a former, that the child might have been begotten (f) by either, would a court at this day, permit the child, even if authority could be produced (which seems, by Cokes com. on Lyt. fol. 8. b, not impossible) for permitting him, to chuse his father? (g)

Formerly, no proof of anything, less than impossibility of procreation, seemed admissible to bastardize a child, who was born in wedlock, if he might have been begotten, whilst the husband was infra qratuor maria. for this numberless authorities are extent, and some of them later than the determination of the case between Rose and Bartlett. do courts at this time abide by those authorities?

In Brookes abridgement, title administer. n. 47, in Swinburnes treatise of testaments, part 7, sect. 8 and in the life and opinions of Tristram Shandy, gentleman, vol. 5, p. 195, we meet with the case stated in the note. (h)

230 *This case in Cokes third book of reports, fol. 40, is indeed denied to be law; because it is erroneous; and, for the same reason,

2. The interpretation of a devise in one mans testament, if the interpretation be erroneous, ought not to be a precedent authorizing a like interpretation of a like devise in another mans testament.

When a court of law misinterprets a devise, a sentence, in conformity with that false interpretation, depriving one of an estate, is no less contrary to law, than the sentence which deprived a mother of her right to an estate, upon the false principle, that she was not of kin to her own child.

In neither case was the question merely legal. in the case of the devise, where no technical term occured, the question was purely philological.

The court is as much bound to fullfill the intention of a testator, according to the the meaning of his own words, as to grant administration to the next of kin.

A court of law, who, interpreting one mans words in his testament, about the meaning of which no man could have entertained a doubt, if similar words in the testament of another man had not been misinterpreted by another court upwards of 160 years before, should be guided in their determination by the authority of such a false interpretation, are affirmed to determine contrary to law,—affirmed with the more confidence, because the law doth not presume the testator to know of such misinterpretation, but, on the contrary, presuming him to be inops consilii, directs the judges to interpret his words according to what they believe to be his meaning by them, upon the supposition that he is without the aid of those who could inform him of judicial sentences, by which similar words had been misinterpreted.

Indeed recurrence to authorities in questions upon the meaning of testamentary dispositions seems improper in most cases, where terms of art do not occur.

3. If a painter, who had been desired to draw the picture of William Aylett, hearing that he resembled one Richard Batyne, 231 *should inquire after the latter, draw his picture, and present it for William Ayletts, most people would think the painter acted absurdly, and more absurdly, if the likeness which he took of Richard Batyne was not a faithful likeness. when the defendents counsil rummaging in his repertorium juridicum, his lumber room of law cases and authorities, found a judicial interpretation of some words in Richard

(f) This might have happened in the case of her, who, returning from the interment of her husband, told a wooer, resolved to apply early enough as he thought, that he was too late; and in the case of the ephesian matron who, as her story is related or perhaps invented by Petronius, to save a living husband, in danger of capital punishment, for neglect of duty, whilst he dallied with her, in watching the corpse of one who had been gibeted, contrived to make a dead husband supply the place of the malefactor, stolen away by some of his friends in the guards absence.—Note in edition of 1795.

(g) A prince satisfactorily decided a dispute between two women, each alleging herself to have borne the same child. but a child, if he can tell what father begot him, must be wiser than Solomon. the mother, in such a case, must be wiser than either of them. why she might not be a witness in it perhaps no good reason can be given. the linements of the child itself in some instances, e. g. resemblance of one or other, or of the acknowledged children of one or the other husband might qualify the child, in propria persona to prove the matter in question. when a roman proconsul of Sicily said to a man of that country, 'I cannot account for the exact similitude between me and thee, since my father was never in this province;' the sicilian, revenging the insult on his mothers chasticy audacius quam virgis et securibus subjecto conveniebat, as Valerius Maximus observes, petulantly retorted, 'but my father went frequently to Rome.'—Note in edition of 1795.

(h) 'In the reign of Edward the sixth, Charles duke of Suffolk, having issue a son by one venter, and a daughter by another venter, made his last will, wherein he devised goods to his son, and died; after whose death the son died also; but without will, without wife, and without child—his mother and his sister by the father side (for she was born of the former venter) then living—the mother took the administration of her sons goods, according to the statute of the 21st of Harry the eight, whereby it is enacted, that in case any person die intestate, the administration of his goods shall be committed to the next of kin.

The administration being thus (surreptitiously) granted to the mother, the sister by the fathers side commenced a suit before the ecclesiastical judge, alleging, 1. that she herself was next of kin, and 2, that the mother was not of kin at all to the party deceased; and therefore prayed the court, that the administration granted to the mother might be revoked, and be committed unto her as next of kin to the deceased, by force of the said statute.

Hereupon, as it was a great cause, and much depending upon its issue—and many causes of great property likely to be decided in time to come, by the precedent to be then made—the most learned, as well in the laws of this realm, as in the civil law, were consulted together, whether the mother was of kin to her son or no.—whereunto not only the temporal lawyers—but the church lawyers, the juris consulti—the juris prudentes—the civilians—the advocates—the commissaries—the judges of the consistory and prerogative courts of Canterbury and York, with the master of the faculties, were all unanimously of opinion, that the mother was not of kin to her child.'—Note in edition of 1795.

Batynes testament resembling the words in William Aylett testament, and recommended an adoption of that interpretation in the principal case, the judge of the high court of chancery thought, if he had adopted the interpretation recommended, which appeared to him false, he should have determined contrary to law, and have acted not less absurdly than the painter; for the interpretation of the testament ought to be as true an image of his intention who made it, as the portrait ought to be of him for whom it was drawn: more especially if the case of Rose versus Bartlett be not only contrary to law, as it is clearly proved to be, but, for other reasons, to be explained hereafter, ought not to have the weight of an authority.

Some judges and many lawyers revere authority so much, that they seem to believe nothing, which hath that sanction, to be wrong, and scarcely anything, which wants it, to be right, and appear to be displeased with those who have not the same kind of implicit faith.

Several years ago, in a case between Parsons and Parsons, where the question was upon the interpretation of a devise, the chagrine of the plaintiffs counsil, occasioned by the courts judgment, which he thought contrary to some authorities produced by him, broke forth in a declaration that, so soon as he should return home, he would burn all his books of reports. such an holocaust might have been an offering not altogether acceptable to Astrea; became of the reported cases are many exceeding valuable. better would have been an imitation of Prometheus, who is said to have taught men, in sacrifices, to consume on the alter the entrails and offal, that is, the vile parts of victims and to regale themselves, in jocund festivity, with the dainty parts.

Of the reports more in proportion might be spared than the barber and curate saved from Don Quixotes library; out of them, well winnowed from the chaff accumulated with them, a body of civil law may be formed, equal in value with the code, pandects, institutes, and novels, which were ushered into the world with imperial auspices.

American judges may contribute to such a desirable compilation; and will not have to encounter the prejudices, and to
232 *struggle against the difficulties, which must occur in England, and retard a reformation of that part of the law, which is said (Co. instit. part 1. fol. 344,) to 'consist of reports and judicial records;' many of which reports english judges acknowledge to have been ill founded.

But how can this be done by american judges, if they may not reject those cases in the reports, which are contrary to law, or not reject them, before they shall have been reprobated by english judges? if the case of Suffolk had not been denied by english judges, must it have been admitted by american judges to be law? in return for this deference by american judges to english authority, how would english judges respect american authority? the resolution of an american court, quoted in Westminster hall, if any counsil there should venture to expose himself to ridicule, perhaps to rebuke, by the quotation, would, no doubt, be treated, if not with fastidious neglect, like a *sus Minervam.

The judge of the high court of chancery, not supposing himself to be in such a humiliating predicament, as that he must wait for leave from english judges, before he can venture, to reject an english determination.

III. Denied the authority of the resolution in the case of Rose versus Bartlett, upon which the defendents counsel in the principal case relied.

That it is contrary to law is believed to have been proved.

Upon that, and other parts of the case, to shew that it ought not to be respected, are observed,

I. The former part of the resolution of the first question is a dogma, merely didactic, imperious and arbitrary, for which no reason is assigned, and the reason given for the other part of it allowing leasehold lands to pass by a devise of all his lands, where the testator had only leasehold lands, seems aukward.—the reason given is, 'for otherwise the will would be merely void.' instead of which most other men would have given this obvious, as well as true reason, why the leasehold lands should pass to the devisee, 'that they were devised to him.'

Again; a case might have happened in which this resolution might have been an authority on either side of the question, and with equal force. if a man, who had lands in fee simple and land for years, had devised all his lands to him who was heir at law of the testator. (i) the devise, without doubt, would have been void as to the fee simple lands, because they would
233 *have descended, and therefore could not have passed by the devise to the heir. here then might have been urged, on one side, the leasehold lands should pass, because 'otherwise the will would be merely void;' on the other, that the leasehold lands should not pass, because 'the testator had fee simple lands,' as well as leasehold lands. (k)

2. The special assent of an executor, to whom a term for years was devised, with a remainder over, in order to execute the remainder, seemed not necessary, as the court resolved it to be in the case quoted, if some facts stated in the special verdict be properly considered.

3. On the third question the judges dif-

*Cic fam. IX. 18. Acad. 1. 4.—Note in edition of 1852.

(i) If Philip was eldest son of William Aylett, this was the principal case.'—Note in edition of 1795.

(k) When an admirer of Croke lately said, 'his books were the best extant,' one, to whom this eulogy was reported, observed upon it, 'that men of the law found the cases collected by that author as useful as belligerent nations find swiss soldiers, who will fight for either of opposite parties;' and this observation seems verified in this case of Rose versus Bartlett.—Note in edition of 1795.

fered in opinion; yet it seems included in the first question, on which they were unanimous.

4. One question in the case was this: Richard Batyne making his wife whole and sole executrix of all his cattle, corn, and moveable goods, and not mentioning what shall be done concerning the residue of his estate, whether the wife be absolute executrix quoad all his estate, or only particular executrix quoad his cattle, corn, and moveable goods, and not quoad his leases and his debts? in discussing which question, two of the judges, in order to prove the wife to have been, not a special, but a catholic executrix used one argument, in these terms: catalla, in latin, extends to all things, turning the english word 'cattle' in the testament. which signifies gregarious quadrupeds, into a latin word which may include a lease of land for years. as happy an expedient as any of those which occurred to Peter, Martin, and Jack, in Swifts tale of a tub.

5. The case doth not appear, by the report of it, to have been finaly decided, and so cannot be said transisse in rem judicatam; for it ends thus: 'wherefore upon ALL the matter justice Jones and myself were of opinion against the plaintiff that he should be barred. but justice Berkley 'contra, per quod adjournatur.'

For these reasons the judge of the high court of chancery, rejecting the clumsy, bungling, unfinished case of Rose versus Bartlett, as he thought it made the decree, which he believed exactly corresponded with the meaning of William Ayletts words, inquisitive to discover that meaning
234 from those words, *convinced that they only ought to be consulted for discovering it (1)

But he was mistaken, as it seemeth, for the court of appeals, before whom the decree in the principal case was impeached, on the 12 day of march, 1795, delivered this opinion: 'that the testator appearing to have freehold lands in the county of Kingwilliam to satisfy the devise to his son Philip of all his lands in Kingwilliam, the leasehold lands in question did not pass, thereby, ACCORDING TO THE UNIFORM DECISIONS ON THE SUBJECT, but passed in the residuary estate devised to the wife and children of the testator, and that there is error in the said decree,' and therefore reversed the said decree.

Upon the reversing decree the writer of the prolusions to it will make one remark, and to it subjoin one question.

The remark is: the terms 'uniform decisions,' that is, decisions in England, suggests a powerfull argument in favour of a different decision in Virginia, if the first english decision were erroneous, as it is affirmed to have been. in that country, if many and uniform decisions have established the doctrine, although it be unsound, defendit numerus. but in the principal case, if it be the only instance (and for anything appearing to the contrary it is the only instance) in which any man ever thought whether a devise of the whole, was satisfied by part, of a thing? to be a disputable question, the precedent here ought to be the reverse, as is conceived, of that in England.

The question is: when a man, who had two tracts of land in Kingwilliam county, devised all his lands in that county,
235 *that is, both the tracts, to his son Philip Aylett, and when that devise is satisfied with half his lands; that is with one of the tracts in Kingwilliam county, this doctrine being established; whether, when the same testator devised ALL the residue of his estate to his wife and children, the devise of ALL there was not satisfied, as in the other instance, with one HALF of the residuary estate; in consequence whereof the wife would have been intitled to one sixth of one half, and to one third of the other half, that is to three twelfths or one fourth part, of the residue?

BETWEEN
JAQUELIN AMBLER, *appellant*,
AND
THOMAS WYLD, the younger, *appellee*.*

Sept. 1793.

1. **New Trial†—Verdict Influenced by Paper Offered in Evidence and Rejected.**—Motion for a new trial on the ground that a paper offered in evidence and rejected by the Court, had been taken out by the jury and influenced their verdict. The paper was a certificate of three of the witnesses in the case and did not vary from their *viva voce* testimony. A new trial should not be granted.

2. **Chancery Practice—Jurisdiction of County Court—Verdict in Another Court.**‡—A county court has no power to interfere by bill in equity, with a verdict

(1) John Locke, in his essay for the understanding of saint Pauls epistles, by consulting saint Paul himself, observed, that sober inquisitive readers of those epistles, who had a mind to see nothing in them but just what the matter meant, would not find the understanding of them difficult; whereas others could see in them what they pleased.

A turkish traveller, introduced into the vatican, when the librarian shewed the shelves on which were arranged the books relating to theology, the polyglotts, paraphrases, commentaries, translations, histories, connections, homilies, sermons, decrees of councils, polemical tracts, and many more, written in order to explane the christian bible, said, 'i suppose then after all this every part of your bible must be well understood.' 'quite the reverse, answered the librarian, controversies have multiplied from that cause.' whether controversies have increased or diminished by the great number of adjudications in cases where interpretations of testaments have been in question the reporter of the principal case will not pretend to decide: but he doth verily believe that in 1793. if the case of Rose versus Bartlett, which was discussed more than 160 years before, had never been published, no man would have thought whether William Aylett, meaned to give all the land to which in Kingwilliam county he had any kind of right to his son Philip Aylett, a controvertable question.—Note in edition of 1795.

*For monographic note on Joint Tenants and Tenants in Common, see end of case.

†New Trial.—See monographic *note* on "New Trials."

‡For the decision of the court of appeals in this case, see Ambler v. Wyld, 2 Wash. 36.

in another court; but the H. C. C. having possession of the case by appeal from a bill improperly brought in the County Court will proceed with it, as if originally commenced there; and

3. **New Trial*—Newly-Disclosed Facts.**—New facts being disclosed, which might have procured from the jury a different verdict; or from the court that tried the case a new trial, the H. C. C. will grant a new trial. Issue directed to be tried again in County Court of Henrico.

4. **Sale of Realty—Depreciation—Payment in Paper Money.**—*A.* had sold *W.* houses and lots in Yorktown, valued at £1000, one-half payable in 12 months:—during which great depreciation had occurred and the main question was whether *W.* should be allowed to pay in paper money. See *Yates* v. *Salle*, ante p. 163, *and Hamilton* v. *Urquhart*, *post*.

THE parties in August, 1778, had agreed, the appellant to sell, and the appellee to buy, the lots and houses of the former in York town, for the price, to which they should be valued by three men appointed by mutual consent, and which price should be paid one half at the time of valuation and the other at the expiration of twelve months thereafter.

The men appointed reported their estimate in these words:—York september 18, 1778, we the subscribers, by desire of mr. Ambler and mr. Thomas Wyld, 236 junior, have, this day, viewed the *lots and houses belonging to mr. Ambler, where he formerly resided, and are of opinion that, in the present situation of the lots and houses, they are worth one thousand pounds. Mat. Pope, Corbin Griffin, Wm. Reynolds.

Five hundred pounds of the purchase money were paid as appeareth by this paper, october 20, 1778, received of mr. Thomas Wyld the sum of five hundred pounds, current money, in part payment of the tenement in York town, purchased of the subscriber. and mr. Wyld agrees, on his part, not to demand a title to the said tenement until the remaining sum of five hundred pounds is paid. witness our hands. J. Ambler, Tho. Wyld, jun. and in autumn, 1779, the appellee, by an agent, offered to pay five hundred pounds more, in paper money, to the appellant who declined acceptance of them, saying he should see mr. Wyld that afternoon.

The appellant afterwards procured (a) from the valuers a paper, on which was written the following words: some time in the year 1778, the under writers were called upon by mr. Thomas Wyld, to value the house and tenement, in York town, then the property of mr. Jaquelin Ambler, which house and tenement the said Ambler, as we were informed, had agreed to sell the said Wyld at such a price as disinterested persons should determine the same were worth. agreeable thereto the under written did value the aforesaid houses and tenement at one thousand pounds. and it being contrary to the laws of the land, at that time in force, to make any difference between paper money and specie, we the underwritten do further declare that we did then, and do now, think the aforesaid houses and tenement were worth one thousand pounds specie. in testimony whereof we have hereunto set our hands, this tenth day of february, 1782.: and to which paper the names of the valuers were subscribed.

An action, which had been commenced by the appellant against the appellee, in the general court to recover the money due, was discontinued, for want of prosecution, the 20 day of October, 1783.

The appellant afterwards commenced action against the appellee, in the county court of Henrico. the declaration contained three counts, the first upon a promise 237 to pay 600 pounds for *lots and tenements, lying in York town, sold by the appellant to the appellee; the second, upon a promise for lots and improvements, lying in York town, sold by the appellant to the appellee, to pay so much money as they were worth, with an averment that they were worth 600 pounds; and the third, upon a promise to pay six hundred pounds for so much money expended by the appellant for the use of the appellee.

The appellee pleaded that he did not assume, upon which the issue was joined, the appellant consenting that the other party might give any special matter in evidence.

On trial of the issue, the appellants counsil offered in evidence to the jury the paper before mentioned, dated the 10 day of february, 1782, subscribed by the three valuers. the counsil of the other party excepted to it, and the court would not allow it to be delivered to the jury. notwithstanding which, the jury took the paper with them, when they were sent out of court to consult of their verdict.

The jury found a verdict for the appellant, assessing his damages to 3741. 1s. 7½.

The counsil for the appellee moved for a new trial, shewing, for cause, that the jury, without permission of the court, carried that paper with them. the motion was rejected, because, as is stated in the bill of exceptions signed by one the judges, the three men who subscribed the paper were present in court, to give full testimony of the import of the same, which paper having been read to the court, after the return of the verdict, appeared to be a certificate signed by three of the witnesses in the cause, and not to vary from their viva voce testimony: and this rejection of the motion for the new trial, and, in consequence, the judgement for the damages, upon an appeal to the general court, were affirmed the 22 day of june, 1789.

The appellee, on the 16 day of march,

(a) This paper is stated to have been procured by the appellant, because, in answer to a part of the bill alleging that to have been the fact, and propounding this interrogatory, whether he, Jaquelin Ambler, or some person for him, did not procure the valuation to be signed by the men whose names are subscribed to it? he, after explaining his motives for what followeth, says, he requested that a certificate of the valuers might be obtained and shewn to the complainant stating the ideas on which the valuations was made.—Note in edition of 1795.

1791, filed a bill in equity against the appellant, in the county court of York, stating, in addition to the matters herein before mentioned, and several others omitted here, because now thought unimportant, that, on trial of the issue before the county court of Henrico, he produced witnesses to contradict the witnesses on behalf of the appellant, or rather to invalidate their testimony, by proving the valuers to have acknowledged, that they made their estimate in current money, and had not specie in their contemplation at that time; but that the court would not suffer the witnesses of the appellee to be examined; and also stating that the valuation of september, 1778, which was required by the appellees counsil to be produced, was denied by the appellants counsil to be in existence;
238 and praying to be relieved *against the judgement, by which the appellee was condemned to pay the damages assessed by the jury, which, aggravated with the additional damages upon affirmance, and with the costs, amount to 550l. 12s. 1¾.

The appellant, by answer, declared, that the trial before Henrico court was fair, as he believes, admitted a valuation in september 1778, but said how or in what manner that valuation was expressed he did not recollect; did not say any thing in answer to the allegation of the bill, repeated interrogatorialy, concerning the suppression of the valuation in 1778, unless it be by these words, had they (the valuers) even pretended to make their certificate of 1782 the foundation of this respondents clame, which is not the fact, the real valuation must have been brought forth, by which words the suppression is understood to be admitted; that he acquiesced in the verdict, feeling himself bound by it, although it gave him less than he thought himself intitled to; contended that no court hath power to interpose, and wrest from him the benefit of his verdict; especialy as the court before whom the trial was, shewed their approbation of the verdict by denying the motion for a new trial, conceived the reason of rejecting testimony on behalf of the appellee, if it were rejected, to have been that the testimony was inadmissible; and, with respect to the proof that the valuers had said they estimated the tenement in current money, the appellant observed the contrary was never contended; that the valuers thought the property worth so much specie, and rated the current money at par with specie, which was the only matter insisted on.

The appellee replied to the answer, and several witnesses were examined.

Samuel Eddins deposed, that doctor Mathew Pope, being charged by Wyld with injustice in signing the paper of the 10 day of february, 1782, the substance of which was then rehearsed, declared it to be wrong, and that neither he nor those with whom he was joined in the valuation of 1778 thought of specie at that time; and that when he signed that paper his intention was that Wyld should make the second payment of 500 pounds equal to the first, and said that it would come to one hundred pounds specie, according to the scale of depretiation, and that mr. Ambler had a right to no more. the same witness deposed; that doctor Corbin Griffin, whom Wyld charged in like manner with injustice, denied his signature to a second valuation of certificate, but being reminded that his signature was attested by Hugh Nelson, acknowledged he had signed a paper presented by mr. Nelson in behalf of mr. Ambler;
239 *and said, if it contained a word of specie, it was wrong and an oversight, for neither he nor the other two thought of specie in the valuation of 1778, adding he was confident the houses would not sell for that money in specie. the same witness deposed, that he had heard those men declare, since the trial in Henrico court, that they did not value the houses in specie but in current money.

Thomas Gibbs deposed that he heard doctor Griffin declare that the houses were not valued in specie, and that the valuers at that time dared not to have mentioned specie in their valuation, paper money being the legal circulating medium.

Laurence Gibbons deposed that he had often heard the valuers of the houses, since the trial in Henrico court, declare, that they did not value them in specie.

Corbin Griffin, to this interrogatory, propounded to him by the appellant, did you not, at the request of said Wyld and said Ambler, value the houses and tenements as aforesaid, in august, 1778, for the sum of one thousand pounds, good money? made answer in these terms:

Some time in the autumn of 1778, i was appointed with doctor Mathew Pope and mr. William Reynolds to value the houses aforesaid, and their value was fixed at one thousand pounds: and

To this interrogatory, what was intended by the term, 'good money;' did you suppose the houses and tenements worth one thousand pounds at the depretiation of five for one, or of the value of one thousand pounds in specie; or the value thereof in paper currency according to the scale of depretiation? made answer in these terms:

I knew of no depretiation, nor of any difference between paper and specie.

William Reynolds, to the former of the two interrogatories mentioned to have been propounded to Corbin Griffin, made answer in these terms:

I was appointed one of three to value the houses, and fixed them at one thousand pounds current money of Virginia; and to the other of those interrogatories, made answer in these terms

I knew of no depretiation at the time, but valued them in the money then in circulation.

Several witnesses deposed that the houses, which had been used for barracks, when Wyld bought them, were so ruinous as not to be then tenentable, without being repaired. and one witness deposed, that in 1784, before which time the houses appear

to have been repaired by Wyld, at considerable expense, when the houses and lots were exposed to public sale, at the price of five hundred pounds, no bidder offered more.

240 *And Thomas Gibbs deposed, that the court of Henrico county would not permit him and two other witnesses to be examined in order to invalidate the testimony of the witnesses who were examined for the appellant.

The county court of York decreed the appellant to pay to the appellee 395l. 11s. 7½, with interest thereon, to be computed, after the rate of five per centum per annum, from the 10 day of june, 1789, till payment, and the costs.

The high court of chancery, before which the cause was bought by appeal, the 28 day of september, 1793, delivered this

OPINION AND DECREE,

That, if the appellee were injured by the verdict of the jury, and judgement of the county court of Henrico stated in his bill, the only mode by which he could regularly obtain redress was a new trial of the issue between the parties in the action at common law, and consequently that he decree of the county court of York, which seems to have thought the principal money recovered by that decree so much more than the appellant ought to have received from the appellee, is erroneous; and therefore this court doth reverse the said decree. but this court supposeth that if certain facts now appearing by the testimony in this cause had been known to the jury who tried the issue, or to the court who rejected the motion for a new trial, either the former might not have found such a verdict, or the other, if they had found it, might have awarded another trial: and is of opinion, that, although the county court of York perhaps had no power to award such new trial, this court retaining the cause may procede in it, as if it had been originally commenced here; and therefore this court doth direct the said issue to be tried again before the said county court of Henrico, and the verdict thereupon to be certified to this court. and the appellee here in court doth consent, without which consent the new trial would not have been awarded, that if the damages which shall be assessed upon such trial excede the damages assessed on the former trial, which may be the event, this court may decree him to pay the excess and award execution against him for the same.

The facts unknown to the court of Henrico, and to the jury who tried the issue, are

That the men who signed the paper, dated the 10 day of february, 1782, signed it at the request of one party, without giving notice of it to the other party, and when they were not together, and are proved by three witnesses, since the trial, to have contradicted the matter

241 affirmed by them in that paper; *and that two of them (the other being dead) who were examined on oath in this case, did not give a categorical answer to an interrogatory propounded explicitly to extort from them such an answer, to the only material question in controversy.

The appellants counsil objected, that the jury's having taking with them the paper of february, 1782, ought not now to be adjudged by this court a good cause for another trial for two reasons, one, that the same matter had been determined by another court, of competent jurisdiction, not to be a good cause for a new trial. which adjudication this court hath no power to correct. which reason perhaps would not have been mentioned, because it ought not to have been mentioned, if the objector had recollected that the bill of exceptions stated the viva voce testimony of the valuers not to have varied from the paper. whence is inferred that the court would have awarded a new trial, if they had known the facts now disclosed, that is, the manner of procuring that paper, and the use which was made of it, and that the viva voce testimony and paper vary from what those men afterwards confessed to be the truth.

The other reason mentioned by the counsil for the appellant for disregarding the jury's taking the paper, is that it did not govern them in their verdict. for if it had governed them, they would have assessed more damages. which reason was not thought satisfactory. that all the jurors were not governed by the paper with the concurrent testimony of the witnesses who signed it was indeed manifest. but that some of them were governed by it, and that it had influence on the assessment, is probable; and if it had influence, that is conceived to be good case to award another trial.

How the jury formed their estimate of the damages can only be conjectured. the admission into that estimate of fractional quantities, whose denominators were so low as farthings, shews the estimate to have been the result of a calculation somewhat complex. If they allowed interest upon the money remaining due to the appellant as they are believed to have done, the principal, with which they charged the appellant, was about 292l. 17s. 6d. for the sum of that and the interest from september, 1779, to the day of finding the verdict, being 81l. 4s. 1½ is equal to the 374l. 1s. 7½ assessed. the jury, differing in their estimates according to a mode of adjustment said to be frequently practised where unanimity is desperate, are supposed to have agreed, that the sum of their estimates added together being divided by their own number, the quotient should be the measure of their damages.

If five jurors had been guided by

242 the paper of february, *1782, and three by the statutory scale of depretiation, and the other four, neglecting both, had fixed on what they thought the true value of the houses and lots, the calculation might have been made in this manner: 5x500 † 3x100 † 4x178l. 12s. 6d. their sum would be

35141. 10s. and this being divided by 12, the quotient would be 2921. 17s. 6d.

This although merely conjectural shews a probability at least, that some of the jurors were governed by that paper; and a probability that they were governed by such a paper and its corroborative evidence, as this last now appeareth, is deemed a good cause for a new trial.

The appellee stated in his bill other matters, of which notice was not taken in the opinion or decree of the high court of chancery, but which perhaps deserved notice.

One was, that on trial of the issue in Henrico court, the valuation in september, 1778, was required by the appellees counsil to be produced, but was denied by the appellants counsil to be in existence. the only part of the appellants answer which is responsive to this allegation, if any part be responsive to it, seems to admit implicitly that the paper could have been produced, but that it was not produced by the appellant. when this matter was mentioned in the high court of chancery, the appellants counsil observed that the appellee had the valuation of september, 1778, for it appears by the transcript of proceedings before the county court of York to have been one of his exhibits. but this doth not prove that he had it at the trial in Henrico court, which was in april, 1785.

The other matter stated in the bill, and unnoticed in the opinion or decree, is that the witnesses offered by the appellees counsil to prove that Griffin, Pope and Reynolds had invaribly acknowledged, that they made the valuation in currency, and that they never thought of specie at that time, were rejected by the court of Henrico: and the fact, which is neither confessed nor denied by the appellant, is proved by a witness.

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[The case of Ambler v. Wyld, 2 Wash. 36, decides.—

1. If the parties in an action at law, are at liberty by the issue to go fully into the examination of evidence, and having done so, a verdict is found after a fair trial, a court of Chancery ought not to interfere by directing a new trial.—Aliter, if part of the evidence was suppressed by the court.

2. The court of one county may relieve against a judgment at law rendered in another, by way of original jurisdiction; and though it cannot award a new trial at the bar of that other court, yet it may direct an issue to be tried at its own bar. And if the relief be afforded without the trial of an issue where that was necessary the High Court of Chancery, upon an appeal, may after reversal retain the cause, and direct an issue to be tried at the bar of that, or any other court.

243 *3. The 5th section of the act for scaling debts &c. was not intended to let men loose from their contracts, but to allow a departure from the established scale, in cases where it is necessary in order to meet the real contract of parties.

See Hamilton v. Urquhart, in this volume, post., and Yates v. Saile, ante.—Ed.]—Note in edition of 1852.

JOINT TENANTS AND TENANTS IN COMMON.

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Cross References to Monographic Notes.

Adversary Possession, appended to Nowlin v. Reynolds, 25 Gratt. 137.

Ejectment, appended to Tapscott v. Cobbs, 11 Gratt. 172.

I. DEFINITIONS.

Joint Tenants.—"Joint tenants are two or more persons who by purchase hold any property jointly between themselves in equal shares, the estate thus held being known as an estate in joint tenancy." 17 Am. & Eng. Enc. Law 648.

"An estate in joint tenancy is where lands or tenements are granted or devised to two or more persons, to hold in fee simple, for life, for years, or at will. It is sometimes called an estate in jointure, which has the same meaning as joint tenancy; but in common speech the term jointure is now usually confined to that joint-estate (as in its origin it was), which is vested in husband and wife, as a statutory satisfaction and bar of the woman's dower. 2 Bl. Com. 180." 2 Min. Inst. (4th Ed.) 466.

Tenants in Common.—"A tenancy in common is where two or more hold the same land, with interests accruing under different titles; or accruing under the same title, but at different periods; or conferred by words of limitation importing that the grantees are to take any distinguished shares." 2 Min. Inst. (4th Ed.) 494; Carneal v. Lynch, 91 Va. 114, 20 S. E. Rep. 959.

"A tenancy in common is where two or more persons hold lands or tenements in fee simple, fee tail, or for term of life, or years, by several titles, not by a joint title, and occupy the same lands or tenements in common; from which circumstance, they are called tenants in common, and their estate a tenancy in common." 1 Lomax Digest 641; Carneal v. Lynch, 91 Va. 114, 20 S. E. Rep. 959.

Cotenant—Cotenancy.—"The term 'cotenant' is used indifferently to denote one who is either a joint tenant or a tenant in common with another or others. Cotenancy is the state of being a cotenant or cotenants, and an estate in cotenancy is an estate held by two or more persons as cotenants." 17 Am. & Eng. Enc. Law (2d Ed.) p. 649.

II. NATURE AND INCIDENTS OF ESTATES IN COTENANCY.

A. JOINT TENANCY.

1. IN GENERAL.—The fourfold unity of an estate in joint tenancy is the great characteristic from which the properties and incidents of such estate are derived. In an estate in joint tenancy there must be unity of interest, unity of title, unity of time and unity of possession; or, in other words, joint ten-

ants must have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. 2 Black. Com. 181; 2 Min. Inst. (4th Ed.) 468; 17 Am. & Eng. Enc. Law (2d Ed.) 649.

Unity of Interest.—By unity of interest is meant that the estate of the tenants must be alike. One joint tenant cannot be entitled to an estate differing from that of the other in duration or quantity of interest. Thus one cannot be tenant for life, the other for years; one cannot be tenant in fee, and the other in tail. 2 Black. Com. 181; 2 Min. Inst. (4th Ed.) 468; 17 Am. & Eng. Enc. Law (2d Ed.) 649.

Unity of Title.—By unity of title is meant that the estate of the tenants must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin. Joint tenancy cannot arise by descent or act of law, but merely by purchase or acquisition by act of the party; and, unless that act be one and the same, the two tenants would have different titles, of which one might prove good and the other bad, thereby destroying the jointure. 2 Black. Com. 181; 17 Am. & Eng. Enc. Law (2d Ed.) 649; 2 Min. Inst. (4th Ed.) 468.

Unity of Time.—The estates of joint tenants must vest at one and the same period. 2 Black. Com. 181; 17 Am. & Eng. Enc. Law (2d Ed.) 649; 2 Min. Inst. (4th Ed.) 469.

Unity of Possession.—Blackstone defines unity of possession as follows: "Joint tenants are said to be seised *per my et per tout*, by the half or moiety, and by all; that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not, one of them a seisin of one-half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety." 2 Black. Com. 182; Thornton v. Thornton, 3 Rand. 182. See also, 17 Am. & Eng. Enc. Law (2d Ed.) 649.

Mr. Minor says: "What Blackstone, and most writers after him, have denominated unity of possession, might with more propriety be styled entirety and equality of interest; for while they continue to hold together, they are not considered as holding in distinct shares, but each is equally entitled to the whole. And on the other hand, though the entirety ceases for the purpose of alienation, every cotenant being entitled at pleasure to transfer separately his own share, yet the equality remains; for each is capable of conveying an equal share with the rest. This combination of entirety of interest with the power of transferring in equal shares is expressed by the ancient law maxim, that every joint tenant is seised *per mie et per tout*; which seems to import a seisin not by the moiety and the whole, as Blackstone represents, (using the word *my*, instead of *mie*,) but *by nothing and by the whole*, the French *mie* meaning not *moiety*, but *nothing*." 2 Min. Inst. (4th Ed.) 470.

Mr. William Green, in his learned note on the "True Nature of a Joint Tenancy," explains this unity in the following manner: "Bracton says: '*Quilibet cohaeredum tantundem juris habet tenendi haereditatem, quantum et alii; sed tamen non per se ante divisionem, sed pro se in communi cum aliis; et sic totum tenet et nihil tenet, scilicet, totum in communi et nihil separatim per se.*' The words of this quotation extend only to co-parceners; but in exact accordance with the author's meaning, as that is apparent from the context, the concluding expression has been quoted by Sir Edward Coke, and after him repeatedly by others, as descriptive of joint tenants;—of whom, as they existed by the common law, the wit of man cannot devise a more accurate, nor perhaps a more felicitous, representation: And Bracton elsewhere, in speaking of them, uses an expression, in words almost, in effect altogether, identical. The same thing is declared also, not indeed so obviously, nor near so strikingly, but yet with equal certainty, by the phrase (long ago become, from continual use, a *decantatum*), that every joint tenant is seised *per my et per tout*. To make this manifest, let us suppose that A. and B. are thus seised of an estate in land, and let us designate the moieties of their estate (as contradistinguished from both the land which is the subject of it, and the mere possession or occupation thereof), by numbers 1 and 2. Now A. is seised of moiety, 1, and B. is seised of moiety 2, because each is seised *per my*; were this all, each would have the whole of an undivided moiety, and neither would have more, of the estate; but that result, in both its aspects, is prevented by the remainder of the description, according to which each is also seised *per tout*, the consequence whereof is, that A. is seised of moiety 2 as much as he is of moiety 1, and B. is seised of moiety 1 not less that he is of moiety 2; each is seised of both moieties (*per tout*), and both are seised of each moiety (*per my*), at one and the same time;—which cannot be, otherwise than by each being seised, of the whole conjointly with the other, and of nothing whatever separately. Hence Blackstone is right in saying, that of two joint tenants neither (that is neither separately) has the whole of an undivided moiety; but when he says, that 'each has an undivided moiety of the whole,' he uses language that can hardly fail to mislead. In a certain sense each has an undivided moiety, because what he has in a moiety is conjoint; but he has not (what the expression easily may be, and perhaps generally is understood to mean) either separately or only such moiety; for in the same manner, that is to say conjointly with his companion, he has both it and the residue of the estate. * * * When it is affirmed, that each joint tenant owns conjointly with the rest the entire estate, and separately nothing, no more is asserted than that this is so while the joint estate endures. Whenever it is destroyed, in that instant it is transmuted into the estates which succeed it. And what is necessary to a perfect comprehension of the subject, in all its aspects, is (as it seems to me) to keep in view steadily the nature of this transmutation, with a reference to the distinctive principles of the estate, which simultaneously it annihilates, on the one hand, and brings into existence, on the other. Until then, to all intents and purposes, whether as among the joint tenants themselves, or as between all or any of them, on the one hand, and the rest of mankind, collectively or individually, on the other each joint tenant, both in point of seisin and in point of right, has, in the words and meaning of Bracton, *totum et*, or *nihil*: to vary the phrase, and adopt the words, less elegant but quite as significant, of Fleta, on the like occasion, joint tenants are proprietors, '*quorum nullus jus habet separatim, cum jus commune sit in personis omnium simul.*'" Appendix, Wythe's Rep. 391 *et seq.*

2. RIGHT OF SURVIVORSHIP. — "The great incident of estates in joint tenancy is the right of survivorship, or *jus accrescendi*, by which, upon the

death of any one of the joint tenants, the entire tenancy remains to the survivor or survivors, in whom the whole estate becomes immediately vested. By reason of the right of survivorship the interest of a joint tenant is not descendible, and cannot be devised by will. But the right of survivorship may be defeated by a conveyance by a joint tenant of his undivided interest to a stranger." 17 Am. & Eng. Enc. Law (2d Ed.) 649. See also, 2 Min. Inst. (2d Ed.) 476.

Before the Revolution, two brothers, British subjects, purchased jointly lands in Virginia and North Carolina. One, who had acted as agent in said purchases, and was also appointed executor of the decedent, became entitled to the legal right by survivorship; but he repeatedly declared it unconscientious to avail himself of said survivorship and made efforts during his life to confer his brother's interest upon said brother's heirs. So that it was plainly known to be his intention not to take the benefit of his survivorship. After his death, the children of the other brother claimed their father's interest. *Held*, that the survivor was a trustee for the plaintiffs, who were entitled to their father's rights and interests in the lands even against the survivor's devisees. Farley v. Shippen, Wythe 254.

A testator devised a tract of land jointly to his four daughters, who were his only children, and provided a fund to be applied by his executors to pay the quit rents, which they accordingly paid annually; and a surplus remained in their hands. *Held*, that the surviving daughter was not entitled to the whole of that surplus, but each of the daughters to one-fourth. Jones v. Williams, 2 Call 102.

Upon a devise to four children, share and share alike, and in the event of the death of one or more of them, his or their share to go to the survivors, the event which is to fix the rights of the children is the death of the testator. If all survive the testator, each takes his or her share of the real estate devised free from any right of survivorship. Armistead v. Hartt, 97 Va. 316, 33 S. E. Rep. 616, 5 Va. Law Reg. 387.

Gift Over in Event of Death—Only Original Shares Survive.—In the absence of a positive and distinct indication of a contrary intention, only original, and not accrued, shares survive in case of a gift over in event of death. Armistead v. Hartt, 97 Va. 316, 33 S. E. Rep. 616, 5 Va. Law Reg. 387.

Statute Abolishing Survivorship between Joint Tenants.—"When any joint tenant shall die, whether the estate be real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, curtesy, dower or distribution, as if he had been a tenant in common. And if hereafter any estate, real or personal, be conveyed or devised to a husband and his wife, they shall take and hold the same by moieties in like manner as if a distinct moiety had been given to each by a separate conveyance." Va. Code 1887, sec. 2430. The West Virginia Code contains a similar provision. W. Va. Code 1899, ch. 71, sec. 18, p. 681.

Exception.—"The preceding section shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favor of or on any contract with two or more, one of whom dies." Va. Code 1887, sec. 2431; W. Va. Code 1899, ch. 71, sec. 19, p. 681; Bank of Greenbrier v. Effingham (W. Va.), 41 S. E. Rep. 143.

Where two persons unite in a joint deed, giving to a third person all their personal property "that they may have at the time of their death," and reserving the "use and control" thereof "so long as they both shall live," they thereby create a joint tenancy survivorship in such personal property, the manifest intention of which is that, on the death of one, the residue vests in the survivor, and such third person is not entitled to any of their property until the death of both the grantors. Bank of Greenbrier v. Effingham (W. Va.), 41 S. E. Rep. 143.

Statutes Does Not Apply Where One Joint Tenant Dies before Estate Vests.—The Virginia statute abolishing survivorship among joint tenants has no application where the estate in joint tenancy has not vested, and hence upon the death of one of two joint devisees in the lifetime of the testator the whole estate passes to the survivor. Lockhart v. Vandyke, 97 Va. 356, 33 S. E. Rep. 613, 5 Va. Law Reg. 303, and *note*, p. 309.

Former Statute Did Not Apply to Estates by Entireties.—The provision that, "if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs subject to debts, curtesy or dower, as the case may be" was first introduced into our Code by the revisal of 1849. Previous thereto survivorship was abolished only as between joint tenants, which was held not to extend to tenants by entireties. Thornton v. Thornton, 3 Rand. 179; Norman v. Cunningham, 5 Gratt. 70; 2 Min. Inst. (4th Ed.) 477. See Dooley v. Baynes, 86 Va. 644, 10 S. E. Rep. 974. See also, monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

B. TENANCY IN COMMON.—"In a tenancy in common the cotenants hold by one and the same undivided possession, and this unity of possession is the only unity required to constitute such a cotenancy. The extent of the respective interests of the cotenants, their sources of title, the times at which their interests become vested, and the periods of duration may all be different." 17 Am. & Eng. Enc. Law (2d Ed.) 651. See 2 Min. Inst. (4th Ed.) 494.

"Freem. Co-Ten., sec. 86, says that tenants in common have but one unity, that of possession. So unity of title is not necessary to constitute persons tenants in common. If there be unity of possession or unity of right of possession, that is sufficient. 4 Kent Comm. 367, says: 'Tenants in common are persons who hold by unity of possession. They may hold by separate and distinct titles, or by title derived at the same time by the same deed or descent.' 'Persons owning undivided interests in realty are tenants in common, though their titles were acquired by separate conveyances, and at different times.' Stevens v. Reynolds (Ind. Sup.), 41 N. E. 931. Thus it is the law that persons deriving title from one cotenant will be regarded as tenants in common with the other cotenant. Dain v. Cowing, 39 Am. Dec. 585." Cecil v. Clark, 44 W. Va. 659, 30 S. E. Rep. 225. As to the nature of a tenancy in common, see also, Davis v. Settle, 43 W. Va. 17, 26 S. E. Rep. 557.

A life tenant of one undivided moiety of a parcel of land and the fee simple owners of the other undivided moiety, whose estates accrue under the same title, but at different times, are tenants

in common of the land. Carneal v. Lynch, 91 Va. 114, 20 S. E. Rep. 959.

The personal representatives of one or more remaindermen, dying during the lifetime of the lifetenants, are tenants in common with the surviving remaindermen and must be joined with them in an action to recover the property. Clarkson v. Booth, 17 Gratt. 490.

Equality of Interest.—Where there is no evidence as to the shares of the several tenants in common, they are presumed to be equal. Jarrett v. Johnson, 11 Gratt. 327. See also, Livesay v. Beard, 22 W. Va. 595.

Interest of Tenant in Common Subject to Attachment.—The undivided interest of a tenant in common may be levied upon and sold under attachment. The cotenants of the debtor are not proper parties to a suit for such purpose. Curry v. Hale, 15 W. Va. 867.

III. CREATION OF ESTATES IN COTENANCY.

A. GENERAL RULE OF CONSTRUCTION.—"Formerly, joint tenancy was much favored; but for more than a century past the courts have laid hold of every available expression to construe estates given to a plurality of tenants as tenancies in common. And although this innovation began in equity, and in reference to wills, yet it has long prevailed in the courts of common law as well, and the doctrine extends to deeds as uniformly as to wills. Hence, such expressions as 'equally to be divided,' 'share and share alike,' 'respectively between and amongst them,' will, according to this modern construction, convert into a tenancy in common, what would once have been a joint tenancy." 2 Min. Inst. (4th Ed.) 467; Lockhart v. Vandyke, 97 Va. 356, 33 S. E. Rep. 613.

B. JOINT TENANCY.—"A joint tenancy arises by act of the parties, and never by act of law. It may be created by the devise, or by any conveyance *inter vivos*, by words which give an estate to a plurality of persons, without adding any restrictive, exclusive, or explanatory words. Thus, if an estate be granted to A and B and their heirs, this makes them joint tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both." 2 Min. Inst. (4th Ed.) 467; Lockhart v. Vandyke, 97 Va. 356, 33 S. E. Rep. 613, 5 Va. Law Reg. 303.

A devise "unto my two sons, to wit, Charles and Henry, of all the lands I now reside on," makes them joint tenants. Lockhart v. Vandyke, 97 Va. 356, 33 S. E. Rep. 613, 5 Va. Law Reg. 303.

A father and his two sons obtained separate patents for 400 acres of land, the three tracts adjoining each other, and the father obtained a patent for another 400 acres. Afterwards, the three took one inclusive patent for the tracts mentioned and another tract of 1162 acres. *Held*, that this destroyed the separate estates in the first tracts, and created a joint tenancy in the whole 2762 acres. Jones v. Jones, 1 Call 458.

An agreement between two persons for the raising of a crop on the lands of a third, by his license and permission, and for a division of the crop between such two persons, constitutes them joint tenants of the crop, and neither can defeat the interests of the other by taking a conveyance of the lands from the owner. Lowe v. Miller, 3 Gratt. 205, 46 Am. Dec. 188.

A contract between the plaintiff and the defendant that the defendant should purchase for them jointly, at an auction, certain property, it to be divided between them, and the plaintiff to pay the defendant half the purchase price, is not an agreement between them as joint tenants, but as individuals, so that an action for damages will lie for breach thereof. Barnes v. Morrison, 97 Va. 372, 34 S. E. Rep. 93.

Gift to Wife and Children.—As to the effect of a gift "to wife and children," there has been some conflict in Virginia.

In Nye v. Lovitt, 2 Va. Law Reg. 29, 92 Va. 710, 24 S. E. Rep. 345, JUDGE BUCHANAN said: "This court, in a line of decisions beginning with Wallace v. Dold, 3 Leigh 258, and coming down to the case of Stace v. Bumgardner, 89 Va. 418, has held that a grant or gift to a woman and her children or to a trustee for the benefit of herself and children, passed to the mother, and that the mention of the word 'children' in the deed or will merely indicated the motive for the conveyance or gift, without investing them with any interest therein." See *foot-notes* to Stinson v. Day, 1 Rob. 435; Leake v. Benson, 29 Gratt. 153.

"The late JUDGE BURKS, in his excellent note to the opinion in Nye v. Lovitt, 2 Va. L. R. 38, referring to the class of cases beginning with *Wallace v. Dold, supra*, shows that in no one of them is the decision, that the children took no interest, rested alone on the language that the gift is to 'the mother and her children' but that 'the intention to give exclusively to the woman is deduced from the context and the language of the instrument taken as a whole;' and in conclusion he says: 'The decisions only show that when the gift is to the woman and her child or children, or is in trust for them, or like phraseology is used, the children are excluded only when it appears from the context, or the whole instrument taken together, that it was the intention to exclude them.'" Lindsey v. Eckels, 99 Va. 668, 40 S. E. Rep. 23.

In Vaughan v. Vaughan, 97 Va. 322, 33 S. E. Rep. 603, 5 Va. Law Reg. 443, JUDGE RILEY, in a *dictum*, said that such words standing alone would undoubtedly convey a joint estate to the wife and children. See criticism of this *dictum* by Mr. Barbour, 5 Va. Law Reg. 427. See article by Mr. Lile approving *dictum*, 5 Va. Law Reg. 491. See also, *foot-note* to Rhett v. Mason, 18 Gratt. 541.

In Lindsey v. Eckels, 99 Va. 668, 40 S. E. Rep. 23, where a deed conveyed property to a trustee for the use, maintenance and support of a mother, and for the use, maintenance and support of her issue, and the grantor further declared that it was the intention of the deed that the mother should be supported from said property, or the proceeds thereof, during her life, and that the issue, during the life of the mother, should be supported and educated from the proceeds of said property, and, at the death of the mother, all of the property and its proceeds should be divided equally' among such issue, it was held that the mother and her issue each take an equal interest in the proceeds of the property during the life of the mother and, at her death, the issue take the property in fee simple.

It seems that the question has been settled in Virginia by the decision in Fitzpatrick v. Fitzpatrick, 100 Va. —, 8 Va. Law Reg. 437, where it is held that a gift to a wife and children, without more, vests a joint estate in the wife and children, in equal portions.

C. TENANCY IN COMMON.—A tenancy in common may, at common law, be created either by the destruction of an estate in joint tenancy or coparcenary, by which the unity of title or interest, but not

the unity of possession, is severed; or by special limitation in a deed, where property is conveyed to two or more persons in such a manner as not to make them joint tenants. On account of the preference of the common law for joint tenancies, it was customary, where a tenancy in common was intended, expressly to limit the estate to the grantees as tenants in common and not as joint tenants. 17 Am. & Eng. Enc. Law (2d Ed.) 655.

The present tendency of the courts, is to lay hold of every available expression to construe estates given to a plurality of tenants as tenancies in common. And although this innovation began in equity, and in reference to wills, yet it has long prevailed in the courts of common law as well, and the doctrine extends to deeds as uniformly as to wills. Hence, such expressions as "equally to be divided," "share and share alike," "respectively between and amongst them," will, according to this modern construction, convert into a tenancy in common what would once have been a joint tenancy. 2 Min. Inst. (4th Ed.) 467; Lockhart v. Vandyke, 97 Va. 356, 33 S. E. Rep. 613.

Where a tenant of land claims under a tenant in common adversely to other tenants in common, he will, in respect to rents and profits be treated as a tenant in common with them. Ruffners v. Lewis, 7 Leigh 720, 30 Am. Dec. 513.

Devise to Five Children to Be Divided between Them.—The provisions of testatrix's will giving to one daughter one-half the land, her half to be taken off the entire tract next to a certain creek, and to include timber sufficient for said half next to certain lands, and giving the remaining half to be divided equally among the other four children except that one should have $500 more in the half to be divided among the four, constituted the five children tenants in common in the lands, giving one a half interest in value to be laid off when partitioned as directed, and giving to the other four the other half in value, to be so divided that one's share should be greater by $500 in value than that of any of the other three, whose shares should be equal. McCamant v. Nuckolls, 85 Va. 331, 12 S. E. Rep. 160.

Purchase of Undivided Interest in Property.—Where a cotenant conveys his undivided interest in the lands held in common, without the knowledge or consent of his companions in interest, the grantee in the deed is a tenant in common in the land with all the rights and obligations of his grantor with reference thereto. Worthington v. Staunton, 16 W. Va. 208. See *infra*, "Right and Powers of Cotenants—Sale or Conveyance of Common Property."

Where one of two joint tenants of land purchases a large tract including the land held jointly and takes the conveyance to himself, and then conveys part of the large tract including the land held jointly, the grantee in this deed is tenant in common with the cotenant of his grantor; and his possession is, in presumption of law, the possession of all, and is to be deemed in support, and not in derogation of the common title. Buchanan v. King, 22 Gratt. 414.

Where the title to the land held in common is conveyed to one of the joint owners and he, reciting that he owns the whole, conveys one-half of it to a third person, and purports to convey the upper moiety, it will be held that the deed passes only an equal undivided moiety of the common subject, and that the other joint owner and the grantee hold in common the whole subject and every part thereof. Cox v. McMullin, 14 Gratt. 82.

A deed by one of two cotenants purporting to convey a particular tract of the land held in common, though ineffectual to pass the particular tract as against the cotenant, will, as against the grantor and strangers, be effectual to pass the interest of the grantor. Possession under such deed will support a release from the cotenant; and if the part conveyed be assigned the alienee on partition, the title will be absolute in law. The deed being good against the grantor, the entry of the tenant under it would be lawful, and though it might be inoperative as far as the rights of the cotenant were thereby prejudiced, yet as it would invest the grantee with the estate of the grantor so far as he could lawfully convey, the grantee would be tenant in common with the cotenant of his grantor, to the extent of the interest conveyed. His possession and seisin would be the possession and seisin of both, because such possession and seisin would not be adverse to the right of his companion, but in support of their common title. Robinett v. Preston, 2 Rob. 273.

Same—Purchase by Person Claiming under Inferior Title.—Where a person claiming an inferior paper title to land held by cotenants under a superior possessory title obtains possession of the land by any device from the cotenant in actual occupancy thereof, without the knowledge of the other cotenants, his entry will be held to have been under the cotenancy possession, and not under his adverse paper title, and to so continue until perfect disseisin of the other tenants, either presumed from lapse of time or some notorious act of adversary possession or disseisin brought home to the knowledge of the other cotenants. The burden of establishing such perfect disseisin is on the person alleging it. Davis v. Settle, 43 W. Va. 17, 26 S. E. Rep. 557.

Purchase of Property for Partnership Purposes.—Where parties purchase an estate jointly for the purposes of their trade, it is considered in equity as an estate in common, in England, and in Virginia, where the *jus accrescendi* is abolished, it is so considered in law as well as in equity. Therefore, a surviving partner can have no other claim against real estate held in partnership than any other creditor has. Deloney v. Hutcheson, 2 Rand. 183.

Where real estate is purchased for partnership purposes and a conveyance is made to the partners in the name of the firm, the partners are tenants in common of the estate, and hold the legal estate subject to the equities of the partnership. Jones v. Neale, 2 P. & H. 339. See Hancock v. Talley, 1 Va. Dec. 433.

Assignment of Dower in Common Property.—Where a husband holds lands as tenant in common or (now that the *jus accrescendi* is abolished) as joint tenant, dower may be assigned his widow to be held in common with the other tenants. Parrish v. Parrish, 88 Va. 529, 14 S. E. Rep. 325.

D. LAPSE OF LEGACY OR DEVISE.—"In 2 Minor (4th Ed.) at page 1049, it is said: 'The general doctrine at common law is that a devise lapses in all cases where the devisee dies before the testator. And if the devise be to several, as tenants in common, and one of them dies in the testator's lifetime, his share lapses. (See Frazier v. Frazier, 2 Leigh 642.) Where, however, the devise is to several jointly, and one of them dies in the testator's lifetime, his share does not lapse, but survives; for although such joint devisees are not joint tenants until the testator's death, yet the gift to them is a gift *per mie et per tout*, and so, if one should die, whereby, as he has nothing separately, his interest ceases to exist, the other or others are entitled to

the whole as at first, but with no one to share it with them. And as the parties have not become joint tenants, the statute abolishing survivorship does not apply.' The law touching the lapse of devises is to be found in section 2523 of the Code, and is as follows: 'If a devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will;' but, as is justly observed by Mr. Minor, this statute is not applicable where independently of it no lapse could occur, and therefore cannot be invoked in a case such as this, 'for by the force and effect of the joint-taking, the share of the party deceased would survive to the survivor or survivors.' 2 Minor, *supra*. See, also, Pendleton v. Hoomes, Wythe's Reports, p. 94. The law of the subject under consideration is discussed with a great wealth of learning by Mr. William Green in an appendix to the volume just cited, which is quoted in terms of high and deserved approbation in Freeman on Cotenancy and Partition, §§ 28, 40. He reaches the conclusion arrived at by Mr. Minor, and shows that the common-law doctrine is still the law, notwithstanding our statute which abolishes the survivorship among joint tenants. With respect to that statute, he observes that, while it does away with the right of survivorship, it does not destroy joint tenancy. To use his own language: 'It does not annihilate the legal entity called a joint estate, so as to prevent any such estate from vesting, nor does it destroy the joint estate forthwith after it has vested. On the contrary, it permits the estate to subsist as joint, with all its former incidents, during the joint lives of all its owners; and if, in that time, partition be made, or a severance effected without partition, it is quiescent as a dead-letter. It begins to operate at all, only when one of the joint tenants has died before partition or severance. And on the happening of that event, and from thenceforth, it directs that the part of the deceased shall be considered as if he had been a tenant in common, not from the beginning, but only when the event to which it refers happened. Where it applies, and to the extent of its application, it operates, *in articulo mortis*, a statutory severance: and that is all. It does not extirpate the quality of a joint estate, which made it produce, among other fruits, the *jus accrescendi*, but only destroys in the moment of production, or blights by anticipation in the bloom, that particular fruit. In this manner it modifies the nature of a joint tenancy by the common law, so far as to take away one of the incidents which the law has annexed to it, but leaves it in all other respects as it was. In short, since the statute, joint tenants seem to have an estate that is to all purposes joint, both in its inception and also in its continuance, until a destruction or severance thereof takes place; which latter, where an interest has become vested, is effectuated by the statute at the moment any of them dies, to the extent of his part; and henceforth that part is to be regarded as it would have been (though the statute had never been enacted) if the joint estate had been to the same extent dissevered by any of the means which theretofore existed. And, if this be the sum of its efficacy, the consequence seems to be, that in regard to the lapsing of devises and legacies, and also in regard to the vesting of estates created or transferred by conveyances *inter vivos*, it has been productive of no change whatever.' He shows that in a case like that under discussion the doctrine of survivorship has no place, as it applies only where the estate in joint tenancy has been created and has vested; and, therefore, the abolition of the doctrine of survivorship does not affect the common-law rule with respect to the death of one or more devisees during the lifetime of the testator, for it is still true, notwithstanding the statute, 'that each joint tenant takes conjointly with the rest the the entire estate—separately nothing,' from which it follows that 'if one should die, whereby, as he has nothing separately, his interest ceases to exist, the other or others are entitled to the whole as at first, but with no one to share it with them.' 2 Minor 1049. This subject was considered by the Supreme Court of West Virginia in the case of Hoke v. Hoke, 12 W. Va. 427, and a decision rendered in accordance with the views of the text writers above quoted. See, also, 2 Redfield on Wills 169; 3 Lomax Digest 185; 2 Williams on Executors (with Perkins' notes), p. 1311; 2 Jarman on Wills, 265." Lockhart v. Vandyke, 97 Va. 356, 33 S. E. Rep. 613; 5 Va. Law Reg. 393.

A testator gave "all the residuum of his estate to be equally divided between the children of his uncle and his cousin, and their heirs forever, share and share alike." Between the date of the will and the testator's death, one of the children of the uncle died. *Held*, that her share did not lapse, so that the heir at law would take it, but survived to the legatees or their assignees just as if the deceased child had never existed. Pendleton v. Hoomes, Wythe 94.

IV. RIGHTS AND POWERS OF COTENANTS.

A. AS TO USE AND ENJOYMENT OF COMMON PROPERTY.—"The great incident of all cotenancies, whether joint or in common, is the unity of possession by which the tenants hold. Each is entitled, equally with all the others, to the entire possession of the whole property and of every part of it, and no one has the exclusive right to the whole or to any particular part. Towards each other the cotenants, by virtue of this unity of interest, sustain a sort of fiduciary relation, and the acts of any one in relation to the common estate, so far as beneficial thereto, will be presumed to be for and will inure to the benefit of all, while no one will be permitted to deal with the property to the prejudice in any way of his cotenants." 17 Am. & Eng. Enc. Law (2d Ed.) 668.

The entry and possession of one joint tenant or tenant in common is, in presumption of law, the entry and possession of all the cotenants and will be deemed in support and not in derogation of the common title. Buchanan v. King, 22 Gratt. 414.

One cotenant or joint owner of land cannot clandestinely, or without fair notice to his cotenants, stipulate with third persons for any private or selfish advantage and benefit to himself in respect to the joint property; and if he does so, a court of equity will, at the option of the co-owners, compel him to divide such benefits. Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. Rep. 371.

All purchases or sales made of or in respect to the common property of such joint owners by one of them, though made for his own benefit, will, at the option of his co-owners, be declared by a court of equity to be for the common benefit of all the owners. Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. Rep. 371.

Alteration of Common Property.—One tenant in common has no right to change or alter the common property to the injury of the other without his consent. Woods v. Early, 95 Va. 307, 28 S. E. Rep. 374.

Easement on Common Property.—One joint tenant cannot create an easement or servitude upon the common estate injurious to the interests of his cotenant, but if such cotenant does not make objection no one else can do so. Lowenback v. Switzer, 1 Va. Dec. 141.

B. AS TO PURCHASE OF OUTSTANDING TITLE OR INCUMBRANCE.—It is well settled that a coowner of property, finding a defect in the common title, cannot purchase an outstanding title except for the common benefit. This rule is based on the community of interest in a common title creating such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do any thing to the prejudice of the others in reference to the common property. The principle applies equally to joint tenants, tenants in common, coparceners, and all others having a common interest. Forrer v. Forrer, 29 Gratt. 144; Battin v. Woods, 27 W. Va. 58; Bowers v. Dickinson, 30 W. Va. 709, 6 S. E. Rep. 335; Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. Rep. 371; Weaver v. Akin, 48 W. Va. 456, 37 S. E. Rep. 600.

"A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance and asserting it against his companions in interest. The purchase is, notwithstanding his designs to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase, by contributing, or offering to contribute, their proportion of the purchase money." Freeman on Cotenancy, sec. 154. Quoted with approval in Va. Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. Rep. 1020.

Two partners purchased a tract of land for partnership purposes. After the death of one of the partners, it was discovered that the title to one-third of the land was defective, and the surviving partner purchased this third interest and took the conveyance to himself. *Held*, that his purchase was for the joint benefit of himself and the heirs of the deceased partner, and that they were entitled to claim it upon paying their share of the purchase money. Forrer v. Forrer, 29 Gratt. 134.

One of several coparceners claiming under an ancestor who has a defective title cannot purchase the outstanding title, falsely state the consideration in his deed, conceal the fact of purchase from his coparceners, and then rely upon lapse of time to defeat their right to get the benefit of such purchase. Pillow v. Southwest Va. Imp. Co., 92 Va. 144, 23 S. E. Rep. 32.

In Cecil v. Clark, 44 W. Va. 659, 30 S. E. Rep. 216, a *quare* is raised as to whether it is necessary, to enable one tenant in common to share in the benefit of an adverse title or incumbrance purchased by a cotenant, that the two tenants shall have acquired their right by separate instruments; and also as to whether a tenant in common, who has ousted his cotenant and claims adversely, can buy for his sole benefit an adverse incumbrance or title.

Purchase of Tax Title.—Where a cotenant permits the common property to be sold for taxes, and directly or indirectly secures the title in his own name, his deed will be avoided at the instance of his cotenants, or he will be held to be a trustee holding the legal title for their mutual benefit. A purchaser of the common property from such cotenant, with notice of the character of his title, will be limited in his holding to the actual interest of his grantor in such property. Parker v. Brast, 45 W. Va. 399, 32 S. E. Rep. 269.

If oneof several tenants in common purchases the land held in common at a tax sale or from a stranger, who bought it at such tax sale, such title so acquired will inure to the benefit of all the tenants in common. Battin v. Woods, 27 W. Va. 58.

A tax purchase by one tenant in common of the land owned in common is but a redemption, and inures to the benefit of the cotenants. The same is true in regard to a purchase under a sale of land under the common title forfeited for taxes, and sold by a commissioner of school lands. Cecil v. Clark, 44 W. Va. 659, 30 S. E. Rep. 216.

Contribution by Cotenants.—Although it is a general rule that a joint tenant or tenant in common cannot purchase for his exclusive benefit an outstanding adverse incumbrance or title to the common property, yet his cotenant, to participate in its benefit, must, within a reasonable time, make his election to claim its benefit and contribute to the expense of its purchase. If he unreasonably delays until there is a change in the condition of the property, or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new acquisition. Morris v. Roseberry, 46 W. Va. 24, 32 S. E. Rep. 1019; Cecil v. Clark, 44 W. Va. 659, 30 S. E. Rep. 216; Buchanan v. King, 22 Gratt. 414; Pillow v. Southwest Va. Imp. Co., 92 Va. 144, 23 S. E. Rep. 32. See also, Bowers v. Dickinson, 30 W. Va. 709, 6 S. E. Rep. 335. See Cosby v. Lambert, 1 Rob. 225.

Where a joint tenant or tenant in common has obtained the assignment of the sheriff's certificate of sale and purchase from a party who purchased the land so held in common at the sheriff's sale of delinquent land, and as such assignee has obtained a deed therefor, and a party claiming to be a joint tenant or tenant in common with the party obtaining such deed seeks by bill in equity to have said deed set aside as a cloud upon his title, he must tender with his bill a sufficient amount to reimburse the party who so obtained said deed, the amount paid for him in redemption of the land, and all subsequent taxes paid by him thereon, with interest. Morris v. Roseberry, 46 W. Va. 24, 32 S. E. Rep. 1019.

Same—Notice.—In such case, before the cotenant can be held to have abandoned the benefit of the purchase, it must appear not only that he knew of the purchase, but of an adverse claim to its exclusive benefit, set up by his cotenant. He may reasonably presume the acquisition was made to support, not to defeat, the common title. Cecil v. Clark, 44 W. Va. 659, 30 S. E. Rep. 216; Buchanan v. King, 22 Gratt. 414.

And in such case, the burden is upon the purchasing tenant to show that his cotenant had notice of the purchase and of the exclusive claim asserted by him. Buchanan v. King, 22 Gratt. 414.

When several parties, as tenants in common, own lands subject to a mortgage, and they enter into an arrangement by which one of such owners, with other parties, agrees to pay off the mortgage or buy in the land, and hold it subject to redemption by the other owners, and such arrangement is not fully complied with, but one of the owners, without explicit notice to the others that he is not acting under said arrangement, buys in the land for his

own benefit for the balance due on the mortgage debt, which is less than one-tenth of the value of the lands, a court of equity will hold that the purchase was made for the benefit of all the owners. Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. Rep. 371.

If one of several joint owners of a lease, to cure a defect therein, takes an additional lease in his own name, he will be presumed to be acting for the common benefit of all the owners, and that such additional lease is a confirmation of the original lease. To oust his co-owners of such benefit, the second lessor must show that, after they had notice by his acts or words that he had intended to hold his lease adversely to them, they delayed for an unreasonable time in accepting the terms thereof. If for eleven months, by his conduct, letters and words, he leads his co-owners to believe that he has no intention of asserting the second lease in avoidance of the first, but during this period they continue mutually enjoying and developing the common property, he cannot suddenly, and without reasonable notice to them, set up sole ownership under the second lease, and in this manner destroy the common ownership under the first. The dealings between co-owners must be fair and open, and free from deception and evil appearances. Weaver v. Akin, 48 W. Va. 456, 37 S. E. Rep. 600.

Different Owners of Soil and Minerals.—Although a cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance, and asserting it against his companions in interest, yet the owner of the surface of the land and the owner of the minerals under it, where each holds a separate and distinct title, are neither joint tenants, nor tenants in common. They are not the owners of undivided interests in the same subject, but are the owners of distinct subjects of entirely different natures. The title to the freehold of the one, either in the surface or the minerals, cannot be acquired by adverse possession of the other, and the purchase of the outstanding title by the one does not enure to the benefit of the other. In the case at bar the evidence does not support the claim of a resulting trust or a constructive trust in favor of the appellant. Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. Rep. 1020.

C. AS TO SALE OR CONVEYANCE OF COMMON PROPERTY.—A cotenant may convey at his pleasure his undivided interest in all the lands held in common without the knowledge or consent of his companions in interest. In this case the effect of the deed is to place the grantee in the deed in the same position that the grantor had previously occupied, and no possible injury could result to the other cotenants in the tract. Worthington v. Staunton, 16 W. Va. 208. See *supra*, "Creation of Estates in Cotenancy—Tenancy in Common."

A deed from a tenant in common carries to the grantee only an undivided interest in the property, no matter by what description the property is conveyed. Woods v. Early, 95 Va. 307, 28 S. E. Rep. 374.

One of two joint tenants purchased a large tract including the land held jointly, and took the conveyance to himself. He then sold the large tract. It was held that the grantee in this deed was tenant in common with the cotenant of his grantor; and that his possession was, in presumption of law, the possession of all, and was to be deemed in support, and not in derogation of the common title. The acts of the joint tenant in taking the conveyance to himself and conveying to his grantee were not such acts as were equivalent to an actual ouster under the Code of 1860, ch. 135, sec. 15. Buchanan v. King, 22 Gratt. 414.

Where one of several tenants in common, who is in possession of the premises, conveys the same to a third person, who enters under such conveyance, claiming title to the whole, there is an ouster of the other tenants, which will bar their right of entry, if continued for the length of time required to establish title by adverse possession. Johnston v. Virginia Coal & Iron Co., 96 Va. 158, 31 S. E. Rep. 85; Bennett v. Pierce, 50 W. Va. 604, 40 S. E. Rep. 395. See monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

Acts of exclusive ownership by one of two cotenants, such as the open sale, conveyance, and delivery of possession thereunder of the whole subject-matter, amount to a complete ouster of the other cotenant, and unless he brings suit within ten years thereafter his right of recovery will be barred by the statute of limitations. Talbott v. Woodford, 48 W. Va. 449, 37 S. E. Rep. 580.

If, after the right of action has accrued and the statute of limitations has begun to run, such ousted cotenant dies, leaving infant heirs, the statute continues to run, and their rights are barred, notwithstanding their disability, in the same number of years as would bar their ancestor. They do not inherit the land, but a mere limited right of action, with days already numbered; and, unless they or their friends take the necessary legal steps to save the same within the period fixed by statute, their right of action is forever lost. Talbott v. Woodford, 48 W. Va. 449, 37 S. E. Rep. 580.

A conveyance from one coparcener to another coparcener of his undivided interest in the common land does not pass his pre-existing demand against his coparceners or their interests in the land for improvements put upon the land, unless such demand is expressly released or transferred in the conveyance. Ward v. Ward, 50 W. Va. 517, 40 S. E. Rep. 472.

A deed from a cotenant of a part of the land held in common, describing it by metes and bounds, cannot in any way operate to the prejudice of the other tenants in common. They have the right to have the land partitioned, unaffected by such deed. But in a partition in such a case a court of equity will allot the portion so conveyed to the purchaser thereof, if it can be done without prejudice to the rights of the other cotenants. Such a deed will become operative and pass the land to the grantee by metes and bounds, if the other tenants in common before partition confirm and ratify it, and after partition if that portion is allotted to the purchaser thereof; and in either case such deed will be binding on both the grantor and grantee. Worthington v. Staunton, 16 W. Va. 208; Boggess v. Meredith, 16 W. Va. 1; Robinett v. Preston, 2 Rob. 273; Cox v. McMullin, 14 Gratt. 82; Buchanan v. King, 22 Gratt. 422.

Although the party holding in common with others can do nothing to impair or vary in the slighest degree the rights of his cotenants, yet if he executes a deed for the specific portion of the common subject, or makes a contract in regard to it, and upon partition such portion falls in severalty to the parties so making the deed or contract, he will be bound by his act. Cox v. McMullin, 14 Gratt. 82. See also, McKee v. Barley, 11 Gratt. 346; Robinett v. Preston, 2 Rob. 273.

If a tenant in common convey with covenant of general warranty a part of the common subject by

metes and bounds, and upon partition afterwards made a material part of the land so conveyed is allotted to other tenants in common, so that the purchaser does not obtain the substantial inducement to his contract of purchase, upon the prayer of such purchaser a court of equity will cancel and annul such deed, and place the parties *in statu quo*. Worthington v. Staunton, 16 W. Va. 208.

The payment of taxes on an undivided third, or a conveyance of a portion by metes and bounds, not followed by actual entry and possession, does not constitute an actual ouster by one tenant in common of his cotenant. Hannon v. Hannah, 9 Gratt. 146.

V. DUTIES AND LIABILITIES OF COTENANTS.

A. AS TO RENTS AND PROFITS.—At common law neither a joint tenant, tenant in common, nor coparcener occupying the common property, and thus taking more than his share of the rents and profits, can be made to account to his fellows, unless he has been appointed bailiff or receiver by them. Each one has a right to enter and use the land, and this right cannot be impaired by the fact that the others absent themselves or do not claim their right to a common enjoyment. Unless the one in possession denies the right of the others to enter and enjoy the estate, or agrees to pay rent, nothing can be claimed of him. It is presumed that the others consent to his use. He cannot call on the others to help him farm or otherwise use the property, and, in case of loss from failure of crops or other cause, he cannot call on the others to contribute to the loss. If the others do not wish to occupy the premises with their co-owners, the remedy of partition is at hand, or, if the property is indivisible, the court will sell it and divide the proceeds. Ward v. Ward, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911; 2 Min. Inst. (4th Ed.) 475. See also, Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

"At common law, 'if one joint tenant, or tenant in common of land,' says Coke, 'maketh his companion his bailiff of his part, he shall have an action of account against him, as hath been said. But, although one tenant in common, or joint tenant, without being made bailiff take the whole profits, no action of account lieth against him: for in an action of account, he must charge him either as a guardian, bailiff, or receiver, as hath been said before: which he cannot do in this case, unless his companion constitute him his bailiff. And, therefore, all those books which affirm that an action of account lieth by one tenant in common or joint tenant against another, must be intended, when the one maketh the other his bailiff, for otherwise, never his bailiff to render an account, is a good plea.' 1 Tho. Co. 787 marg. And in a note by the editor, it is said: 'At common law joint tenants and tenants in common had no remedy against each other, where one alone received the whole profits of the estate, since he could not be charged as bailiff or receiver to his companion, unless he actually made him so.' Id. 788, note (R)." Early v. Friend, 16 Gratt. 42.

But it is provided by statute in Virginia and West Virginia that an action of account may be maintained by one joint tenant or tenant in common, or his personal representative, against the other for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common. Va. Code 1887, § 3294; W. Va. Code 1899, ch. 100, § 14, p. 770.

This statute has been held not to apply to parceners. Ward v. Ward, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911. Mr. Minor, however, is of opinion that it extends to them also by construction. See 2 Min. Inst. (4th Ed.) 476.

The only purpose of this statute "is to change the common-law rule of nonaccountability as to the ordinary use of the common property which a cotenant may legitimately make of it. Such legitimate use contemplated by that section does not waste the property by damaging the inheritance permanently, but leaves it, after such use, intact, uninjured, ready for partition, as before such use. That statute only says that if one cotenant, by such lawful use for ordinary purposes, get more than his fair share, he shall account for the excess to him entitled to the excess. Such construction of this statute was given in Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411, and Ward v. Ward's Heirs, 40 W. Va. 611, 21 S. E. Rep. 746." Cecil v. Clark, 47 W. Va. 402, 35 S. E. Rep. 11.

Whenever the nature of the property is such as not to admit of its use and occupation by several, and it is used and occupied by one only of the tenants in common; or whenever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share and proportion in the meaning of the statute. Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Rust v. Rust, 17 W. Va. 901; Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415.

If one tenant in common take coal from land without the consent of another, he must account to that other therefor, and cannot keep the proceeds of the sale of the coal, without accounting, on the theory that the portion of land furnishing the coal is no more than his just share. The statute does not apply to this case. It relates to rents and profits only in ordinary cultivation or other use authorized by law to one tenant in common. Cecil v. Clark, 47 W. Va. 402, 35 S. E. Rep. 11.

The statutory action for rents and profits where one cotenant has received more than his proper share does not apply to a case of waste by a cotenant. Cecil v. Clark, 47 W. Va. 402, 35 S. E. Rep. 11; Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

Tenant Not Liable for Rents and Profits Unless He Has Received More Than His Just Share.—Every tenant in common has a right to possess, use and enjoy the common property, without being accountable to his cotenants for rents and profits, except when he has received more than his just share thereof. Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

Where the nature of the property is such as to admit of its use and occupation by several, and less than his just share and proportion of the common property is used and occupied by one tenant in common in a manner which tends in no way to hinder or exclude the other tenants in common from in like manner using and occupying the common property, such tenant does not receive more than comes to his just share and proportion in the meaning of the statute, and is not accountable to his cotenants for the profits of that portion of the property used by him. Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415.

Where a tenant in common uses the land for purposes allowable by law to a tenant in common, but uses no more than his share, and does not exclude his cotenant, he is not accountable to him for rents

and profits. Cecil v. Clark, 47 W. Va. 402, 35 S. E. Rep. 11.

No Liability Where Tenant Has Received No Rents and Profits.—Where one tenant in common holds the common property to the exclusion of his cotenant, he is not chargeable with rents or profits where none have been made, provided he has employed the property in good faith with a view to make it profitable, but has failed in doing so; nor is he chargeable with speculative profits where the real profits are susceptible of being ascertained. Ruffners v. Lewis, 7 Leigh 720, 30 Am. Dec. 513.

Liability Where Premises Are Occupied by One Cotenant.—Where one joint tenant or tenant in common has the possession and sole enjoyment of the common property, he is accountable to his cotenants for receiving more than his proportionate share of the rents and profits of the common property, whether he has rented the property out or has occupied and used the whole property himself. Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658; White v. Stuart, 76 Va. 546; Rust v. Rust, 17 W. Va. 901; Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415.

If one tenant in common uses the common land, and excludes his cotenant, he is accountable to such cotenant, though he does not take beyond his just share of rents and profits. Cecil v. Clark, 47 W. Va. 402, 35 S. E. Rep. 11.

One tenant in common may maintain a suit in equity against his cotenant, who has occupied the whole of the common property, for an account of rents and profits. Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649.

A brother and sister were joint tenants of a furnace, forge, and a large quantity of land derived from their father, and the brother, who had conducted the business for some years in the lifetime of his father, continued to carry it on with the assent of his sister, without any contract with her. *Held*, that he must account to his sister for her share of the profits, and though they had attempted to come to an agreement upon a rent which should be paid for her half of the property, and the brother seemed to have thought that his proposition had been acquiesced in, and did not keep such accounts as he should have kept to enable him to render the account of profits to her yet she was entitled to have the account taken, and to have her share of the profits. Newman v. Newman, 27 Gratt. 714.

Where one of the cotenants entitled to partition had the possession and enjoyment of the whole land for many years, through want of knowledge of the title of the other cotenants, to whom he made their title known immediately after it was discovered by himself, it was considered equitable, upon a bill filed by them for partition, that he should account for their proportions of the rents received by him, deducting his disbursements for securing the title; that all the leases and agreements of lease he had made of the land should be acquiesced in by the plaintiffs; and that for the part which he had sold he should pay the price received with interest from the time of sale, the time when he received it not appearing to be different from that of the sale. Interest would also have been allowed the other cotenants on their proportions of the rents received by him from the time of filing their bill; but by their consent it was allowed from the beginning of the next year after the last receipt. Carter v. Carter, 5 Munf. 108.

Same—Occupying Tenant Not Liable for Rents and Profits Arising from His Own Expenditures.—But the occupying tenant is liable only for a reasonable rent for the property in the condition in which it was at the time it went into his possession. The cotenants are not entitled to the benefit of the issues and profits made by the application of the skill, labor and capital of the occupying tenant upon the property. Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658; White v. Stuart, 76 Va. 546; Rust v. Rust, 17 W. Va. 901; Moore v. Ligon, 30 W. Va. 146, 3 S. E. Rep. 572.

Measure of Accountability to Cotenant.—As a general rule, where a tenant in common uses the common property to the exclusion of his cotenants, or occupies and uses more than his just share or proportion, the best measure of his accountability to his cotenants is their shares of a fair rent of the property so used and occupied by him. Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658; Early v. Friend, 16 Gratt. 21, 100 Am. Dec. 649; Newman v. Newman, 27 Gratt. 714.

Where the common property is rented out by one tenant in common, he is accountable to his cotenants for their share of the rents he has received. And where he occupies and uses the whole property himself, he is liable to his cotenants for a reasonable rent for it in the condition it was when he took possession. Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Rust v. Rust, 17 W. Va. 901; Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415.

But there may be peculiar circumstances in a case making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common. Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658; Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Newman v. Newman, 27 Gratt. 714.

Thus in the case of a tenancy in common in lead mines, an account of issues and profits is the proper mode of adjustment. And in settling the accounts of the operating tenants, they should not be charged a certain sum per ton for the ore raised from the mine, or credited with an estimated sum per ton for raising the ore and manufacturing the lead; but each so operating, is to be charged with all his receipts and credited with all his expenses, including those for necessary improvements, on account of the operation of the mine. Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658. See Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

The defendants, who were joint owners with others of certain salt works, occupied the joint property from January 1, 1861, to January 1869, without the consent of the other joint owners. During these years an extraordinary profit was realized, which could not at the beginning of such occupation have been anticipated. The property was, however, destroyed by armed forces in 1864. *Held*, that the defendants were liable for a reasonable rent, based on the condition of the property at the time of their taking possession, but were not accountable to the plaintiffs for the extraordinary profits realized by them during their occupancy, nor were they liable to the plaintiffs for rent after the destruction of the property. White v. Stuart, 76 Va. 546.

A tenant in common in sole possession claiming exclusive ownership, taking petroleum oil, and converting it to his exclusive use, is liable to account on the basis of rents and profits, not for annual rental. Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

Where a guardian, duly qualified, has agreed with a co-guardian of a brother of his ward's upon a rent to be paid for a store, the joint property of himself and the ward, and occupied by such guardian, and has regularly accounted for such to the other guardian, and, on his own ward's marriage, has settled in full with her husband on that basis, and, after the lunacy of such husband, has settled in full with the wife, and has continued to pay the rent agreed upon to the parties entitled, without complaint, during several years, he cannot afterwards, in an action brought by his ward, be compelled to account for a higher rate than that agreed upon and paid by him. Paxton v. Gamewell, 82 Va. 706, 1 S. E. Rep. 92.

In ascertaining what is a reasonable rent, where the report of the commissioner is concurred in by the court below, the appellate court will not reverse except in case of palpable error. White v. Stuart, 76 Va. 546.

Where the occupying tenant was allowed all his expenses, in carrying on the business, including $1500 a year for his services, and interest on his capital employed in it until it became self-sustaining, and was also allowed by the decree three-fifths of the net profits, it was held that he at least could not complain of the decree. Newman v. Newman, 27 Gratt. 714.

Set-Off and Counterclaim.—Where a tenant makes permanent improvements on the land, which greatly enhance the value thereof, he is entitled to abate from the amount of rents with which he is chargeable the value of such improvement, and all taxes upon the land paid by him while in his possession. Moore v. Ligon, 30 W. Va. 146, 3 S. E. Rep. 572. See Newman v. Newman, 27 Gratt. 714.

In an action of trespass for mesne profits, the defendant is not entitled to offset his improvements against the rent, if at the time they were made he had knowledge of the plaintiff's title, although he in good faith believed his own title to be the better in point of law. Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

Where an accounting is had between tenants in common, the expenditures of each year should be offset against the rents and profits of that year, and the claim for improvements in any one year should be liquidated in whole or in part by the rents and profits of that or any succeeding year. Ruffners v. Lewis, 7 Leigh 720, 30 Am. Dec. 513.

In Ruffners v. Lewis, 7 Leigh 720, parties holding adversely to the plaintiff, were treated as tenants in common with them, and as they had bored wells, and had discovered and produced salt water, were allowed improvements, including the costs of the wells, as set-offs against rents and profits, and even for abortive wells, the court saying: "The plaintiffs, if they will have advantage from their successes, must be content to share their disappointments and failures. He who takes the profit must share the burden." See Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

Abatement of Rent Where Premises Destroyed.—In the absence of express covenant to pay rent, the occupying tenant is not liable for the same, where the premises are destroyed, whatever the rule may be in case of such express covenant. White v. Stuart, 76 Va. 546.

The defendants, who were joint tenants with others of certain salt works, occupied the joint property from 1861 to 1869, without the consent of the other joint owners. The property was destroyed by armed forces in 1864. *Held*, that the defendants were not liable to the plaintiffs for rent after such destruction. White v. Stuart, 76 Va. 546.

Interest.—Interest is to be paid upon the annual rent found to be due at the end of each year from the tenant in possession to his cotenant; and the interest should be upon the amount due at the end of each year. Rust v. Rust, 17 W. Va. 901; Earley v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415.

B. AS TO IMPROVEMENTS AND REPAIRS.

Right to Reimbursement for Improvements.—Where one tenant in common lays out money in improvements on the estate, although the money so paid does not in strictness constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account, and a suitable compensation. To entitle the tenant in common to an allowance on a partition in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his cotenants to such improvements, or a promise, on their part, to contribute their share of the expense, nor, is it necessary for him to show a previous request to join in the improvements, and their refusal. The allowance of compensation for improvements is, in all cases, made, not as a matter of legal right, but purely from the desire of the court to do justice, and therefore the compensation will be estimated so as to inflict no injury on the cotenant, against whom the improvements are charged. Ballou v. Ballou, 94 Va. 350, 26 S. E. Rep. 840.

Where improvements, such as clearing and fencing and building a house, are done by one tenant in common with the assent of the others, or when they know that such improvements are being made and do not object, such tenant in common is entitled to the full benefit of the increased value of the land either by having his improvements assessed at the rate the land would have been worth before the improvements were made, or, if the land is sold, to have an additional part of the price allowed him, which shall be equal to the increased price obtained as the result of his improvements. Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415.

"Improvements made by one cotenant, independent of any agreement so to do, may sometimes be proper matter to be considered in taking an account; but under what circumstances, and to what extent, improvements may be considered in taking an account between cotenants, cannot be stated with desirable precision. It is probable, however, that they will not be made a subject of compensation, unless they are of an usual character and necessary for the ordinary and conceded use of the property." Freemans's Cotenancy & Partition, § 279. Quoted in Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

In the case of a tenancy in common lead mines, the operating tenant in common should have a credit in his account for improvements made by him which were necessary to his operation of the mine. Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

Where a tenant in common improves the property at his own expense, without the assent of his cotenants, limitations do not begin to run against the equity for compensation till a partition is asked. Ballou v. Ballou, 94 Va. 350, 26 S. E. Rep. 840.

Right to Recover Directly from Cotenant Denied.—Where a tenant in common improves the property at his own expense, without the assent of his co-

tenants, he cannot maintain an action of assumpsit to recover any part of the costs of improvement from his cotenants. Ballou v. Ballou, 94 Va. 350, 26 S. E. Rep. 840.

One cotenant cannot compel another to make improvements on the common property, nor maintain an action against him personally to compel contribution to the expense of improvements made thereon without his consent, express or implied, nor fix it as a lien on his interest in the estate, except that at common law by the writ of *de reparatione facienda* all the tenants could be compelled to unite in the expenses of the necessary repairs of a house or mill owned by them. Ward v. Ward, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911.

Permanent improvements made by one coparcener, without the request or agreement of the others, are not chargeable to the others personally or upon their shares in the land; but, if made by their request or agreement, they are a debt upon them, and a lien on their shares in the land. Ward v. Ward, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911.

Where one joint tenant or tenant in common, without denying his cotenant's title, and without his cotenant's consent, makes improvements, he cannot charge him, nor hold exclusive possession until reimbursed by rents and profits. Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

When two joint tenants of real estate agree with each other that one shall, with his own money, erect improvements on the real estate jointly held, and have lien on the interest of the other for the money so expended, the agreement, with the actual erection of the improvements by the one and the acquiescence of the other, constitutes such a lien as will be recognized and enforced in a court of equity. Houston v. McCluney, 8 W. Va. 135.

Where improvements are made with the consent of the cotenants, they are personally bound, and the demand is a lien on their shares. Ward v. Ward, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911.

But such lien is not valid, and will not be enforced in favor of the tenant who erects the improvements, against a creditor of the other, who has caused his interest in the property to be attached or a purchaser under such attachment, whether the creditor attaching, or the purchaser under the attachment, have notice of the previous equitable lien or not. Houston v. McCluney, 8 W. Va. 135.

Allowance for Improvements on Partition.—On partition the part improved, if it can be done without injury to others, should be assigned to the improver; but, where this cannot be done, the cost of improvement cannot be charged to him to whom it goes. Ward v. Ward, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911. On the subject of partition generally, see monographic *note* on "Partition."

Where a tenant in common has laid out money in erecting buildings, or making other substantial improvements, the court may, in entering a decree in partition, direct that the portion of the premises which has thus been enhanced in value shall be assigned to him, or if this cannot be done conveniently and it becomes requisite to proceed to a sale, that the purchase money shall be so apportioned as to reimburse him for his outlay. Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415.

Where, however, the property is not susceptible of partition, and must be sold to divide the proceeds, the coparcener who made repairs and permanent improvements shall receive out of the proceeds that amount by which the property, at the date of sale, remains enhanced in value from the improvements, not their original cost. Ward v. Ward, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911. See Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415.

Same—Amount Allowed.—Where property is not susceptible of partition, and must be sold to divide the proceeds, the coparcener who made repairs and permanent improvements should be allowed out of the proceeds of the sale that amount by which the property, at the date of the sale, remains enhanced in value from the improvements, not their original cost. Ward v. Ward, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911.

Setting Off Improvements against Rents and Profits.—Improvements made by a tenant in possession may be set off against the rents and profits due from him to his cotenant. Ruffners v. Lewis, 7 Leigh 743, 30 Am. Dec. 513; Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658; Moore v. Ligon, 30 W. Va. 146, 3 S. E. Rep. 572. See Newman v. Newman, 27 Gratt. 714.

There is a difference between the case where the party making improvements seeks, as an actor or plaintiff, to set up a debt against the co-owner or his land for improvements, and one where the co-owner calls on the other to account for rents and profits; for in the former case, generally, the party will fail, and in the latter, if the party has acted in good faith, he will be allowed to set off improvements. Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411. See opinion in Effinger v. Hall, 81 Va. 103; 3 Pom. Eq. Jur. § 1241.

Repairs.—"The rule applicable in the matter of repairs is different from that in the case of improvements. In the former case the weight of authority is that, when the repair of joint property is necessary to its use and preservation, one joint tenant, when his fellows refuse to unite, may have the property repaired and sue for compensation, but we have been referred to no authority which holds that this can be done in the case of improvements." Ballou v. Ballou, 94 Va. 350, 26 S. E. Rep. 840.

Where the plaintiff in an action of trespass for mesne profits seeks, in addition to the rent, to recover damages for waste occasioned by the failure of the defendant to make proper repairs, the improvements made by the defendant in the general nature of repairs should be taken into consideration in estimating the general depreciation of the value of the property through fault of the defendant. Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

C. AS TO WASTE.—By the common law one joint tenant or tenant in common could not recover against another for waste, because each was entitled to the possession of the undivided whole, and so might obtain redress as to waste on the part of his fellow by entering upon and occupying the premises. 2 Min. Inst. (4th Ed.) 475, 498. But it is provided by statute in Virginia and West Virginia that "if a tenant in common, joint tenant, or parcener commit waste, he shall be liable to his contenants, jointly or severally, for damages." Va. Code 1887, § 2776; W. Va. Code 1899, ch. 92, § 2, p. 754; Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

Whether any particular act on the part of a joint tenant or tenant in common constitutes waste, depends on the circumstances of each particular case, and is often varied by the locality of the act complained of. Thus, the cutting of timber in

some sections may be considered waste, while in others it is a positive benefit. Hence, in every case, the law on this subject must be applied with reasonable regard to circumstances. See McDodrill v. Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. Rep. 878; Findlay v. Smith, 6 Munf. 134; Macaulay v. Land Co., 2 Rob. 507. See also, monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

It is waste in a tenant in common to take petroleum oil from the land, for which he is liable to his cotenants to the extent of their right in the land. Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

The extraction of coal by one tenant in common without consent of another is waste, for which he must account to that other. Cecil v. Clark, 47 W. Va. 402, 35 S. E. Rep. 11.

A tenant in common occupying and using the common property separately, will be responsible to his cotenants, if he wilfully or by gross negligence destroys or wastes the common property. Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

But he cannot be held responsible for such destruction or waste in a case in which the bill does not charge it. Graham v. Pierce, 19 Gratt. 28, 100 Am. Dec. 658.

Cotenants, who commit waste, are liable to each other jointly or severally for the damages; but the amount of a recovery against a stranger or a grantee of a cotenant must be apportioned to correspond with his undivided interest in the land. McDodrill v. Pardee & Curtin Lumber Co., 40 W. Va. 564, 21 S. E. Rep. 878.

When a tenant in common has become liable for damages for waste, under W. Va. Code 1899, ch. 92, § 2, p. 754, by the removal of coal from the premises, the cotenant injured may waive the tort, and require an accounting for money had and received, when the coal has been sold by such tenant. Cecil v. Clark, 49 W. Va. 459, 39 S. E. Rep. 202.

If a tenant in common takes possession of the premises to the exclusion of his cotenant, and leases the same to third parties for the purpose of the mining and removal of the coal therefrom, at a specified sum per ton, as royalty for the coal so removed, the cotenant so excluded may require an accounting to him for his just proportion of such royalty, as the proper measure of damages for such waste. Cecil v. Clark, 49 W. Va. 459, 39 S. E. Rep. 202.

When a tenant so taking possession and leasing the premises for operating the coal purchases front lands in his own right, and not as common property, which are absolutely essential for right of way for the removal of the coal, in accounting to his cotenant for his proportion of the royalty when the tort has been waived, legal interest on the amount of money invested in the purchase of such front lands is a just compensation for the use thereof. Cecil v. Clark, 49 W. Va. 359, 39 S. E. Rep. 202.

The statutory action for rents and profits where one cotenant has received more than his proper share does not apply to a case of waste by cotenants. Cecil v. Clark, 47 W. Va. 402, 35 S. E. Rep. 11; Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411.

VI. ACTIONS BETWEEN COTENANTS.

Action of Account.—Since the possession of one joint tenant or tenant in common is the possession of all, and all are equally entitled to the use and enjoyment of the common property, it followed that at common law no action would lie by one tenant against his companion for profits or income of the common property, unless he had been appointed bailiff by his cotenant. But this rule of the common law has been changed in Virginia and West Virginia by the statute which provides that an action of account may be maintained by one joint tenant or tenant in common, or his personal representative, against the other for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common. Va. Code 1887, § 3294; W. Va. Code 1899, ch. 100, § 14, p. 770. See *supra*, "Duties and Liabilities of Cotenants—As to Rents and Profits."

Action for Improvements and Repairs.—One joint tenant or tenant in common cannot maintain an action against his cotenant personally to compel contribution to the expense of improvements made on the common property without his consent, express or implied, nor fix it as a lien on his interest in the estate, except that, at common law, by the writ of *de reparatione facienda* all the tenants could be compelled to unite in the expenses of the necessary repairs of a house or mill owned by them. Ward v. Ward, 40 W. Va. 611, 21 S. E. Rep. 746, 52 Am. St. Rep. 911. See *supra*, "Duties and Liabilities of Cotenants—As to Improvements and Repairs."

The mere fact of improving the common property by a joint tenant does not raise an implied assumpsit on the part of the cotenants to contribute to the expenses thereof, and no action therefor will lie by the tenant making the improvements. The rule is otherwise where repairs are made on the common property by one joint tenant at his sole expense. Ballou v. Ballou, 94 Va. 350, 26 S. E. Rep. 840.

Trover.—Trover lies by one tenant in common of a personal chattel against his cotenant for the appropriation of the chattel to his exclusive use, where the chattel is of such a nature as to be necessarily destroyed by the use thereof. Lowe v. Miller, 3 Gratt. 205. See also, monographic *note* on "Trover and Conversion" appended to Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163.

Waste.—At common law one joint tenant or tenant in common could not recover against another for waste, because each was entitled to the possession of the undivided whole, and so might obtain redress for waste on the part of his cotenant by entering upon and occupying the premises. But in Virginia provision is made by statute for a remedy by one cotenant against another for waste. See *supra*, "Duties and Liabilities of Cotenants—As to Waste."

Ejectment—For a full treatment of the subject of ejectment, see monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

Ejectment may be maintained by one tenant in common against another; but in such case actual ouster must be shown by the plaintiff before he can maintain the action. The *pro forma* confession of ouster, which a defendant was required to make under the old "consent rule" before being allowed to plead, was not sufficient to satisfy this rule. Taylor v. Hill, 10 Leigh 457.

In ejectment between cotenants, where the defendants rely upon adversary possession, and acquiescence by the plaintiffs, letters by a party under whom the defendant's claim, and also a correspondence between one of the plaintiffs and the agent of the defendant, may be competent evidence to show for what purpose the tenants in possession had claimed the property, and the plaintiffs acquiesced in their claim. Stonestreet v. Doyle, 75 Va. 356.

Trespass for Mesne Profits.—In an action of trespass for mesne profits, if the defendant at the time of the inception of the cause of action had knowledge of the plaintiff's title, although he honestly believed that he held the superior legal title, the measure of damages is not the actual receipts, but is the fair annual rental of the property, with legal interest, less the taxes paid by the defendant. Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

In such action the defendant is not entitled to offset his improvements against the rent, if at the time they were made he had knowledge of the plaintiff's title, although he in good faith believed his own title to be the better, in point of law. Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

If, in addition to the rent, the plaintiff seeks to recover damages for waste occasioned by the failure of defendant to make proper, tenantable repairs, and his abuse and misuse of the property, the improvements made by the defendant in the nature of general repairs should be taken into consideration in estimating the general depreciation of the value of the property through fault of the defendant. Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

The defendant is not liable for natural wear and tear resulting from the lapse of time and the proper use of the property, but only for the damages occasioned by his negligence, misuse or abuse. Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

Where the action is not founded on the want of probable cause and maliciousness, punitive damages are not recoverable, and evidence tending to establish the same is not admissible. Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

The true measure of damages is compensation for the actual loss sustained by the plaintiff in being deprived of the use of his property, and speculative profits, founded on an exaggerated notion of the real value of the property, are not recoverable. Evidence tending to establish such speculative profits is inadmissible, as it may mislead the jury in arriving at the fair rental of the property. Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

Suits in Equity.—As one joint tenant or tenant in common was not allowed at common law to have an action *ex contractu* against his cotenant, except as bailiff, his only remedy was by bill in equity. The statute allowing an action of account between cotenants did not abridge the remedy in equity; and, where a case is presented involving a variety of adjustments, a bill in equity is still the usual mode of relief against a cotenant who has received more than his just share or proportion. 2 Min. Inst. (4th Ed.) 498; Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649; Rust v. Rust, 17 W. Va. 901; Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415.

Same—Injunction.—A court of equity will grant an injunction in favor of a tenant in common to restrain the commission of a continuing and permanent injury, as where one tenant in common of a building erects a wall in the hallway thereof so as to interfere with the free enjoyment of the building. Woods v. Early, 95 Va. 307, 28 S. E. Rep. 374.

A court of equity has no jurisdiction to restrain one joint devisee of land from entering thereon, at the suit of a tenant claiming under the other devisees. Baldwin v. Darst, 3 Gratt. 132.

VII. ACTIONS AGAINST THIRD PERSONS.

The personal representative of one or more remaindermen, dying during the lifetime of the life tenant, is tenant in common with the surviving remaindermen, and must be joined with the remaindermen in an action to recover the property. Clarkson v. Booth, 17 Gratt. 490.

In Walton v. Hale, 9 Gratt. 194, a *quære* was raised as to whether a tenant in common of an undivided interest in land may maintain a caveat against the issuing of a grant of a third person, upon a survey of part of the land embraced within the limits of an amount in which he holds an undivided interest.

Unlawful Detainer.—One joint tenant or tenant in common may, in an action of unlawful detainer, recover the possession of the whole land, without joining his cotenant in the action. Voss v. King, 33 W. Va. 236, 10 S. E. Rep. 402; Allen v. Gibson, 4 Rand. 468.

Ejectment.—A plaintiff in an action of ejectment can only recover that to which he has the legal title. He cannot recover the share of his cotenant or coparcener. If an ineffectual partition has been made, each joint tenant is still seised of his individual share of the whole, and cannot recover more in an action of ejectment. Nye v. Lovitt, 92 Va. 710, 24 S. E. Rep. 345. See *supra*, "Actions between Cotenants."

One joint tenant cannot recover, in an action of ejectment in his own name, as sole plaintiff, the interests of himself, and his cotenants. He can only recover that to which he has the title, and if this be an undivided interest he must prove what his proportion is, else there must be judgment for the defendant. Marshall v. Palmer, 91 Va. 344, 21 S. E. Rep. 672.

VIII. SEVERANCE OF COTENANCY.

Joint tenancy is severed or dissolved by destroying any of its constituent unities; and if it be any other unity than that of possession, the holding then becomes a tenancy in common. For a discussion of the severance of the relation of joint tenancy, see 2 Min. Inst. (4th Ed.) 478 *et seq.* See also, 17 Am. & Eng. Enc. Law (2d Ed.) 708.

Since the unity of possession is the only unity in a tenancy in common, such tenancy is severed or dissolved by disuniting the possession and assigning to each tenant his share in severalty, or by uniting all the shares in the hands of some one of the tenants, or by agreeing to do one or the other of these things. See discussion of this subject in 2 Min. Inst. (4th Ed.) 501 *et seq.* See also, 17 Am. & Eng. Enc. Law (2d Ed.) 711.

The usual mode by which a cotenancy is dissolved is by partition or the division of the common property between the several cotenants, so that they shall thereafter hold their respective shares in severalty. Partition may be affected either by act of the parties or by judicial proceedings. For a full discussion of the subject of partition, see monographic *note* on "Partition."

BETWEEN

CHRISTOPHER ROANE, Frederick Woodson, William Armistead, Thomas Quarles, John Fleet, Dudley Digges, Nathaniel Littleton Savage, William Graves, Samuel Tinsley and Thomas Carter, officers of the state line, *appellants*,

AND

JAMES INNIS, attorney general, and Jaquelin Ambler, treasurer, *defendents*,

and John Pendleton, auditor for public accounts, *appellee.*

Oct., 1793.

1. **Revolutionary Officers—Discharged in 1783—Right to Half Pay.**—Revolutionary officers in one of the legions raised by Act of 1781, who continued in service from the time of entering it, until Feb. 1783, when they were discharged by the Governor, and were not afterwards required to enter into service again, HELD, by Court of Appeals, not entitled to half pay, because they were discharged before the preliminary articles of peace were notified, on the 19th day of April, 1783, and did not again enter into service and continue therein to the end of the war. Opinion of General Court reversed.

2. **Same—Same—Same.***—The judgement of the Court of Appeals being without prejudice to any future claim on fuller evidence, the question came before the H. C. C., which decreed the half pay; and commutation,—to such as were entitled to commutation.

3. The Chancellor's remarks sustaining his opinion against that of the Court of Appeal.

THE plaintiffs, who were officers in one of the legions, raised for defence of the commonwealth, by an act passed in the spring session of 1781, continued in service, from the time of entering into it, until february, 1783, when they were discharged by the governor, after which time they were not required again to enter into service.

They, supposing that officers of the commonwealth's battalions who were supernumerary by reduction of their battalions before the end of the war, if they were not required to enter into service again, were intitled to half pay, during life, by 244 the *words of the act of general assembly, passed in the may session of 1779, concerning, officers, soldiers, sailors, and marines, (a) and also supposing themselves, by the act of 1790, giving compensation of half pay to certain officers of the state line intitled to the same compensation as the law allowed to officers of the battalions, exhibited their clames for half pay, or, in lieu of it, the commutation of five years full pay, to the auditor for public accounts, who disallowed their claims.

From his disallowance the plaintiffs appealed separately, each of them stating his case in a petition to the judges of the district court, holden in Richmond.

That court referred the case to the general court, who certified their opinion in these terms:

'That under the act of may, 1779, the general officers, field officers, captain and subalterns, physicians, surgeons, and surgeons mates, then on duty, or who should afterwards be placed on duty, in the battalions at that time raised, for the continental or state service, were intitled to half pay, unless they failed to serve until the end of the war, or being supernumerary refused to enter again into the service on a command to that effect, or unless they were in the service of Georgia, or another state, or provided for in this respect by congress; that the respective laws, under which they have been appointed, and the act of 1790, intitle all such persons as are described in the act of 1779, who belonged to the state line, and who have been appointed since the passing the act of 1779, to the like allowance of half pay, provided they served to the end of the war, or being supernumerary did not refuse to enter again into the service, on a command to do so, and that the troops being disbanded in the month of february, 1783, and the preliminary articles of peace being signed before that period, the officers ought to be considered to have served to the end of the war.'

Whereupon the district court ad- 245 judged the plaintiffs intitled *to the commutation clamed by them, and ordered the auditor to issue to each petitioner a certificate accordingly.

From which judgement, on the prayer of the attorney general for the commonwealth, an appeal was allowed; and

The court of appeals, on the 2 day of may 1792, delivered the following opinion in the case of one of the petitioners:

'That under the act of Assembly, passed in May, 1779, intituled an act concerning officers, soldiers, sailors, and marines, and all subsequent acts made respecting them, only such of the general officers of the state army, being citizens of this commonwealth, and such of the field officers, captains, and subalterns, serving in the battalions raised for the immediate defense of this state, and such of the chaplains, physicians, surgeons and surgeons mates as were appointed to the said battalions, being citizens of this commonwealth, and not being in the service of Georgia, or any other state, and for whom congress hath not made any adaequate provision, and only such of them as actually served thence forward, or from the time of their being commissioned, until the end of the war, unless restrained by being prisoners of war, on parole, or otherwise, and also only such of the said officers who became super-

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*On appeal, the decree of the high court of chancery in this case was unanimously reversed. See Innis v. Roane, 4 Call 379.

The principal case was cited in Lilly's Case, 1 Leigh 549, 559, 562.

(a) 'All general officers of the army being citizens of this commonwealth, and all field officers, captains, and subalterns, commanding, or who shall command in the battalions of this commonwealth on continental establishment, or serving in the battalions raised for the immediate defense of this state, or for the defense of the united states: and all chaplains, physicians, surgeons, and surgeon's mates, appointed to the said battalions, or any of them, being citizens of this commonwealth, and not being in the service of Georgia, or any other state, provided congress do not make some tantamount provision for them, who shall serve henceforward, or from the time of their being commissioned, until the end of the war; and all such officers who have, or shall become supernumerary on the reduction of any of the said battalions, and shall again enter into the said service if required so to do, in the same or any higher rank, and continue therein until the end of the war, shall be intitled to half pay during life, to commence from the determination of their command or service.' 1779 c. 4.—Note in edition of 1795.

numerary on the reduction of the said battalions and again actually entered into the said service, in same or high rank, having been required so to do, and continued therein until the end of the war, are intitled to half pay during life, under the said acts, to commence from the determination of their command or service, when the same was duly signified to them by the governor, or executive of this state, and their regiments disbanded in persuance thereof, after the preliminary articles of peace between America and Great-britain were signed and notified to the executive of this state. which appears, by the proceedings in council, in evidence in this case, to have been on the 19 day of april, 1783, and the army disbanded in persuance thereof on the 22 of the said month, and it appearing by the petition of the appellee, that he was a supernumerary officer, and discharged as such on the 9 day of february, 1783, before the said preliminary articles were notified, and the legion, to which he belonged, disbanded as aforesaid, and that he did not again enter into service and continue therein until the end of the war, this court is of opinion, that he is not intitled to half pay for life, and that the opinion of the general court, and order of the district court thereon, are erroneous:' therefore.

The order of the district court was reversed, and the disallowance by the auditor affirmed. to which was added this entry; 'but this judgement is not to bar or prejudice any future clame of the appellee, made on fuller proof to the auditor.'

246 *Several of the parties, whose clames were decided by the court of appeals not to be maintainable, nevertheless, exhibited the same clames again to the auditor, supposing the entry subjoined to the judgement of reversal to have reserved to them liberty to do so.

The clames were again disallowed by the auditor, and from that disallowance the clamants appealed to the high court of chancery, prosecuting their appeal by way of original bill against the attorney general, the treasurer, and the auditor, who were made defendents, and of whom the last only answered, disclosing however nothing more than what appeareth in the foregoing state of facts.

The cause came on, before the H. C. C. by consent of parties, to be heard in october, 1793.

The court at first haesitated to interpose in the matter, first, because it seemed proper to be brought before the common law court, and, secondly because the clames, which the court of appeals permitted to be made again to the auditor, were permitted to be made on fuller proof; but no proof was now exhibited more than or different from what was exhibited before the court of appeals. the first difficulty was removed by the answer of one defendent, which did not except to the jurisdiction of the court of equity, and by the consent of the other defendents that the cause should be heard on its merits by that court. the other difficulty was removed by this consideration: the facts stated by the clamants in their petitions of appeal to the district court were all admitted to be true by the attorney general, who was the proper party to controvert the facts, if they had not been true, and whose admission is equivalent to the fullest proof. fuller proof being therefore impossible, those terms in the reservation subjoined to the reversing judgement were supposed to have been used inadvertently, and the reservation was understood in the same sense as if it had not contained them: and the court of chancery delivered the following

OPINION:

'That by the words in the act of general assembly of the may session, in the year 1779, intituled an act concerning officers, soldiers, sailors and marines, 'officers who have or shall become supernumerary on the reduction of battalions and shall again enter into the service, if required so to do, and continue therein until the end of the war, shall be intitled to half pay during life, to commence from the determination of their command or service,' the officers intended to be provided for were of two classes; one, those who had continued

247 in the service *until their battalion was reduced, and their command determined, and were not required to enter again into the service: and the other, those who, after the reduction of their battalion, were required to enter, and did enter, again into the service, and continued in it until the end of the war; and that the said words ought to be interpreted thus: officers who have or shall become supernumerary shall be intitled to half pay during life, to commence from the determination of their command, if they were not required to enter again into the service and refused to do so; and officers who have or shall become supernumerary and shall again enter into the service if required so to do, shall be entitled to half pay during life, to commence from the determination of their service;' because by any other interpretation, the words, 'command or,' in the last member of the sentence would not only be superfluous but have no meaning; and because the words, although they may be interpreted in another sense, ought to be interpreted in a sense most beneficial for the officers whom the general assembly were inviting into their service by offers of gratuities the most liberal in their power to make. but this court is of opinion that by the latter part of the act of general assembly, made in the year 1790, intituled An act giving compensation of half pay to certain officers of the state line, such of the petitioners as belong to the first of the two classes before mentioned are so distinguished from officers of the other class that the petitioners are not intitled to half pay by that part of the act, although the court can not believe that the general assembly intended to deprive them of it, being unable to divine any reason for the distinction. Nevertheless this court is of opinion that

by the former part of the last mentioned act the officers, who were discharged by proper authority, and not required to enter again into service after the 30 day of november, in the year 1782, that is in february following, are intitled to their half pay no less than those who were not discharged before 22 day of april, in that year, to whom the compensation for half pay hath been allowed; because the former may be said, with as much propriety as the latter, to have continued in the service until the end of the war, since they were in the service on the said 30 day of november, when the provisional articles between the united states of America and the king of Great-britain were done, by the seventh article whereof it was agreed that there should be a peace between those parties, and their respective citizens and subjects, and that all hostilities should cease, and by the ninth article restitution was agreed to be made of whatever might be conquered by the arms of either from the other before the arrival of those articles in America:

248 *whereas if the end of the war was not before the definitive treaty of peace between the same parties, which was done the 3 of september, 1783, those officers who were discharged before that day, that is those who were discharged on the 22 day of april, 1783, had not served until the end of the war;'

And decreed the auditor to allow half pay for life, or, in lieu thereof (b) five years commutation, to such of the plaintiffs as should appear to be entitled thereto according to the foregoing opinion.

From which decree the defendents, on their prayer, were allowed an appeal.

In justification of this opinion, which differeth from that of the court of appeals, upon the later are submitted these

REMARKS.*

The opinion of the court of appeals consists of these propositions:

1. Officers who continued in the service until the end of the war, are intitled to half pay during life, to commence from the determination of their service.

2. Officers, who were restrained, by being prisoners of war, or on parole, or otherwise, from continuing in the service until

249 *the end of the war, are intitled to half pay during life, to commence from the determination of their command. this proposition is not explicitly stated, but is implied in the opinion.

3. Officers, who became supernumerary on reduction of their battalions, and again entered into the service having been required so to do, and continued therein until the end of the war, are intitled to half pay during life, to commence from the determination of their service.

4. Such supernumerary officers as did not enter, although they were not required to enter, again into the service, are not intitled to half pay during life. This proposition follows from the word 'only' in that part of the opinion from which is formed the next preceding proposition.

5. Officers to be intitled to half pay during life, must have continued in the service until the signature of the provisional articles, here called the preliminary articles of peace between the united states of America and the king of Great-britain, was notified to the governor of the commonwealth, and duly signified by him to the officers.

The first proposition is admitted by all. and upon it partly is founded the decree of the high court of chancery, as is there explained.

The second proposition may be doubted until the statute can be shewn, by which half pay for life was promised to those officers, who were hindered, by being prisoners of war, or by being on parole, OR were hindered OTHERWISE, from continuing in the service until the end of the war. but if the proposition be true, the conclusion from it is thought to be opposite to the conclusion, drawn by the court of appeals. for if an officer hindered from continuing in service until the end of the war, by being a prisoner, or on parole, OR hindered OTHERWISE, be intitled to half pay during life a supernumerary officer who not being required to enter again into the service, is hindered from continuing in the service until the end of the war, no less effectually than the officer who is an immured captive, or is enlarged on parole, seems no less intitled.

The third proposition is true. but the plaintiffs cannot intitle themselves by it; because, if they were properly supernumerary officers, they did not, after they became so, enter again into the service.

The fourth proposition is founded, as is

(b) This alternative was inserted because the court of appeals, as was said and seemed admitted, had allowed it in some cases where the clames for half pay were sustained.—Note in edition of 1795.

*The Chancellor's remarks are on the appeal from the decision of the General Court. The appeal from his decision was not determined till after his work was published.

On appeal, the decree of the High Court of Chancery was unanimously reversed in 1797. See the case, Innis. Attorney General, &c., v. Roane and als. 4 Call. 379, which decides,

"The proclamation of government is the only evidence that war is at an end, and peace established.

"For the constituted authorities are the arbiters of peace and war; and their declaration that war is ended is decisive; and no averment lies against it.

"Therefore, the supernumerary officers, who retired after the date of the preliminary articles between Great Britian and the U. States, and before peace was announced by proclamation, were not intitled to the half pay promised by the act of 1779, to those who served to the end of the war.

"The half pay promised by that statute was a bounty; and therefore the officers who claim it, must show exact performance, by having returned into service when called, and serving through the whole war afterwards.

"For substantial performance never entitles to a bounty, as the claimant has no equity.

"There can be no contract without mutual obligation.

"If a judgement of reversal states that it 'is not to bar or prejudice any future claim of the appellee, made on fuller proof to the auditor,' and the new case does not differ from the former, the first judgment concludes the cause."—Ed.—Note in edition of 1852.

conceived, in a misconstruction of the act of 1779.

Two arguments are stated in the decree of the court of chancery, to prove that the act ought so to be expounded as to intitle the supernumerary officers who were not 250 required, after reduction *of their battalions, to enter again into the service, to half pay during life; first, that, otherwise, the words, 'command or,' in the act, would have no meaning, as will be manifest to one who reads the act without those words; for he will see, if they be left out, it hath exactly the meaning which the court of appeals have given to it, with them; whereas the words, 'command or,' applied to supernumerary officers, not required to enter again into service, are significant: second, that the act, if it could be expounded in two senses, ought to be expounded in the sense which is most beneficial to the officers, for the reason there mentioned. to which, after premising that the act of 1779, in its nature, is a compact between the commonwealth and the officers, the author of that decree, now adds, thirdly, the parties entering into the compact may reasonably be supposed to have treated and concluded in some such form as this:

COMMONWEALTH.

We agree to allow to you officers, who will serve us in our army until the end of the war, half pay, during your lives, to commence from the determination of your service.

OFFICERS.

We are willing to serve for the stipend you offer. but you may deprive us or some of us, of it, by disbanding your army, or part of it before the end of the war.

COMMONWEALTH.

If we disband our army, or part of it, before the end of the war, we will allow to you, who thereby become supernumerary, half pay during your lives to commence from the determination of your respective commands: but upon this condition, which no doubt you will think just, that you shall enter again, if we require you to enter again, into our service, and continue therein until the end of the war in which last case your half pay shall commence from the determinination, not of your command but of your service.

OFFICERS.

To all this we agree; and accordingly we enter into your service. whether the act of 1779 ought not to be expounded, as such articles would have been expounded? is referred to the candid and judicious. fourthly, where one party hindereth another from performing a duty, by which 251 he would earn a reward, the *hindrance is in fraud of the party willing to perform; from which fraud he who practiseth it ought not to derive benefit, nor ought the other to lose that to which he would otherwise have been intitled. and in this case the commonwealth hindered the officers from performing the duty by which he would have earned a reward. and fifthly, the words of the act, 'if, being required again to enter, they again do enter, into the service, and continue in it until the end of the war,' seem the denuntiation of a penalty for breach of duty. the half pay would be earned by service before the officers became supernumerary. but, to secure their future service, if it should be requisite, they should forfeit the half pay, if they failed afterwards to perform another duty enjoined. this duty was again entering into the service, if they were required, and continuing in it until the end of the war. but if they were not required again to enter into the service, no duty was enjoined to be performed, and consequently by failure to perfom the duty no forfeiture was incurred.

Therefore that the plaintiffs, if they had been officers in the battalions, for whom the act of 1779 provided, upon the supposition that they were supernumerary officers, would have been intitled to half pay, is thought to be evinced.

But they are believed not to have been comprehended in that act, nor to be intitled to the half pay, which is allowed to officers in the battalions, unless it be by the act passed in 1790, giving the compensation of half pay to certain officers of the state line.

The words of that act are, 'that the same compensation of half pay should be extended to those officers of the state line who continued in actual service to the end of the war, as was allowed to the officers of the continental line; and also to those who became supernumerary, and, being afterwards required, did again enter into actual service, and continue therein to the end of the war.'

The act, in the latter part of it, includeth supernumerary officers, who did again enter into actual service, only; and consequently doth not include the plaintiffs, who confess themselves not to have entered again into the service.

If then the plaintiffs be intitled to half pay, it must be by the former part of this act, that is, they must have been, not supernumerary officers but, officers who continued in actual service to the end of the war. so that whether this can be praedicated of them? is the question, which will lead us to consider

The fifth proposition of the court of appeals.

The plaintiffs are admitted to have 252 been in actual service before *and on the 30th day of november, 1782, when the provisional articles were done, and to have continued in the service until february afterwards, when they were discharged by order of the executive.

If the war ended when those articles were done the plaintiffs, by the terms of the act, by the terms of the compact, if the act of 1779 be in the nature of the compact, and by the terms of the act of 1790, were intitled to their half pay, to commence from feb-

ruary, 1783, the determination of their actual service.

The provisional articles prove the war to have been ended by that act.

The articles indeed were not to be conclusive until the terms of a peace should be agreed upon between Great-britain and France. but when those terms were agreed upon the articles were conclusive. and they were an act of the day on which they were done, not of the day on which the terms of peace between Great-britain and France were agreed upon. if the terms of peace between Great-britain and France had not been agreed upon, the provisional articles would not have been in force from the begining; this being true, its converse, if the terms of peace between Great-britain and France were agreed upon, the provisional articles were in force from the begining, must also be true. yea, the court of appeals theirselves in this opinion admit the war to have been ended by those articles. for,

If the war was not ended by the provisional articles, it was not ended before the definitive treaty in september, 1783; (c) but the court of appeals have allowed those officers who were in service until april, one thousand seven hundred and eighty three, to be intitled to half pay, and therefore the war to have ended when the provisional articles were done. (d)

If the war was ended by the provisional articles why are not the officers who continued in the service until the signature of those articles, including the plaintiffs, intitled to their half pay? because, say the court of appeals, officers, to be intitled to half pay, must have continued in the service until the signature of the articles was notified to the governor and signified
253 by him to the *officers. (e) did the commonwealth agree with the officers that they should not be intitled to half pay, unless they woud continue in service until such notification and signification? do the statutes declare so? when the statutes had enacted, that officers who continued in service until the end of the war, should receive half pay during life, can any court, without assuming the power to change the law, determine, that the officers shall not receive half pay, although they shall have served until the end of the war, unless they shall moreover have continued in the service until a notification to the governor, that the war was ended: and this too, notwithstanding the officers continued in service until they were discharged by the governor, and were not required to enter into it again? and hath any court power to change the law? if these questions be answered negatively, as probably they will be, the principal question, namely, whether officers, who continued in service until the provisional articles were done, and afterwards until they were discharged, be intitled to half pay, must be answered affirmatively.

BETWEEN
RICHARD WOODS, *plaintiff*,
AND
PHILIP MACRAE, *defendent*.*

March, 1794.

New Trial—Mistaken in Verdict.†—New trial granted for mistake in the verdict: Jurors examined to prove the mistake.

SOME of the jurors on trial of the issue in an action at common law, brought by the defendent against the plaintiff, appearing by their own examinations, (a) taken in this cause, to have believed the defendent intitled to one half of a lottery ticket, and upon that supposition to have calculated the damages assessed for him, although that he was intitled only to one fourth, if to any, part of the ticket, appeared manifestly from abundant testimony; the court, the 8 day of march, 1794, ordered another trial of the issue.

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*BETWEEN 254
JOHN SIMON FARLEY and Elizabeth Morson, *plaintiffs*,
AND
THOMAS LEE SHIPPEN and Elizabeth Carter, late Elizabeth Carter Banister, his wife, Champe Carter and Maria, late Maria Farley, his wife, Mary Byrd Farley, and Rebecca Parke Farley; which two last named parties, being infants, appear by John Dunbar their guardian, *defendents*.

March, 1794.

Joint Tenancy‡—**Right of Survivorship—Case at Bar.**—Before our revolution two brothers, british subjects, purchased jointly lands in Virginia and in N. Carolina. One, who had acted as the agent in said purchases, and was also appointed executor of the decedent, became entitled to the legal right by survivorship; but he repeatedly declared it

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(c) No man will pretend that the proclamation by the governor of Virginia, one of thirteen confederated states, could end the war which was prosecuted by the british king against all those states united; and if the war ended not by the governors proclamation, it must have ended by the provisional articles, or the definitive treaty.—Note in edition of 1795.

(d) This is not a mere argumentum ad homines, but is conclusive in this case; the supreme court, by determining those officers to be intitled who did not continue in the service until the definitive treaty, having implicitly decided the war to have ended before.—Note in edition of 1795.

(e) By this doctrine, the officer who was unluckily discharged a few weeks, or a few minutes, before official notification of the peace to the executive, instead of being gratified by enjoyment of those delectable things, the promise of which had tempted him to enter into the service of the commonwealth, and encouraged him to continue, so long as they would permit him to continue, in their service, with the thirst and appetite of Tantalus,

Nec bibit inter aquas, nec poma natantia carpit.—Petronius Arb.—Note in edition of 1795.

*On appeal, the decree of the high court of chancery in this case was affirmed by the court of appeals. M'Rae v. Woods, 2 Wash. 80.

†**New Trial.**—See monographic *note* on "New Trials."

(a) See the case between Cochran and Street, ante.—Note in edition of 1795.

‡**Joint Tenancy**—See monographic *note* on "Joint Tenants and Tenants in Common" appended to Ambler v. Wyld, Wythe 235.

unconscientious to avail himself of said survivorship and made efforts during his life to confer his brother's interest upon said brother's heirs. So that it was plainly known to be his intention not to take the benefit of his survivorship. After his death, the children of the other brother claimed their father's interest. HELD:

1. **Same—Same—Same.**—That the survivor was a trustee for the plaintiffs, who were entitled to their father's rights and interests in and to said lands even against survivor's devisees.
2. **Same—Same—Same—Length of Time.***—That the defendents, whose title was not acquired by purchase for valuable consideration cannot bar the demand of the plaintiffs by length of time; and that the plaintiffs, whose right accrued before the separation of the United States from Great Britain, are not disabled to prosecute this suit.
3. **Same—Same—Same—Jurisdiction.**†—That the Court hath jurisdiction, the defendents being amenable to its process, though the land lies in another State.
4. **Same—Same—Same—Profits.**—The plaintiffs are entitled to rents and profits; accounts ordered accordingly.

FRANCIS FARLEY and Simon Farley, brothers, british subjects and fathers each of several children, in the year 1755, bought of William Byrd 26000 acres of land, called the Saura town, or the land of Eden, in Northcarolina, for 1000 pounds of sterling money. the conveyance was to Francis Farley and Simon Farley and to their heirs. they bought also, together with one Francis Miller, several parcels of land, in the county of Norfolk in Virginia, which were conveyed to the three purchasers, and to their heirs:

Simon Farley paid one half of the purchase-money for the land in Northcarolina, and one third part of the purchase money for the land in Virginia. slaves belonging to both the brothers were employed in cultivating the Northcarolina land: and Francis Farley debited Simon with one half of certain expenses incurred many years after the death of the later, on account of that estate.

255 *The whole business of treating for the purchases, taking the conveyances, and managing the estates, was transacted by Francis Farley, who was several times in Virginia, his brother residing in Antigua.

Simon Farley died about the year 1756 and, by his testament, whereof he appointed his brother Francis one of the executors, his children, the plaintiffs, to whom the said Francis was appointed testamentary guardian, with others, clame what they now demand, which is one half of the Northcarolina land, and one third part of the Virginia land.

After his death, Francis Farley bought from Francis Miller his third part of the land in Virginia.

25 of january, 1757, Francis Farley wrote to Francis Miller a letter in these words: i pray the favor of you to send me by the first opportunity a copy of the sale or conveyance to my brother and myself of the land bought from col. Byrd, for, as my brother is dead, i am as survivor intitled by law to the whole, so i want the sale, that i may have a conveyance drawn for one half to my brothers children; for god forbid i should ever take such an advantage as his death gives me; and, for this reason, i want copies of those other lands bought between you, him and myself * * * the sooner you send me these papers the better, and the more will you oblige me; for life is very uncertain, and i want to get this business done for fear of acçidents.

In another letter, dated 14 of august, 1758, from Francis Farley to Francis Miller, are these words: i imagine some of my last letters to you have miscarried, as you take no notice in yours to me of some things i mentioned to you particularly the sending me copies of the conveyance made by col. Byrd to my brother and myself of the land we bought of him in Carolina. i have mentioned this two or three times, and

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***Aliens—Persons Born Subjects of the Same Common Allegiance.**—In Read v. Read, 5 Call 190, it is said: "An idea has sometimes been urged, that all those who are born subjects of the same common allegiance, can never be considered as aliens in relation to each other. See *Wythe's Rep.* case of *Farley v. Farley*. I admit the truth of this position in every case where the plaintiff can show himself to be no alien to the sovereign where he sues. I deny the truth of it in every other case; in other words, the relation which existed between the two individuals is wholly and immaterial and foreign enquiry. I bottom this position upon Calvin's Case, 7 Rep. 1. itself."

†**Chancery Jurisdiction—Lands in Other States.**—The well settled general rule is, that the court of one state has no jurisdiction to make a decree which will directly affect either the legal or equitable title to land situated in another state. The doctrine is, that if the person to do the act decreed is within the jurisdiction of the court, and the act may be done without the exercise of any authority *operating territorially* within the foreign jurisdiction, the court may act *in personam*, and oblige the party to convey, or otherwise comply with its decree. But it is not competent to the court to decree touching a foreign subject, when the act to be done can be accomplished and perfected only by an authority *operating territorially*. Thus a conveyance may be decreed of lands abroad, if the defendant is within the jurisdiction of the court, but not a partition of lands, as between joint tenants, tenants in common or co-parceners. Poindexter v. Burwell, 82 Va. 513, citing among others, the principal case. To the same point, the principal case was also cited with approval in Guerrant v. Fowler, 1 H. & M. 5; Aldridge v. Giles, 3 H. & M. 142; Humphreys v. McClenachan, 1 Munf. 500; Dickinson v. Hoomes, 8 Gratt. 412, 416; Wimer v. Wimer, 82 Va. 901, 5 S. E. Rep. 536; *foot-note* to Barger v. Buckland, 28 Gratt. 850. And see principal case cited in Davis v. Morriss, 76 Va. 32.

In Guerrant v. Fowler, 1 H. & M. 6, the court, approving the principles laid down in *Farley v. Shippen*, held that a person being within the commonwealth may be decreed to cancel a deed, obtained by fraud, for lands lying in another state.

must beg you will furnish me with it, by the very first opportunity: do not send the original deed, but copies by two opportunities. i want it prodigiously that i may settle the matter, lest any accident should happen my life; and god forbid that i or mine should take the advantage the law gives, by my surviving my poor brother; and i find you are of the same honest and honourable way of thinking. so you will be so kind to have this matter settled with you by a proper deed as to your survivorship, with regard to the lands we purchased in partnership in Virginia. charge me for all the expenses that may attend your doing it, and sending copies of the deed from col. Byrd.

In a letter from Francis Farley to his son, James Parke Farley, dated the 31 of march, 1772, are these words: i believe Jack Farley will soon be obliged to
256 go with the regiment to *Ireland, &c. that poor family will i fear be infallibly ruined, and obliged to sell their share of the land of Eden.

In a letter from Francis Farley to John Simon Farley, dated 11 of june, 1777, are these words: i am very apprehensive, that, if the americans find out you are one of the kings officers they will confiscate your lands in America, in that case you will have nothing to depend upon but your commission, and i shall lose above 3000 pounds.

In a latter from Francis Farley to John Simon Farley, dated 13 of July, 1778, are these words: if you do not quit the army you will certainly lose your property in Northamerica, which i trust is worth more than a colonels commission, and a regiment, or two or three regiments * * * surely you cannot have the least doubt whether it will be best to preserve valuable porperty, in such a country, or to continue a slave in the army of a very declining almost ruined country * * * in my last i said, i should not again presume to advise you, but, in a very short time, things are so vastly altered, i cannot help attempting it once more. i then thought that all of us who had property in Northamerica, and were absent from the country, would forfeit it, but from the late accounts we have, we find the congress acts upon more liberal principles, and intend to give time to all absentees to return and clame their property, even those that deserted them in the day of distress, and bore arms against them; but, if they do not return in a certain limited time, their property is to be confiscated, and you may take for granted, they will have no partiality towards an officer in the kings service. i therefore hope you will see this matter in the light i do, and think it better to part with the commission you now have, and come over to be ready to go to America to clame your property, soon as matters are settled, than to lose considerable property in a very growing country. * * * p. s. if you have purchased a captains commission before you receive this, i must beg you will sell it, &c. then go to America to clame your land, if you should not like to remain in that country, you may sell the land, and live in a country you like better. you cannot afford to lose that land.

The writing which, after the death of Francis Farley, was proved for his testament, and by which all his estate in Northcarolina and Virginia was devised (a) to the children of his son, James Parke Farley, the female defendents, without
257 *making any declaration in favor of the plaintiffs, was lodged in the hands of Thomas Warner, attorney general of Antigua, the counsil of that testator, with a paper, on which were written by his direction the following words: my late brother Simon Farley, was half concerned with me in the purchase of a tract of land from the honourable William Byrd esquire and Elizabeth his wife, and known by the name of Saura town, or the land of Eden, in the province or state of Northcarolina. he was also one third concern with mr. Francis Miller of Virginia merchant, and myself, in the purchase of the following tracts of land, viz.

one tract purchased from Robert Ives and Keiza his wife, one tract purchased from Anne Ludgall widow, John Biggs and Bathia his wife, William Dale and Mary his wife, and Sarah Lugdall Spinster, one tract purchased from John Ivy and Elizabeth his wife, one tract purchased from James Tucker. note i have since purchased Francis Millers title to his one third part. so that i now possess two third parts of these several tracts of land.

My late brother is no how concerned with me in the great dismal swamp, or any other lands that i have in Virginia or Northcarolina, except the five parcels above mentioned. and a man who in march, 1779, had been sent for the said testamentary writing in order to return it to Francis Farley, was informed by the counsil, that Francis Farley had wished to make a declaration in his will, as to the title of John Simon Farley to the said lands in America, which the counsil, as he informed the messenger, declined to do from reasons of policy, and Francis Farley, when the testament was brought to him, with that information, lamented that such declaration could not be made.

To the bill of the plaintiffs, who insisted that Francis Farley held in trust for their benefit the proportions of the lands now clamed by them, and prayed a decree for an execution of the trust, and for the rents and profits, the defendents, by their answer, relying upon their legal title by survivorship, and not admitting the existence of the trust, alleged the plaintiffs to be aliens, disabled to hold lands of inheritance, in any of the united american states, and

(a) Francis Farley, who appeareth to have expected that the property in America of british subjects would be confiscated, probably hoped to prevent the loss of these lands by devising them to his grandchildren, who were american citizens, praetermitting his brothers children, because a devise to them might be vain.—Note in edition of 1795.

consequently to maintain any action for recovery thereof; and, as to the land in Northcarolina, excepted to the jurisdiction of this court, and objected, that the action of the plaintiffs was barred by the statute for limitation of actions, in that country.

The cause was argued the 18 day of march, 1794.

258 *BY THE COURT.

I. The first question is, whether Francis Farley was a trustee for his brother's children, the plaintiffs, as to one moiety of the Northcarolina, and as to one third part of the Virginia, lands? for, if he were a trustee, the defendents, volunteer clamants under him, are in the same predicament undoubtedly.

In the case between Fisher and Wigg, Peere Williams, b. 1. p. 21. reports Chief Justice Holt to have said, jointenancy is favored in law; (b) because as the 259 law does not love fractions of *estates; so neither does it encourage divisions of tenures, or multiplication of services. now as long as the jointenancy continues, there is a joint tenure, but when the tenacy becomes in common, then the tenures and services are served. * * * this is the true and only reason why joint estates are favoured in law; at least, i can invent no other.

The court of equity, instead of favouring the right of survivorship, hath, on the contrary, opposed it, wherever it could be opposed, without usurping unwarrantable powers.

The only case, in which the right of survivorship doth not seem rigid, groundless, and unjust, is that wherein the tenants deliberately agree to take their chances for it.

Where the tenents become interested gratuitously, e. g. by devise, to deprive the family of the tenent who died first, seems unjust, and more so, if he had improved the land, by bestowing labour and expense upon it. in such a case however their supplication to the court of equity for relief would be vain, perhaps, because that court can no more decree directly against the right of survivorship, the existence of which is recognized by law, than, it can alter the law, in any other instance.

If two men, whose object is not of a mercantile nature, for there is no right by survivorship, advance equal portions of the money for lands purchased by them, and conveyed by words, which in construction of law, would transfer a joint interest, whether the court of equity, simply for the reason that the purchase money was equaly advanced, ought to declare the survivor a trustee for the representatives of his deceased companion? is a question upon which an opinion will not now be delivered, because it is unecessary. for

In addition to payment by Simon Farley of his proportions of the purchase money, in the principal case, several circumstances, thought abundantly sufficient to constitute Francis Farley a trustee for his brother, as to the lands now clamed, occur.

1. The brothers did not intend that either of them should acquire by survivorship a right to the whole estates purchased.—Simon probably did not know that such a right could exist, and certainly did not expect it would be clamed in the event which happened. This is manifest by his testament, which, devising those estates, and appointing Francis an executor, supposed the validity of the one, notwithstanding survivance of the other. if Simon did not know that the right by survivorship could exist, or did not expect it would be clamed in the event which happened, hence is concludeth that he never intended to purchase these estates in such a manner that a right to the whole of them should accrue to the survivor. that Francis did not 260 *intend originaly to purchase the estates in that manner is proven, 1, by his abjuration of the right by survivorship, which he thought iniquitous, but which could not be iniquitous if it had been in contemplation of the parties at the times of the purchases; and 2, by his pur-

(b) That common law courts are disposed to favour jointenancy. and the consequent right of survivorship appeareth by numerous examples, and by none more signaly than the following:

Lyttleton, in the 298 sect. of his tenures, saith, if lands be given to two, to have and to hold, s. the one moiety to the one, and to his heirs, and the other moiety to the other, and to his heirs, they are tenents in common. and this hath never been denied to be law, even where the gift was by deed.

But if the lands be given by deed to two, to be equaly divided between them, and their respective heirs. the law hath been declared by many adjudications to be, that the donees are jointenents, and not tenents in common. the reason of the case in Lyttleton is said by Coke, 1, inst. p. 190. b. to be, because, they have several freeholds, and an occupation pro indiviso; and by Holt, 1 P. Will. p. 18. because the deed operates as several conveyances, and not as one, for two liveries must be made, there being several freeholders, and livery to one, secundum formam chartae, not enuring to the other; and that case is not like to ours, (Fisher v. Wigg) in regard there is an actual division and distribution of the land: whereas the words equaly to be divided, do not assign several parts.

Yet a man not conversant with law books, nor an admirer of law jargon, would be puzzled to discern a solid difference between the two cases, and would incline to think, with the chancellor, 2 chan. ca. 65. the law was so, because the judges would have it so. he would not haesitate to affirm the donors intention to have been the same in both cases, because the words, I give lands to A and B to be holden, one moiety by A and his heirs. and the other moiety by B and his heirs, and the words, I give lands to A and B. to be equally divided between them and their respective heirs, are convertible terms: for, if one moiety were holden by A and his heirs, and the other moiety were holden by B and his heirs, the lands would be equaly divided between A and B and their respective heirs: and, vice versa, if the lands were equaly divided between A for himself and his heirs, and B for himself and his heirs, or between A and B and their respective heirs, they would be holden, one moiety by A and his heirs, and the other moiety by B and his heirs. he would be unable to discover why, in the one case as well as in the other, the donees might not, according to Coke, have several freeholds and an occupation pro indiviso, and why the deed might not, according to Holt, operate, as several conveyances, and not as one; and why their might not have been two liveries; nor would he be able to reconcile the words of those two judges, of whom, commenting on Lyttletons text, one says the donees have an occupation pro indiviso, that is, an undivided occupation, or no division or distribution of the land being made, and the other says, there is an actual division and distribution of the land.—Note in edition of 1795.

chase after his brothers death, from Francis Miller of one third part, instead of one half, of the lands in Norfolk. and a court of equity may set aside or reform a conveyance not agreeing with the intention of parties; for the conveyance written, nor for its own sake but, for exhibiting and fullfilling that intention, ought to be a true image of its archetype. if it be not so, the court of equity, decreeing a party, holding a legal property by the terms of such a conveyance, to restore so much of it as he ought not to retain, to him, who would have been the legal owner, if the conveyance had faithfully exhibited the intention, is exercising one of the functions universaly conceded to be proper to that tribunal.

2. Accomplishment of an act by Francis Farley, after the legal title by survivorship accrued. for preventing assertion of that title by his representatives, was hindered by failure of counsil to observe instructions sent to him for that purpose.—and when the progress of an act, which is admitted by all to be just, and which the party, confessing himself in honour bound to perform, had begun to perform, hath been interrupted, without any default of him whose benefit was the object, a decree, putting matters in the same state wherein they would have been, if the act had been accomplished, is dictated by the spirit of equity, and believed to be not inconsistent with the practice of this court.

The common rule in a court of equity is, where an agreement made upon good consideration is not performed, the party interested shall have the benefit to which performance would have intitled him. Strange's rep. 456. The spirit which suggested this rule cannot disapprove the following rule: where the completion of an act, which one in obedience to the precepts of conscience had earnestly begun to perform, was prevented against his will, the party interested shall have like benefit as if the act had been completely performed. the instructions to counsil by Francis Farley; which was the begining of an act intended to secure to his brothers family an estate to which he knew them to be justly intitled, was undoubtedly equivalent to an agreement to that purpose; and his motive to it, namely, that he might be eased of that compunction, which one conscious of withholding dishonestly the property of another feels, is affirmed with equal confidence to be a good consideration.

261 *Where a legal title, for recovering which a legal remedy had been prosecuted, is rendered an abortion by some event posterior to institution of the demand, the court of equity may supply that remedy which the law had not provided. e. g. a writ de partitione facienda between two jointenents will abate by death of either party before the first judgement awarded, although not afterwards. see Bacon's abr. tit. coparceners (D) where is quoted Dalison 59. in such a case, on application by the heir or devisee of the defendent, if by his death the writ abated, the court of equity, as is believed, would be justified in decreeing a partition, because it would be the consummation of an act begun by the plaintiff himself. if the plaintiff were the party by whose death the writ abated that on behalf of his heir or devisee the court would make a like decree is as little doubted, not only because the remedies of the parties ought to be reciprocal, and consequently if the plaintiffs surviving would have been compeled to make partition, the defendent in the contrary event ought to be likewise compellable, but because an assignable right ought not to be destroyed by an event, which the owner could not prevent, that is, his own death in the life time of another man, an event against the consequence from which he was actually endeavouring to guard, and in relieving against which the court of equity would exercise one of the powers acknowledged, as is conceived to belong to it

Where a man, intending to settle an estate, over which he hath a power, so that it may be subject to testamentary disposition, or, in default of that, to hereditary succession, neglects a form which the law requires to perfect the settlement, but of which the absence or presence could not influence the intention, the party interested shall have the benefit to which observance of the form would intitle him. e. g. a writing signed and sealed by one jointenent, declaring the intention thereof to be to sever the jointure, and purporting to be a conveyance of his moiety of the land in trust for those to whom he should devise it, or for his heirs, if he should not devise it, omits the name of the trustee, or appoints a trustee who had died before, in such a case a court of equity, dispensing with the trustees intervention, who, if he had existed, could not have done more in the business than his portrait or his statue, would decree the partition, consummating the parties intention; because that court, if power and will, alone essential naturaly to translation of property, concur, will aid the act designed for a memorial of the translation, supplying defects in the form, in which office the court fullfills the purpose of instituting forms, which was that they might be subservient to the intentions of the parties, not that the want of forms should defeat those their intentions.

262 *3. Francis Farley was the agent for his brother in purchasing the lands. and, when two or more men employed another to purchase lands for them, the presumption being that a wager upon longevity was not in contemplation of the purchasers, the court of equity may with propriety decree the survivor, in case a joint estate be conveyed, to be a trustee of so much as excedes his just proportion, unless instructions to the agent shew the intention of his constituents to have been to take their chances for survivorship; because such a conveyance being an unauthorized act binds not in equity the rights of the constituents. now in this case not only

instructions to take a conveyance of a joint estate are not produced, but, that the parties did not design or desire such a conveyance to be taken seems manifest.

4. Francis Farley, in 1765, and the year following, debited Simon with proportions of money paid on account of the lands, and particularly for quit rents of those in North-carolina, with which the representatives of Simon could not have been justly chargeable, if his surviving brother remained sole proprietor of the lands. This therefore is an implicit acknowledgement of the right of those representatives. Francis doth not indeed appear to have rendered an account of profits, for which one of his letters contains the reason, that is, the lands had not yielded profits.

5. Francis Farley explicitly, repeatedly, and uniformly acknowledged the right of his brothers representatives to the lands now clamed by them. and that acknowledgement includeth an admission of every thing essential to the perfection of that right, and consequently an admission of a trust in him who held the legal title.

6. The instructions written by direction of Francis Farley, and sent by him to his counsil, were professedly designed to preserve to his brother's representatives the right which they are endeavoring to assert. these instructions, slighted and disobeyed, contrary to the anxious desire of their author, ought in equity to be deemed a declaration of trust by him for the benefit of those representatives.

II. The next question is whether the plaintiffs, who, being natural born subjects of Great-britain at the time of the american separation, did not afterwards become citizens of the united states, are aliens to those states, and consequently disabled to prosecute any action to recover, because disabled to hold, lands of inheritance, in the said states?

The statute of may session, 1779, c. 14 sect. I in the preamble recites, that by the separation of the united american 263 *states, which had been part of the british empire, the inhabitants of the other parts of that empire became aliens and enemies to the said states, and as such incapable of holding property real or personal acquired therein, and so much of the property as was within this commonwealth became by the laws vested in the commonwealth.

The laws, to which the legislature refers, must be the common law, as is supposed, because no other law then existing is recollected by which aliens are incapable of holding property of any kind, in the country to the sovereign whereof they are not subjects. By the common law, if we allow it to be contained in those archives which alone have hitherto been consulted in order to discover it, a natural born subject of Great-britain cannot by any mean become an alien to those who, at the time of his birth, were his fellow subjects. this appears by 7. Co. Calvins case passim. on which case, one observation by the reporter is, that such a concurrence of judgements resolutions and rules there be in our books in all ages concerning this case, as if they had been prepared for the deciding of the question of this point; and that (which never fell out in any doubtful case) no one opinion in all our books is against this judgement. which observation, unless it can be contradicted, ought to make proselytes to the doctrine asserted in that case those who where before fautors of the contrary doctrine stated in that statute of 1779. c. 14. Francis Bacon, in his argument of the same case, goes so far as to say, if a man look narrowly into the law in this point, he shall find a consequence that may seem at the first strange, but yet cannot be well avoided; which is, that if divers families of englishmen and woman plant themselves at Middleborough, or at Roan, or at Lisbon, and have issue, and their descendents do intermarry among themselves, without any intermixture of foreign blood, such descendents are naturalized to all generations; for every generation is still of liege parents, and therefore naturalized; so as you may have whole tribes and lineages of english in foreign countries. and to the words quoted by Coke in Calvins case fo. 27 b. from Bracton, the last mentioned author subjoins. 'et ita tamen fi contingat guerram moveri inter reges, remaneat personalitur quilibet eorum cum eo cui fecerit ligeantiam, et faciat fervicium debitum ei cum quo non steterit impersona. fol. 427. b.

The inconveniences from permitting the permanent property in any country to be holden by those who, although they be not in a legal sense aliens, may be, and actually were in this case enemies, in the popular sense, must not be remedied by judges who have not power to judge according to 264 that which *they think to be fit, but that which out of the laws they know to be right, and consonant to law, 7 Co. fol. 27. a. judges must judge according as the law is, not as it ought to be. Vaugh 285.

When, out of empires violently dismembered (which was the case between America and Great-Britain) separate, and independent nations are formed, such of the evils, which must happen, both during the conflict, and after it, as can be cured, may be cured by treaties between the nations, when tranquility is restored, more humanely than by fulminating the panoply of escheats, forfeitures, confiscations involving in distress and ruin many people on both sides innocent, otherwise than by fiction, of those injuries which caused the separation. (c)

If the common law be as it hath been stated, the recital in the statute of 1779, which was consequently untrue, did not change the law; for a recital, even in a legislative act, hath not a plastic energy—a declaration that a thing is, which is

(c) May we not hope the period not to be far distant, when the regum ultima ratio will give place to modes of disceptation, rational, just, humane, for terminating national differences, of every kind? what nation by their example, fitter than americans, to recommend those modes.—Note in edition of 1795.

not, will not make the thing to be. if this statute had recited that by a former statute, which did not exist, the people of other parts of the british empire, born before the separation, were aliens to the united american states, and disabled to hold property within them, such a recital would not have been a legislative act, nor had the force of a law. and if such a recital could have altered the common law in this commonwealth, it would have been ineffectual as to the lands clamed by the plaintiffs in Northcarolina.

Of the remaining questions, which affect the lands in Northcarolina only, the third is

III. Whether the plaintiffs, who did not commence this suit within the time prescribed by the statute for limitation of actions in that state are barred?

To which the answer is, the statute is not pleadable by the defendents, who are trustees, because in equity their possession is the possession of the plaintiffs.

By the common law possession is homologous with the right of the possessor. of two men abiding in the same house, if one only have right to the possession the law shall adjudge him only in possession. Lyttleton's tenures, sect. 701, et vice versa of two parceners, jointenents, or tenents in common of the same house, if one only abide in the house, the law will adjudge both in possession. See 1 Salk. 285.

265 so that a possession, actualy *social, is legaly private, if the right be private; and a possession, actualy private, is legaly social, if the right be social.

By parity of reason, the possession of the defendents, who were trustees for the plaintiffs, as to their proportion, and in equity tenents in common with them, that is, holding one moiety to their own use, and holding the other moiety to the use of the plaintiffs, was in equity the possession of those plaintiffs pro tanto.

IV. The fourth question is, whether a court of equity in this commonwealth can decree the defendents, who are within its jurisdiction, to convey to the plaintiffs lands which are without its jurisdiction?

The power of that court being exerciseable (d) generaly over persons they must be subject to the jurisdiction of the court; and moreover the acts, which they may be decreed to perform, must be such as, if performed within the limits of that jurisdiction, will be effectual.

That the defendents are subject to the jurisdiction of the court, and amesnable, to its process hath not been denied; and that a charter of feoffment containing a power of attorney to deliver seisin, a deed of bargain and sale, deeds of lease and release, or a covenant to stand seised, executed in Virginia, would convey the inheritance of lands in Northcarolina as effectualy as the like acts executed in that state would convey such an inheritance, hath not been denied, and is presumed, until some law there to the contrary be shewn, because the place where a writing is signed sealed and delivered, in the nature of the thing, is unimportant.

If an act performed by a party in Virginia, who ought to perform it, will be effectual to convey land in Northcarolina, why may not a court of equity in Virginia decree that party, regularly brought before that tribunal, to perform the act?

Some of the defendents counsil supposed that such a decree would be deemed by our brethren of Northcarolina an invasion of their sovereignty. to this shall be allowed the force of a good objection, if those who urged it will prove that the sovereignty of that state would be violated by the Virginia court of equity decreeing a party, within its jurisdiction. to perform an act there, which act voluntarily performed, any where, would not be such a violation.

The defendents counsil objected

266 also, that the court cannot, *in execution of its decree, award a writ of sequestration against the lands in Northcarolina, because its precepts are not authorative there. but this, which is admitted to be true, doth not prove that the court cannot make the decree, because, although it can not award such a writ of sequestration, it hath power confessedly to award an attachment for contempt in refusing to perform the decree. this remedy may fail indeed by removal of the defendents out of the courts jurisdiction. yet such a removal, after the party had been cited, is not an exception which can be interposed to prevent a decree. a court of common law may enter up a judgement against him, who, by removal of his goods and chatels with himself, after having pleaded to the declaration, or after having been arrested, rendereth vain a capias ad satisfaciendum or a fieri facias. (e)

From a doctrine contrary to that now stated and believed to be correct may result both inconvenience and a failure of justice.

1. A man agrees to sell to another, or holds in trust for another, lands in Georgia, Kentuckey, or one of the new states northwest of the Ohio, but he cannot be decreed to execute the agreement, or to fullfill the trust by any tribunal but that in one of those countries, several hundred miles distant from the country e. g. North-

(d) Acts of general assembly have given power to the court of equity to condemn the property in this commonwealth. of those who do not reside there, and are not regularly amesnable to the process of that tribunal. to satisfaction of demands against them.—Note in edition of 1795.

(e) By the first section of the IV article of the constitution for the united states of America full faith and credit shall be given in each state to the public acts, records and judicial procedings of every other state. and the subsequent words. and the congress may by general laws prescribe the manner in which such acts, records and procedings, shall be proved, and the effect thereof, seem to shew that provision for such cases as these, among others, was intended to be made. until such provision shall be made, perhaps the decree, judgement or sentence of any state court may be eluded by retirement of the party into another state. yet a bond or other contract is obligatory every where. the sentence of arbitrators is supposed to be binding every where. why should not the sentence of a judge bind the party every where else as much as it would have bound him where it was pronounced? —Note in edition of 1795.

carolina, in which both parties, and the witnesses to prove matters of fact controverted between them, reside. like and greater inconveniences may happen in numberless other cases. whereas a case can rarely if ever occur, the discussion of which can be so convenient to the defendent in any other as in his own country.

2. An agent employed to purchase land for people intending to migrate to america, or for others, having laid out the money deposited for that purpose with him by them, and having taken conveyances to himself or to a friend for his use, refuseth not only to make titles to his constituents, but also to discover the lands purchased. they meet with him in one of the states, and in the court of equity there file a
267 bill against him, praying a *discovery and a decree for conveyances. he excepts to the jurisdiction of the court as to any lands not lying within that state, and denieth by answer that any lands within that state were purchased by him for the plaintiffs, which was true. the bill in such a case, according to the doctrine of the defendents counsil in the principal case, must be dismissed. and this must be the fate of every other bill, until he shall have the good fortune to find out in what state the lands purchased are: and if they be in several states, a bill must be filed in every one. if to this be said, that the court may compel the discovery, although it may procede no further, the answer is, that this is directly the reverse of the rule in the court of equity, namely, that the court when it can compel the discovery, will compleat the remedy, without amanding the party elsewhere for that purpose, and decree to be done what ought to be done in consequence of the discovery.

Therefore the court is of opinion, that Francis Farley the grand father of the female defendents, after the death of his brother Simon Farley, was a trustee for the plaintiffs, the children, devisees, and legatees of the decedent, as to one moiety of the lands in Northcarolina, brought by the brothers from William Byrd, and as to one third part of the lands in the county of Norfolk, in this commonwealth of Virginia, bought by them and Francis Miller from Robert Ives and Keziah his wife, from Anne Ludgal widow, John Biggs and Bathia his wife, William Dale and Mary his wife, and Sarah Ludgal Spinster, from John Ivy and Elizabeth his wife, and from James Tucker, and that some of the exhibits are proofs of such trust, equivalent to a formal declaration thereof; and that the defendents, whose title was not acquired by purchase for valuable consideration, can not bar the demand of the plaintiffs, by length of time; and that the plaintiffs, whose right accrued before the separation of the united states of America from Greatbritain, are not disabled to prosecute this suit: and that this court hath jurisdiction thereof, the defendents being amesnable to its process, and therefore the court, declaring the said Francis Farley to have stood seised, and the defendents now to stand seized of one undivided moiety of the lands in Northcarolina, and of one undivided third part of the lands in the county of Norfolk, which proportions are clamed by the bill, in trust to the use of the plaintiffs, doth adjudge order and decree that the defendents, when the females shall attain their ages of twenty one years, do convey the said moiety and third part to the plaintiffs, at their costs; and in the mean time that the defendents Thomas Lee Ship-
268 pen and Champe Carter, and their *respective wives, and the guardian of the other defendents, do permit the plaintiffs to enter into and peaceably hold the said moiety and third part and to receive the rents and profits thereof; and that the said defendents do pay unto the plaintiffs one half of the rents and profits of the said lands in Northcarolina, and one third part of the rents and profits of the said lands in the county of Norfolk from the time of commencing this suit: accounts of which rents and profits are directed to be made up before one of the commissioners of this court, who is required to examine, state and settle the same and make report thereof to the court, with such matters especially as he may think pertinent, or as the parties may require.

BETWEEN
The executors of DUNCAN ROSE, *plaintiffs*,
AND
CARTER NICHOLAS, *defendent*.

May, 1794.

Contract for Purchase of Land—Specific Execution*—Decree.—Decree for specific execution of a contract for the sale and purchase of land: the plaintiff insisted that it should also have been for the sale of the land, if the purchase money should not be paid in a reasonable time: and a decree for the deficiency, if any, against the body or estate of the defendent. HELD: that an agreement is in equity specifically performed when the parties are put into the state in which they would have been, if the agreement had been punctually performed, and the court will not decree the land to be sold; but that the defendent do pay the purchase money, the dates for paying his promised bonds having passed.

BY written agreement, the plaintiffs had bound themselves to convey a parcel of land, when it should be surveyed, to the defendent, and he had bound himself to give his bonds for payment of the purchase money to the sellers at several days of payment.

A conveyance of the land, after it had been surveyed, was offered by the plaintiffs to be made to the defendent, upon his performing what by the agreement he was bound to perform, which he refused.

***Contract—Specific Execution.**—On this subject, see monographic *note* on "Specific Performance" appended to Hanna v. Wilson, 3 Gratt. 243; *foot-note* to Parrill v. McKinley, 9 Gratt. 1.

See Appendix, Wythe 447.

Whereupon the plaintiffs brought a bill for a specific execution of the agreement, adding the usual prayer for further relief; and the defendent brought a cross bill to set aside the agreement.

The defendents bill was dismissed.

And the decree pronounced for the plaintiffs, the 5th day of may, 1794, was, that, upon their executing a conveyance of the land, and delivering it to the defend-
269 ent, or, if he will not accept *the conveyance, lodging it, for his use, with the clerk of this court, he the defendent do pay to the plaintiffs the purchase money, the days of payment which ought to have been limited in the conditions of the bonds, being now passed, with interest thereon from those days respectively.

The plaintiffs counsil insisted, that the decree ought moreover to have authorised a sale of the land, thereby to raise the money, if it should not be paid in a reasonable time, and if the product of the sale should not be equal to the debt, to have authorised an execution of the decree for the deficiency against the body or estate of the defendent. But

By the court,

A party injured by breach of an agreement, at his election, may have either of two remedies; he may bring an action at common law, and recover damages for the injury, or he may bring a bill in equity, and compel the other party to perform the agreement specificaly.

An agreement is understood to be performed specificaly, when the parties are put into the state in which they would have been, if the agreement had been punctually performed. If this be not the true criterion by which decrees in such cases ought to be examined, let the fallacy of it be shewn.

If it be the true criterion, we will suppose the agreement to have been punctually performed, that is, that soon after the signature of it one party had procured the survey to be made and had conveyed the land, and the other party had sealed and delivered his bonds for payment of the purchase money. in such a case,

If the plaintiff had brought a bill praying a decree for sale of the lands in order by the product of sale to raise the purchase money, the question would be, ought the court of equity to decree, or rather hath the court of equity power to decree the sale?

To authorise the decree some decisions by the english court of chancery, in cases said to be similar to this, were produced by counsil for the plaintiffs; and others, to the same purpose; were said by him to be extant. but the similitude of those produced is not admitted, and, if it were admitted, and the number of them were greater, the example will not be followed by this court, until the judge thereof shall be convinced, otherwise than by precedents only, that he hath power to make such a decree in the case supposed; and if he hath not the power in the case supposed, he hath it not, as is believed in the principal case.

270 *The ground for interposition by the court of equity in decreeing execution of agreements seemeth to be this: for injury by breach of an agreement the court of common law can only award a compensation in damages, which cannot be certainly known to be commensurate exactly to the injury, because the things compared are heterogeneous, so that by no standard, common to both, their equality or difference can be discerned. the action at common law therefore is not an adaequate remedy.

But the court of equity can decree performance of the agreement, which performance expunges the injury itself. The bill in equity therefore is an adaequate remedy.

The terms adaequate remedy are relative. an adaequate remedy must be accommodated to the wrong which is to be redressed by it. the manifest analogy between an adaequate remedy and its correlative wrong, limits the progress of the former by the extent of the latter. the remedy, which doth more than redress the wrong, is not adaequate,—so far as it goeth beyond the wrong, is not a remedy, unless its metaphorical sense, in which it is here used, vary from its proper sense, any more than the remedy in medicine, whose virtue and efficacy are adapted peculiarly to some certain disease, and are adequate to it, can be called a remedy for a different disease.

Now what is the wrong of which the plaintiffs complain, and for which they seek redress? the question is answered in these words in their own bill: 'but now so it is that the said Carter Nicholas hath altogether refused to comply with his agreement aforesaid, and will neither attend to have the boundaries of the land laid off, nor accept a deed for the same, or pass or seal and deliver his bonds for the purchase money, which is contrary to equity.'

If the court decree the land to be sold for payment of the purchase money, it would decree something to be done, not which the parties agreed, but which the parties did not agree should be done, and, under pretext of exercising a power to administer a remedy for redress of a wrong in non performance of an agreement, would extend that agreement to a subject manifestly not in contemplation of the parties, creating another wrong for the sake of administering a remedy to redress it.

If indeed the defendent, after the days of payment elapsed, had brought a bill for execution of the agreement, the court would have allowed the present plaintiffs to retain the legal title oppignerated in equity for the purchase money, until it should be paid or secured. where the party, against whom a bill for execution of an agreement is brought, shews that a strict execution
271 *would be inequitable, and prays that a decree may not be made but upon such terms as are equitable, the court which is not bound to make any decree of it seem not equitable, may impose those terms upon the plaintiff, or, if he will not submit to them, may dismiss his bill, leav-

ing him to his remedy by action at common law; but where the party bringing a bill for execution of an agreement, alledging that the execution will not sufficiently relieve him, prays a decree for something more which the agreement doth not comprehend, the court of equity cannot, as is conceived, justify such an amplification of the plaintiffs remedy. the court can only decree an execution in both cases. the difference between them is that in one the court witholds the remedy, which it hath power to grant, but is not obliged to grant, until the defendent will consent to do something which will make the decree an equitable adjustment; in the other it doth not withold the remedy.

The plaintiffs counsil objected, that the decree reserves liberty to the defendent, at any time indefinitely, to demand a conveyance, upon payment of the consideration money and interest, which is unreasonable. but the plaintiffs might have prevented it, by consenting to a rescission of the agreement, according to the prayer of the defendent's bill, instead of pressing for a dismission of the bill,—may prevent it now, by consenting to this addition to the decree, 'that the defendent be barred of his title to the land, and restore the possession thereof to the plaintiffs, unless he pay to them the debt, interest and costs before a time to be limited,' the consequence of which would be a discharge of the debt. if the plaintiffs will not consent to this, the decree must remain.

If the defendent had brought a bill for execution of the agreement, and the cause had come on to be heard, before the day of payment had elapsed, perhaps the court would have decreed the conveyance upon his sealing and delivering his bonds for payment of the purchase money, unless his credit appeared to be more dubious than it was at the time of the agreement; because this court cannot discover that it hath power to alter agreements by supplying defects in the securities thereby stipulated by the parties themselves, if the court would not have decreed the conveyance upon those terms, the consequence is not that the decree must have subjected the land to sale for payment of the purchase money. the court either might have refused to make any decree, so that the party must have resorted to his remedy at common law, or might have decreed the conveyance upon the terms of paying or securing the purchase money, whereby the debt would be so far a lien upon the land, that be-
272 fore *one was paid, or secured, the title to the other would not be conveyed. but this would have been a different decree from that now desired, for subjecting the land to sale for payment of the purchase money, or so much as will be thereby raised, charging the purchaser with a deficiency.—a decree which not only is not justifiable by the agreement but, which, in one event seeming not improbable, would give the sellers a double satisfaction for the same thing; for if the land be sold, and the sale produce not the whole purchase money, for example not more than half, which the defendent supposed equal to the full value of it, the plaintiffs, for the same land, besides that product, will recover from the defendent, if he be able to pay it, the other half of the purchase money—a decree asked, without grace, as is conceived, from a court, of whose attributes one is a power and disposition to alleviate, instead of aggravating the burdens which legal rigor sometimes imposes.

BETWEEN

WILLIAM COLE, *plaintiff*,

AND

MARY SLOMAN SCOTT, executrix, and Francis Scott, James Scott, and Frederick Scott, sons of Thomas Scott, *defendents*.

May, 1794.

Contract to Purchase Land—Specific Execution.*—Bill for specific execution of agreement to purchase land. Same point as in the preceding case. Decree for sale of the land refused.

IN this cause, which was a bill for specific execution of an agreement to purchase land, and which was heard the 15 day of may, 1794, the court, for reasons similar to those explained in the case between Rose and Nicholas, refused to subject the land to sale for payment of the purchase money.†

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*BETWEEN 273

MARGARET FIELD, executrix of James Field, *plaintiff*,

AND

COLLIER HARRISON, and Christiana his wife, executrix of David Minge, *defendents*.

May, 1794.

1. **Chancery Practice—Joint Bond—Death of One Obligor—Liability of His Executor.**‡—The Court of Appeals, reversing the decree of the Chancellor, who had decreed otherwise, HELD (2 Wash. 136,) that if a bond be made joint without fraud or mistake, equity will not charge the executors of the surety who have become discharged at law by

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***Contract—Specific Execution.**—See monographic *note* on "Specific Performance" appended to Hanna v. Wilson, 3 Gratt. 243.

[†The Court of Appeals say, 2 Wash. 141-3, that the only question was, whether the vender of land sold and in possession of the vendee, but not conveyed, has a lien upon it, so as to secure the payment of the purchase money. They held, that the appellant Cole, not having conveyed the land, nor taken any security for the balance of his purchase money, hath a lien upon the lands in the hands of the appellee for satisfaction of such balance. Chancellor's decree dismissing the bill reversed. See King v. Hanson, 4 Call, 259.—Ed.]—Note in edition of 1852.

‡**Joint Bonds—Death of One Obligor—Liability of His Executor.**—See *foot-note* to Richardson v. Johnston, 2 Call 527; *foot-note* to Elliott v. Lyell, 3 Call 268.

On the subject of bonds, see generally, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

The principal case was cited in Harris v. Harris, 31 Gratt. 32.

his death in the life time of the principal. Aliter, if the money for which the bond was given had been lent to both obligors.

2. Remarks of the Chancellor in support of his opinion: which is supported now by the Code, p. 582, sec. 13.

WILLIAM CLAIBORNE and David Minge, the former of whom had received fifteen hundred pounds from James Field, by loan, for repayment thereof, sealed and delivered their obligation, in these words: 'know all men, by these presents, that we William Claiborne and David Minge are held and firmly bound unto doctor James Field, of Princegeorge county, in the just and full sum of three thousand pounds, current money; to be paid unto the said doctor James Field, his certain attorney, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents; sealed with our seals, and dated this eleventh day of august, one thousand seven hundred and seventy-eight. the condition of the above obligation is such, that, if the above bound William Claiborne and David Minge do and shall well and truly pay our cause to be paid unto the said doctor James Field, his certain attorney, his executors, administrators, or assigns, the just sum of fifteen hundred pounds, current money of Virginia, on demand, with interest from this day, then the above obligation to be void, or else to remain in full force and virtue.''

David Minge being dead, and William Claiborne being insolvent, the creditors executrix, who could not maintain an action at common law against the representatives of the former, as is generally supposed, because the obligation being joint the right of action survived, brought a bill in equity, for recovering the money.

The defendents demurred to the bill, shewing for causes, that the representative of David Minge, who died in the lifetime of the other obligator, was discharged 274 by that event; that *the bill contained no equity; and that the plaintiff might have an action at common law against the surviving obligor.

The first and second causes seeming false, and the third trifling, the high court of chancery overruled the demurrer upon argument, on the 15th day of may, 1794, delivering this opinion: 'that, by the death of one joint obligor, in the lifetime of the other, the duty of the former is not discharged, although against his representatives the obligee hath no legal remedy for exacting performance thereof, for which reason the court of equity may properly supply such remedy.' and that court afterwards, upon a hearing, decreed the defendents to pay to the plaintiff the principal money, due by the obligation, with interest.

This decree was, in October, 1795, reversed by the court of appeals. their opinion, preceding the reversal, is stated thus: 'that the testator David Minge, having been neither the barrower nor the user of the money lent to and used by Claiborne but a security only, ought not, in equity, to be further or otherwise bound than he was by the contract bound at law; and, no fraud or mistake appearing to have occurred in the writing of the bond, it is to be considered as a joint obligation, and subject to the legal consequence of Minge and his representatives being discharged by the death of him, in the lifetime of Claiborne; and that the said decree is erroneous.'

The decree of the high court of chancery was thought, by him who pronounced it, and will be thought, as he believeth, by most other men, to be consonant with purest principles of justice; not to be repugnant to any principle of the common law, that is of its moral part; and to have been dictated by the spirit, which revealed the utility and necessity, and designated the functions, of the court of equity.

To prove that he, at whose request, and in confidence of whose cautionary engagement for another, one man lends his money to that other, is bound to restore the money, as conscientiously as he would have been bound, if he had applied it to his proper use; and that, if this duty be not performed by the cautioner, the representatives who succede to his goods, are bound, no less than he was bound, if those goods will enable them, to perform it, will not be attempted; because these propositions are thought to be of equal dignity with axioms, and to him who requireth a proof of them no intellectual truth whatever can be proved.

That the common law (a) hath de- 275 clared an obligation, originating *by contract, to be discharged by any thing, but performance of the act undertaken to be performed, or by consent of him who had a right to exact performance, will be denied, until it shall be proved, otherwise than by deduction from want of a legal remedy to coerce performance.

That one capital branch of the court of equitys jurisdiction is to supply defects, unavoidable in such a system as that which is called the common law,—unavoidable in every system of jurisprudence, contrived by human wisdom, when it is reduced to a text,—every man conversant with those subjects, will admit.

Such a man knows the province of the court of equity to be,

First, to invent and apply remedies for recovering, preserving, and securing rights, and for represing, anticipating, and repair-

(a) Here is meant what, in contradistinction to the ritual, customary, feodal, &c. aptly may be called the common law, because it is the law common to all men, impressed on the human mind in characters so legible and significant that every one may understand it;—in other words, the law of nature and reason, of which the praecepts are such that, to their recitude assent is yielded, and to their authority the obligation of obedience is professed, by all, except the disciples of those who can be eloquent encomiasts of the most barbarous parts of what, by some of them is alleged to have been the antient common law of England.—Note in edition of 1795.

ing wrongs, in cases where the common law had never provided remedies;

Secondly, to modify the remedies provided by the common law, amplifying them in cases where they afford scanty, and abridging them in cases where they afford excessive, measures of reparation;

Thirdly, to restore the remedies, or to substitute other for the remedies, which had been provided by the common law, but of which the parties are deprived, not by vices in the constitution of the rights clamed, but by impracticability of formulae, the observance of which in prosecution of the remedies had been required,—the rights theirselves remaining unchanged, but the modes of asserting them being such as, from intermediate events, not through default in the parties, cannot be pursued.

In administering these remedies, the court of equity doth not thwart or conteract, but doth promote and accomplish the design of, the common law itself.

Examples of the former heads of division are not pertinent to this case. the subjoined examples of the other may be useful for illustration:

1. F lends money to C, who, for repayment thereof, seals and delivers his obligation.

276 *The remedy, provided by the common law, to recover the money is an action of debt.

F, losing the written obligation, which was evidence of the debt, can maintain no action whatever, by common law.

He cannot maintain the action upon an implied promise, which he might have maintained, if he had not taken the written obligation, because the promise, termed a simple contract, was merged in the written obligation, termed a specialty, the name by which every act of that kind, with a seal affixed or appended to it, is called.

He cannot maintain an action of debt upon this; because, if in the declaration, after recital of the specialty, he omit the profert in curia, as it is called, that is, if he do not add these words, 'which writing obligatory is brought into court,' or the like, except in some particular cases, the defendent may demur to the declaration, and judgement will be given for him. if the declaration contain the profert in curia, the defendent cannot be ruled to plead, before the specialty, or, in some instances an authentic copy of it, shall have been shewn, —may demand a hearing of it, and the plaintiff, failing to produce it, will be nonsuit.

In such a case, to say, the right of F to the money is vitiated by the loss of a paper, which the law requireth to be produced, because it is regularly the legal evidence of the right,—to suppose the common law to have willed and intended, (if to such an allegorical being we may attribute volition and design,) when the rule, that a specialty, by which a thing is demanded, should be exhibited, not because the demand was on that account more just, but, that the court might judge whether the specialty were a valid act, was established,—to affirm the common law to have willed and intended, that the creditor, by such an accident, at the loss of this paper, should be deprived of his property, would betray stupid ignorance.

The law wills and intends, that justice should be done in every case; that was the object of it, when its rules were established, and its formulae prescribed; but those rules and formulae, in particular cases, are the very means of injustice; as in case of the obligation lost.

Men, who delight in quaintness of phrase, and suppose themselves to discover in it pith of argument, in such a case as this, have said, 'want of remedy and want of right are the same,' and hence, by that gross sophism, where concerning the essential properties of a subject, is affirmed or denied that, which is true or false of something accidental only to the subject, infer, that when, the EVIDENCE required

277 by law to prove *a debt is LOST, so that the legal remedy to recover it cannot be pursued, the OBLIGATION to pay the debt is DISCHARGED. they have maintained even a greater absurdity,—have asserted that, where the legal title to property, of a particular kind, could not be recovered, because the remedy to recover it could not be prosecuted during a certain time only, upon this principle, as it is said, of the common law, that a personal action once suspended is extinct, (Hobarts reports p. 10. 1 Salkelds reports p. 306.) in such a case, even the court of equity ought not to interpose. (b)

The common law hath indeed exposed and abandoned that right, which was its own offspring originaly, the legal evidence of which cannot be produced, being not unwilling, but, unable, without disordering

(b) In the case between Cage and Acton, reported by R. Raymond, 1 vol. p 515, where a man, who had bound himself in the penalty of 2000 pounds, payable to the woman whom he married afterwards, with condition that the obligation should be void, if, in the event of her surviving him, his executors or administrators, should pay to her 1000 pounds, died before the wife, chief justice Holt, who was of opinion the bond was extinguished by the intermarriage, said, that, in such a case the chancery would not give relief; in which, however, the chancellor did not concur, for, in another case, found in the 2 vol. of Vernons reports, p. 480, upon that very bond, the chancery did give relief. and upon this principle partly, a debitor hath been adjudged to be discharged from his obligation, when he is appointed executor of the testament of his creditor, except in particular instances. in England this doctrine hath been approved by the court of equity, in cases innumerable, the authority of which may be thought by some sufficient to condemn the decree of the high court of chancery, in the principal case; in vindication whereof, however, is contended, first, that a determination, not founded in natural justice, in one case, ought not, by analogy, to be a precedent for authorising a similar determination in other cases differing from it in material facts and circumstances, as in the present instance, and that the determinations in favor of the debitors discharge are founded in natural justice no man but a bigot to authority, as is conceived, will affirm, and, secondly, another reason for those determinations is a disposition of the common law and chancery courts in England to preserve uniformity of decision with the ecclesiastical courts there, who have attributed to an executor the character of a residuary legatee.—Note in edition of 1795.

some parts of its oconomy in the praxis, to cherish and maintain the right.

This is a defect in the law, if it intended, as surely one may venture to affirm it did intend, that justice should be done in every case.

Here, then, the court of equity supplies the defect, by which the right, from debility in the parent of it to support it, would have perished, and undertaking the benign office, which the common law reluctantly declined, adopts, and in loco parentis, fosters and educates the foundling.

2. Again: F lends money to C and M
278 who, for repayment *thereof, sealed and delivered their obligation, writen in the form which constitutes in the law nomenclature, a joint bond, in contradistinction to the bond joint and several. (c)

The remedy provided by the common law, whilst C and M live, is an action of debt against them both jointly.

If M die before C, F cannot maintain one action against C and the executor or administrator of M, because, by the common law, the judgements ought to be against one in his proper, against the other in his representative, character; moreover the writs of execution, conformably with the judgements, must be that satisfaction be made, of one, out of the goods and chatels of the defunct, of the other, out of the goods and chatels of the surviving, obligor, or by his imprisonment; but an union of such different sentences, and such different modes of executing them, is irregular.

Neither can F maintain a separate action, as is said, against the executor or administrator of M, because the obligation, being joint, in the law language, the action survived. (d)

279 *In this case too, for reasons explained before, the court of equity, yielding the remedy which the court of common law, constrained by forms prescribed for its governance in ordinary cases, witholds, would subject the estate of M, in the hands of his representatives, to payment of the money borrowed.

The opinion and decree of the court of appeals are supposed, instead of contravening, to have approved the doctrine herein before stated in these examples, unless perhaps, in the second example, they would have charged the executor or administrator, of M with so much only or the money borrowed as could be proved to have been used by himself, and thus have made important the inquiry how much of the money borrowed he used, and possibly which way he used it.

But, in the principal case, the plain-
280 tiff in her bill having confessed *the

(c) The propriety of this determination, so understood, originaly perhaps a reverie of some dull drowsy dreaming judge, which his successors, too lazy to examine it, have suffered time to mature into an authority, is doubted; because it seems not consistent with the notions of the common law itself: for an execution to satisfy a judgement against C and M jointly the law will compel either of them to discharge intirely, which seems a proof that each was bound for the whole, and consequently bound, in effect, severaly, although, in form, jointly, again, when C and M are bound in an obligation, called joint, for payment of money, if C die first, the whole may be recovered from M; if M die first, the whole may be recovered from C; now unless the death of one man, in the lifetime of another, can create an obligation in that other, which perhaps no man will affirm, C and M, must have been originaly bound severaly.—Note in edition of 1795.

(d) An action against the survivor of joint obligors is supposed to have been authorised by law, for the benefit of the obligee, of two, bound to perform an act, when one died before performance, the other required to make amends for the whole wrong, might have objected, that the representatives of his associate in the contract ought to participate of the burthen proportionaly, but the law prohibits a junction, in the same action, of one party, in his proper, with another party, in his representative, character, for several obvious reasons; nor will the law permit the obligee to maintain two actions for the same thing, because he might thus recover a double satisfaction for a single injury, the law therefore, abhorent from extinction of a right by failure of a remedy, alloweth an action to be maintained against the surviving obligor, and that he too might not be injured, alloweth him to maintain an action against the representatives of the co-obligor, whereby the matter is finally adjusted without injury to any party, and unless one of the obligors shall have become insolvent, without detriment to any party.

The doctrine, stated in this note, the writer of it acknowledgeth to have sprung, as well as he can recollect, from his own invention, and hopes that he is not less happy in the discovery than chief justice Holt was, when he racked his more prolific invention, (as we are informed he did, by Peere Williams, in 1 vol. of his reports, p. 21,) to discover the reason why joint estates, and the consequent rights by survivorship, in lands, are favored in law.

If the common law, from its antipathy to injury by failure of remedy, as well as by other causes, allowed the right of action to survive, for the benefit of an obligee, what must have been that logic of the common lawyers, when the affirmed, and common law judges too, when they determined, if judges ever did determine (see Vernons reports 2 vol. p. 99) that, where the surviving joint obligor was insolvent, the obligation of the defunct was discharged?

That common lawyers, with whom must be classed judges, have not been at all times so well acquainted with, or so attentive to, the rudiments and rituals of their own law, as not to have misunderstood them, or not to have argued fallaciously from them, is probable, if we may credit one who was well informed: 'sir H. Spelman somewhere condemns the common lawyers of his own time, for the small acquaintance they had with the principles and rationale of their profession.' 'we are all for profit,' says he, 'and lucrando pane,' taking what we find at market, without inquiring whence it came.' Taylors elements of this civil law, p. 399, an error from a cause not altogether dissimilar, justice Fortescue, in the preface to his reports, hath detected in Coke himself, the english Sulpitius, the juris antisies* of the common lawyers.

Let us, for the sake of elucidation, reverse the case, and suppose one, of two joint obligees, to have died, and the other to have removed, carrying with him the bond, to parts unknown, in which case the representatives of the defunct obligee could no more maintain an action at common law against the obligor than, in the principal case, the obligee or his executrix could have maintained an action, against the representative of the defunct joint obligor: would the common lawyers say, because the law gave no remedy, that the obligation was discharged? and, if judges should so determine, would not the court of equity give the executor of the defunct a remedy against the obligor for so much, at least, of the money, as was due to the testator?

Let us suppose William Claiborne and David Minge to have perished together, by shipwreck, lightning, or some other accident, so that which of them last drew breath could not be proved: would the obligation have been discharged as to David Minge? and, if no action could have been maintained at common law would not the court of equity have decreed his representatives to pay the money. —Note in edition of 1795.

*Quinctil. lib. XI. c. 1.—Note in edition of 1852.

money, for repayment of which William Claiborne and David Minge were bound, to have been lent to the former obligor, by which circumstance the case is supposed to be distinguishable from the case stated in that second example, this distinction is believed to be partly, if not solely, the foundation of the reversing decree.

For, unless the opinion preliminary to that decree be misunderstood, which is not impossible, whilst one is ranging among such a groupe of negatives as are there exhibited, if David Minge had appeared to have either borrowed or used the money, his representative would have been accountable for it.

The rationale of this distinction, and the truth of the propositions, and logic of the conclusions from which it seemeth to result, will be the subjects of examination, in some strictures on that opinion, by way of

COMMENTARY.

The testator David Minge having been neither the borrower,] when the testator James Field consented to let William Claiborne have money, not on his credit, but on the credit of David Minge only, the term 'borrower,' applied to David Minge, perhaps is, not a catachresis but, a proper appellation,—not less proper than it would be, if David Minge, by his separate obligation, had bound himself to repay money advanced on his credit only to his friend, his son, his servant, or to any one else. if, granting his separate obligation, David Minge would have been a borrower, how the conjunction, with him, of the friend, son, servant, or other user, could disrobe him of the character is not discerned.

Nor user of the money,] for reasons so much like those in the next preceding paragraph, and suggested so obviously, that adaptation of them to this would seem repitition, the term 'user' is applicable to David Minge as properly as the term 'borrower.'

But if these appellations belong not to him, whether, in equity, his representative ought to repay the money borrowed and used, or not, will be discussed hereafter.

Lent to and used by Claiborne,] on these words no animadversion is necessary, more than that they are a mere pleonasm; for the representative of David Minge, if he were not the borrower or user of the money, was according to the opinion, not bound in equity, for repayment of it, what other man soever was the borrower or user.

But a security only,] security, as the term is here used, is the synonyma of surety, which latter, because it is less equivocal than the former, shall, instead of it, be hereafter employed.

281 *A surety is one bound that something shall be done, not by himself in the first instance but, by some other, and, in case of default by this prime agent, that the obligor shall perform the act, or compensate for nonperformance.

In the principal case, the relation of William Claiborne and David Minge, between themselves, was the relation of debitor and surety, so that the latter, if he had been compelled to repay the money borrowed, might for reparation, have resorted to the former, upon one or other of the principles explained in the case between Lomax and Pendleton. (e)

The legal relation of James Field and David Minge, between themselves, was, not the relation of creditor and surety but, the relation of creditor and principal debitor; for David Minge, binds himself and his heirs, &c. in a penalty, and the obligation for payment of the penalty he agrees, by the condition, shall remain in force, if he and William Claiborne shall not pay the principal money and interest.

David Minge, therefore, by law was, not a surety, or a security as he is called, but by the terms of the obligation, as much a debitor as the co-obligor William Claiborne.

Ought not, in equity, to be further or otherwise bound than he was, by the contract, bound at law,] the contract itself sheweth him to have been bound at law as far as William Claiborne was bound at law.

Why then ought not the representatives of David Minge, in equity, to be bound as far as the representatives of William Claiborne, if he had died first, would 282 have been bound? the *answer, contained in the opinion introductory to the reversing decree, is, he was, neither, first, the borrower, nor, secondly, the user, of the money, but, thirdly, a security only. let all these, although every one of them may plausibly at least be denied, be for argumentsake, granted; the single question then will be, whether a creditor ought not, in equity, to have like remedy against the suretys representatives as he might have prosecuted against the principal debitors representatives?

If between the obligations of the debitor and surety and their respective representatives to pay, and between the rights of the

(e) This case is to be found in a thin folio, called chancery decisions. about a score, of many copies of it printed, have been sold. the author of it, who expected it would be thought to deserve a place in most law libraries, accounts for this neglect in a way suggested to him by the following passage in Plutarch: that biographer relates, that Cato, the censor, when he was eighty years of age, undertook to learn the language of the greeks, the cultivation of whose literature, believed by his countrymen to have enlightened them, he had, upon all occasions before, discouraged, vilified, reprobated. to punish him for this blasphemy, the rage, with which, at such an advanced period of his life, he was infected, for confabulation in a dialect new to him, was called a judgement upon him. the author of the chancery decisions was guilty of an offence somewhat similar. he had been for many years occasionally speaking irreverently of some reported westmonasterian adjudications; to be punished for which, perhaps, he was afterwards seized with a rage for reporting ——reporting his own adjudications too, which may be as unentertaining and unedifying as the senile garrulity of Cato in a language not his vernacular tongue. notwithstanding that work has been slighted, the authors cacoe, thes blasphemandi in that way is so inveterate that it may be pronounced insanable this opusculum may be slighted in the same manner: yet his cacoethes edendi will break forth, when such occasions as this present fit subjects for his lucubrations.—Note in edition of 1795.

creditor to demand, from one or other, the money due, in the event which happened, the distinction exist, some reason for it may be and ought to be adduced.

The only specious argument for the distinction, which hath occurred to the commentator, after long, frequent, diligent investigation, is founded on compassion for an innocent surety, as he is called,—improperly called, if we regard the etymology of the epithet, and the consequence to the creditor pretended to be sanctified by it. an innocent man is he, by whose act, or by whose omission, another man is not hurt; but the creditor, losing the money, which he had lent, and the loss of which he would not have hazarded, if the surety had not solemnly agreed to be sponsor for the borrowers sufficiency, is hurt by an act of the surety in procuring the loan, and by his omission to guard against the loss, if his representative be discharged from responsibility.

However that may be, compassion ought not to influence a judge, in whom, acting officialy, apathy is less a vice than sympathy.

The creditor may have mercy upon his necessitous debitor, and forgive him the debt, incurred by borrowing money to support a family,—may be content with less than he might rigorously clame from a surety, upon whom the debt of an insolvent falls. such charity and liberality in the creditor himself are commendable. but when he exacts his dues, the judge cannot constitute himself the creditors almoner, or the dispenser of his bounty. the judge, by the eagerness, which his yearnings excite, to divert the burthen impending on a surety, ought not to be transported so far as to forget, that his charity and beneficence ought to begin at home; that his own purse, not the purse of another man, is the source from which the relief he would afford should flow; and that, whilst he spares the store of a wealthy surety, he may be taking the bread out of the mouths of a creditors starving family. of the cases which can be put, such exoneration of the surety seemeth, in all unjust, arbitrary, oppressive, and, in some, cruel.

283 *The distinction, now under consideration, is oppugned by principles both of law and equity, according to them, the right to demand, and the obligation to make, specific restitution, or vicarious satisfaction, originating by contract, are complete, either, first, by an act of one party beneficial to the other, and performed at his request, or, secondly, by an act of one party detrimental to himself, performed at like request of the other party.

The merits of the party performing the acts, in both cases, are equal in legal estimation, nor do the principles of equity teach us to exalt the merit in one above that in the other, or to construct tables for graduating the merits in either of them.

Whoever used the money, or in whatever manner he used it, or whether he threw it away, the merit of the lender was the same, because his detriment in parting with his money was the same. the borrower indeed, obtaining what he wanted and what he could not have obtained without the suretys kind office, in procuring the loan, is indebted to that benefactor doubly,—owes the 'debt immense of endless gratitude,' and is moreover bound to indemnify him; but the right of the lender to demand from them, and their obligation to repay to him, the money borrowed, do not depend upon, and cannot be magnified or diminished by, the right and obligation existing between them, either in law or equity.

When the cause was heard before the high court of chancery, the argument, in support of the distinction, now irrevocably established, consisted, not of reasoning on the subject but, of quotations from, and references to, authorities, (f) of which

284 *kinds of argumentation the latter. is generaly preferred, because it is not only much easier, but, more influential, than the former.

Of the authorities, quoted by the defendents counsel, that upon which he chiefly relied, which was not less satisfactory than the other, and the sense of which is trans-

(f) Sentences, exhibited sometimes in print, and enshrined, at other times, in MSS, of men in England, who, after inauguration by the coif, with the pageantry and grimace attending that ceremony, called by writs, or commissioned by letters patent, are mounted on the one bench or the other, at Westminster, or who had been appointed masters of the rolls, or who had received the great seal from the hands, after kissing them, of his or her sacred majesty, with the titles of lord keepers or lord chancellors,—the sentences are called authorities, and are so respected that when a thing is said to be just or unjust, the speaker, who is required to prove it, in like manner as some men, not long ago, thought nothing necessary to prove a physical truth more than to shew that it had been affirmed by Aristotle, some where or other in his works, supposeth the justice or injustice of the thing in question, decisively proved, if he can shew it to have been declared to be just or unjust by some lord chief baron, lord chief justice, or one of their associates, or by his honor the master of the rolls, or by some lord keeper or lord chancellor. when one of these sentences, carried before the house of lords, is affirmed or reversed, the matter is then supposed to have been examined with extreme severity, and like subjects tortured in the experimentum crusis, to be incapable of further enucleation. these affirmations and reversals, by those judges in appeal, in that country, at all times after bear the stamp of infallibility, to deny or dispute which is a dangerous heresy; for, in 1697, the court of kings bench having given a judgment, inconsistent with a determination of the house of lords, their supremacies, much offended, summoned the chief justice to give his reasons for the judgment, and when he refused to do so, threatened him with a commitment to the tower. reports by R. Raymond, 1 vol. p. 18. in numberless cases, and, among them, even where the question is, what was the meaning of a mans words in his testament! decads of heavy, huge, unwieldly, folio volumes, attended by a suitable number of quartos and octavos, are introduced, every one pretended to contain the report of a case in point. the authorities appear sometimes to jarr, and, when they do so, the english judges seldom fail, because it is very much their wish, to reconcile them. when that is done, every one seems to be satisfied, but whether the authorities can be reconciled with common sense, often more difficult than reconciliement of them with another, is rarely thought worth inquiry. the superstitious veneration from them even in America, is so deeply rooted, that the man who can rationaly expect he shall live until it is eradicated, ought to have antediluvian stamina.—Note in edition of 1795.

cribed almost literaly into the opinion of the court of appeals, is this case of Ratcliffe versus Graves et alios, in Vernon's reports 1 vol. p. 196.

'Walter Ratcliffe, plaintiffs father, having made his will, and plaintiff and his brother John executors and residuary legatees, and they being infants at their fathers death, administration with the will annexed during their minority was granted to Elizabeth Ratcliffe their mother; and the prerogative court upon granting the said administration took the usual bond from the administratrix, in which the two defendents the Heathers were bound, as her sureties. the plaintiffs brother being dead, and having made his will and plaintiff executor, he now brought his bill for an account of the testators personal estate, and as to the defendents the sureties, it was suggested that by fraud and covin, they had got up their said bond, and had procured insufficient security to be accepted by the prerogative court in the room thereof. but the lord keeper, upon the first opening of the matter, declared he would not charge the sureties further than they were answerable at law; and dismissed the bill as to that part.'

Upon this case but few observations can be made, because the man who determined it hath not condescended to give a reason for his determination, not only would give no reason, but, interrupted a discussion, turning a deaf ear, when the matter was first opened, to everything which 285 could have been *urged against, and which might have prevailed upon him to repudiate, the opinion, to which he had been wedded perhaps overfondly. the commentator, when this authority was quoted on another occasion, ventured to affirm, that such a hasty dogmatical, abrupt depulsion of the question, rather than decision, which ought always to be preceded by mature deliberation,—a declaration that he would not charge the sureties further than they were answerable at law, and this, for any thing appearing to the contrary, only because he would not charge them, as if the will of this lordly judge, like the princely sic volo sic jubeo, were law,—deserveth not to be classed among the responsa prudentum; —and moreover ventured to affirm, that it is intitled to less respect than one of the cases which are called anomalous, not only deviating from general principles, admitted universaly to be the foundation of resort to the court of equity for relief, where the party applying for it is remediless at common law but, contradicting those principles where they have been recognized and exemplified in particular cases, not rationaly distinguishable from it; in proof of which, besides the cases herein before adduced, by way of examples, let a reference be to the case of Underwood against Staney, reported in chancery cases, p. 77 which was thus:

'The obligee in a bond of twenty years old exhibits his bill against the administrator of the principal and the surety (upon loss of the bond.) the administrator saith by his answer that he hath no assets. Upon hearing the cause, it was directed to a trial, whether the surety had sealed and delivered the bond; and a verdict had passed against the surety, (viz.) that he had sealed and entered into the bond. and the cause coming back to this court, and the plaintiffs counsil praying a decree for the plaintiffs debt against the surety, serjeant Fountain (not of counsil on either side) said it was doubtful whether equity should in this case bind the surety, who was not obliged in law, but in respect of the lien of the bond; and that being lost and the surety having no benefit by (nor consideration for) being bound, he thought equity after so long a time should not charge the surety, the master of the rolls said he would see to moderate and mediate this matter between the parties; in order to which, he was several times attended by the plaintiff; and the defendent making default, he decreed for the plaintiff. and afterwards the cause was, upon a case made, brought before my lord chancellor, who was of opinion with the master of rolls, and decreed it for the plaintiff. it was in the debate of this case, said, that if a grantee in a voluntary deed, or an obligee in a voluntary bond, lose 286 the deed or bond, they should have *remedy against the grantor or obligor in equity. tamen quaere. but if so, no mistake in the principal case, where the bond was for money lent; and though the surety had no advantage, yet the obligee had parted with his money, and loss is as good a consideration for a promise, as benefit or profit.'

This case may be a match at least, if not an overmatch, for that in Vernon. neither of them states any reason for the decree. the case in Vernon was indeed determined a few years after the other; but, to compensate for this, the determination in the earlier was by his honor the rolls, and his lordship, the chancellor; in the other, by his lordship the keeper only; so that here are two judges (one of them not a lord indeed) to one; that in Vernon was upon the first opening; that in the other was upon a case made brought before my lord chancellor, and therefore possibly, after deliberation. perhaps neither of them ought to be of oracular authority further than they are reconcilable with the principles of justice. and the one in the chancery cases is thought reconcilable with those principles.

If its authority be allowed, it is, in forensic phrase, a case in point, unless between a loss of the surety's bond and the surety's death in the lifetime of the principal debtor, by which events the obligees were deprived of their remedies at common law, be such a difference as will, in equity, justify a decree for the obligee in one case, and a dismission of his bill in the other case.

Judges, whose understandings elaborate erudition hath polished and recondite science hath illumined, may be able to dis-

cover such a difference. the commentator acknowledgeth such a difference to have eluded his acumen ingenii.

The accident by which a party, in one case, was remediless at common law, was the loss of a paper; the accident by which a party, in the other case, was remediless at common law, was the death of one man before another,--a difference, if material at all, favorable to the party in the latter case, because the accident there was, not through any default of her or her testator but, an act of god, which the law itself declareth shall not injure any man. whereas the loss of the paper may have been through negligence of the obligee.

Perhaps this difference may be alleged that, in one case, by the bond, if it were ostensible, the surety might be charged even at common law, so that the court of equity, giving relief in that case, doth nothing more than supply the want of evidence to prove existence of the bond, and enforce performance of an obligation praeexistent; but in the principal case, the bond is ostensible; and the court of equity giving relief, instead of forcing performance of an obligation praeexistent,
287 *upon which an action at common law is maintainable, would create a new obligation, the former being discharged. but this would bring us back to the question, whether a right were destroyed, or an obligation discharged, by the want of legal remedy to recover the right, or to exact performance of the obligation.

Now an obligation may be discharged either by an act of the obligor, or by an act of the obligee.

1. By act of the obligor; when William Claiborne and David Minge sealed and delivered their obligation, acknowledging themselves bound in 3000 pounds, payable to James Field, upon condition, that, if they paid 1500 pounds to him, the obligation should be void; if they had paid 1500 pounds accordingly, the obligation would have been discharged,—would have been void,--by the letter of the contract.

2. By act of the obligee: if James Field had sealed and delivered an acquitance, the obligation would have been discharged by consent. neither of these having been in the case,

If the obligation were discharged, it must have been by an act of the law, or rather by an omission of the law, to provide a remedy for redress of a wrong; but let it be called an act of the law. the case then is this:

By act of law, a man is deprived of his remedy to recover a just debt. on the other hand, one of the maxims of law is, 'an act of the law shall never work a wrong.'

In such a case, Francis Bacon, in a tract intituled maxims of the law, under the rule, by him numbered 3, verba fortius accipiuntur contra proferentem, hath delivered a criterion, fit to be remembered, in these words: 'a point worthy to be observed generally in the rules of the law is, that when they encounter and cross one another in any case, it be understood which the law holdeth worthier and to be prefered; and it is in this particular very notable to consider that this being a rule of some strictness and rigor doth not, as it were, it office, but in absence of other rules which are of more equity and humanity.'

The man who thinks the rules of law, b an inference from which the bond in th principal case was affirmed, as is supposed to have been discharged, strict and rigorous, and the maxim, an act of the law sha never work a wrong, equitable and humane and that the foresaid inference and maxi in this instance encounter and cross on another; such a man would incline to be lieve that a Bacon, if he had been th judge, even in a court of law, would no have said that the bond was discharged b the death of Minge in the lifetime of Clai borne, although no action at common la could be maintained on the bond
288 what he *would probably have said in another place, will be mentione hereafter.

That author in the same tract hath in serted this rule, numbered 9, quod remedi destituitur ipsa re valet si culpa absit, t which are subjoined these paraphrasti terms: 'the benignity of the law is such, a when to preserve the principles and ground of law it depriveth a man of his remed without his own fault, it will rather pu him in a better degree and condition tha in a worse; for if it disable him to pursu his action, or to make his claim, some times it will give him the thing itself b operation of law without any act of hi own, sometimes it will give him a mor beneficial remedy.'

If the genius of the common law in spires its judges with an inclination to in vent and apply remedies for averting th perdition of rights, by operation of rigi inflexible rules,—to uphold rights, although for recovery thereof, those rules have dis abled parties to pursue their actions,—i fine to put parties, so deprived of thei actions, in a better condition rather tha in a worse; may we not reasonably con jecture that the mystagogue of science whose language was lately quoted, if whe he adorned the english high court o chancery, the principal case had bee brought before him, would not like the in exorable keeper, in the case of Ratcliff versus Graves, have hurried the plaintif from his presence, with a dismission of he bill, but that, inspired by the genius o equity, he would have pronounced a sen tence somewhat in this form; 'the benignit of equity is such, that it will, when the law to preserve its principles and grounds, de priveth a man of his remedy, without hi own fault, give him a remedy equaly bene ficial'? and would not such a sentence hav been in perfect concord with principles o equity, which hitherto have been acknowl edged universaly, and from which example of deviation occur not, except in two o three sudden selfwilled declarations of

lord keeper, that he would not charge a surety further than he was answerable at law, although neither he, nor any other man, ever pretended to assign a reason, nor, as is believed, was able to assign a reason, for the deviation?

So much of the opinion as hath been considered, no doubt seemed to those who delivered it sufficient to evince the error of the reversed decree; so that the following part appeareth to have been added per saturam; but, as it is crammed therein, it must not be passed over; and it deserveth special notice, because it refereth to certain topics, from which, or from one of which, at least, an argument may be drawn powerfully supporting that decree, the eversion of which was intended.

289 *And no fraud or mistake appearing to have occurred in the writing of the bond, [if the three men, who transacted this business, did intend to make a contract to this purpose; that the representatives of David Minge, in the event of his death, in the lifetime of William Claiborne, should be discharged from their testators obligation to assure the repayment of the money borrowed by William Claiborne, with interest, every man will agree with the court of appeals, that no fraud or mistake occurred in the writing of the bond; and perhaps the court of appeals will agree, with every other man, that the creditor was unwise in making such a contract, which was nothing but a wager, by which, in no event, he could gain any thing, and in one event might lose his stake.

But, if the parties did intend, that David Minge or his representatives should assure the repayment, in every event, as most men will suppose they did, and if the bond be written in such a manner, that, unless the money were paid in the lifetime of both, the intended satisdation is confined to the single event of David Minges breathing after William Claiborne should cease to breathe, then the parties were deceived,—deception occurred in the writing of the bond; and if deception and fraud be convertible terms, as they are, if ordinary vocabularies err not, fraud occurred in the writing of the bond.

Whether the party who gained by the deception meditated it or not? authorities perhaps may make an important inquiry; but if they do not decide otherwise, the pure principles of equity seem to teach, that a man ought not to suffer detriment by fraud, occurring in a contract, although the fraud were not premeditated, and the contract not studiously and industriously conceived in terms by which the party was harmed. the turpitude of the fraud, with that ingredient, is indeed the fouler for it; but the reason, why the contract ought not to be detrimental to the party, is supposed to be, that it was a contract which he did not mean to make,—a contract, to which, if he had known the purport of the terms used to declare it he would not have yielded his consent,—a contract not the image of the parties intention, by which the written act ought to have been moulded. by the roman civil law, non videntur, qui errant, consentire. Dig. lib. L. tit. XVII. Reg. CXVI § 2.

Further, if the parties did intend that David Minge or his representatives should assure repayment of the money borrowed, in all events, and the bond be written in such a form that the satisdation would be ineffectual in one event,—an event which neither the creditor nor perhaps either of the other parties had in contemplation;—in other words, if the creditor. if all

290 the *parties, did TAKE a bond to be what it is not, some men would NAME what occurred in the writing of the bond a MISTAKE, and would not be persuaded easily, that they gave it a MISNAME.

If a court of equity, because possibly not supported by authorities, would not relieve against a fraud unpremeditated, that court, as is conceived, would not transgress its legitime bounds by granting relief against such a mistake.

It is to be considered as a joint obligation,] it was stated to be, and therefore must have been considered, as a joint obligation, both in the bill, and the reversed decree; and because, being joint, an action at common law could not be maintained upon it, the executrix of the obligee, illadvised as unlucky, supplicated a court of equity to succour a conscientious demand, which the court of common law, although not an enemy to it, and in truth the parent of it, could not befriend;—a case occupying perhaps the first grade in the catalogue of cases, which are intitled to be salutiferous interposition of the court of equity, and for the sake of which that tribunal, auxiliary to the common law itself, was instituted. but vain was her application, for the bond was

Subject to the LEGAL consequence of Minge and his representatives being discharged by the death of him in the lifetime of Claiborne,] the sum of the opinion seems to be, that, when, for any cause whatever, an action at common law cannot be maintained against a surety, or his representative, on his bond, wherein with him the principal is bound jointly, unless he the surety was borrower or user of the money, or fraud or mistake appear to have occurred in the writing of the bond, the obligation is discharged in equity. if such be the opinion of the court of appeals, to reconcile it with fundamental general principles is not in the power of the commentator.

If this be not their opinion, what there or elsewhere can justify the final sentence

And that the said decree is erroneous?] to which sentence however, all people, within a certain district, must now submit; but which will not be approved, as is believed, by them any more than it will be approved by others. let us vary the case, only, by supposing James Field to have been resident on Amsterdam, Paris, or some other foreign country, and William Claiborne and David Minge to have gone

thither, and, for securing repayment of the borrowed money by William Claiborne, to have sealed and delivered their obligation there, instead of Princegeorge county in Virginia; would the court of appeals have reversed the decree, in that case, for the executrix of James Field against the representative of David Minge? if not,
291 what *reason can be assigned for the difference? if they would have reversed it, would foreigners think the justice of Virginia or the administrators of it proper subjects for panegyric?

BETWEEN

CARTER BASSETT HARRISON, and Mary Howell his wife, and Anne Armistead, Allen and Martha Bland Allen, infants by the said Carter Bassett, their next friend, *plaintiffs*,

AND

WILLIAM ALLEN, *defendent*.

Sept., 1794.

Statute of Descent—Suspension of Repealing Statute—Effect.*—The section of the statute of 1785-7, that an intestate's real estate shall descend to his children; if none, to his father; if none, to his mother, brother, and sister, &c., was enacted in 1792, by an act which repealed that of 1785-7, which was to be in force from its passage; but subsequently in the same session, the operation of the Acts of 1792, was suspended. By Act of 1789, the mere repeal of a law did not revive a law which it had repealed. HELD, that the section of the Act of 1785, above cited, was not repealed, nor the Act itself, during the suspension of that of 1792. So that.

1. **Same—Sisters—Brothers.**—Sisters could participate with their brother in an inheritance.
2. **Wills—After-Acquired Lands.**†—Lands acquired after the date of a testament could be transferred by said testament if such be the testator's intention.
3. **Same—Same.**—If such after acquired land did not pass by a testament, it would descend, in default of children and their descendents, to testator's father, and so, on down according to the statute.

THE plaintiffs femes and the defendent were the children of William Allen, by second wife.

His son, by a former wife, John Allen, by his testament, which was dated in may, 1783, devised all his estate to his father, and died in may, 1793, being seized of lands of inheritance acquired after the date of his testament.

William Allen, the father, in september, 1789, made his testament, containing devises of lands, and a bequest of the résidue of his estate after some specific and pecuniary legacies, to his sons, and died in july, 1793.

By statute, passed in 1785, to be in force from and after the first day of january 1787, was enacted, that when any person having title to real estate of inheritance shall die intestate as to such estate, it shall descend to his children, if any there be: if there be no children, nor their descendents, then to his father; if there be no father, then to his mother, brothers and sisters, and their descendents, or such of them as there be.

292 *On the 8 day december, 1792, a statute was made, to reduce into one the several acts directing the course of descents. the words of it are the same as the words before rehearsed of the statute of 1785. a subsequent section of it (22) is in these words: all and every act and acts, clauses and parts of acts heretofore made containing any thing within the purview of this act shall be and the same are hereby repealed. this act by the last section of it is to commence in force from the passing thereof.

In the same session, on the 28 day of the same december, 1792, a statute was made, by which the operation of several acts of that session, among which is the forementioned statute of the 8 day of december, was suspended until the first day of october, 1793.

By statute passed in november, 1789, whensoever one law, which shall have repealed another law, shall be itself repealed, the former law, shall not be revived without express words to that effect. (a)

William Allen having died whilst the operation of the statute of the 8 day of december, 1792, which is supposed to have repealed the statute of 1785, was suspended; whether during that period the common law which excluded the daughters from a participation of the fathers inheritance with their brother was restored, so that he alone succeeded to the lands the devise whereof to John Allen was ineffectual by his death in the testators life time? was the question argued by counsil.

A second question occuring in the case is, whether by the devise in the testament of John Allen of all his estates to his father, the lands acquired after the date of the testament were transferred? this question dependeth upon the principles which govern the decision of the first, as inspection of the statutes of 1785, chap. 63, of the 13 day of december, 1792, intituled an act reducing into one the several acts concerning wills, &c. and of the forementioned 28 day of december, in that session, will shew. and

A third question is, whether John Allens

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*For the decision of the court of appeals in this case, affirming the decree of the high court of chancery, see Harrison v. Allen, 3 Call 289.

†**Wills—After-Acquired Lands.**—See *notes* cited in *foot-note* to Turpin v. Turpin, Wythe 137.

(a) Hence was inferred by the counsil for the defendent, that suspension of the operation of the statute made the 8 day of december 1792, did not revive the statute of 1785: a suspension differing from a repeal in their duration only, that of one being for a limited, of the other for an indefinite, period. to which the plaintiffs counsil retorted, the act of 1785 repealed the common law, by which the defendent would exclude his sisters from shares of his fathers lands of inheritance, and by repeal of that act the common law was not restored, any more than the act of 1785 was revived by suspension of the act which repealed it.—Note in edition of 1795.

after acquired lands, if they were not transferred by his testament, descended to
293 his *father? which will be resolved by the resolution of the first question; so that the discussion of this shall suffice for all.

By the court, 27 day of september, 1794.

I. The statute of 1785 was not repealed by the statute of the 8 day of december, 1792.

II. The statute of 1785, if it were repealed by the statute of the 8 day of december, 1792, remained during twenty days only repealed, being at the end of that period recuscitated by the statute of 28 day of december, 1792.

I. The statute of 1785 was not repealed by the statute of 8 day of december, 1792, as to the subject of the present litigation, because both statutes, being in the same words, have the same meaning.

A statute is the legislative will.

If the lawmakers of any country assembling will, for example, that in the occupation and enjoyment of things, the dying owner whereof shall not have appointed a successor, his children, or their descendents, or, if he be childless, his father, or if fatherless, his mother, brothers and sisters, &c. shall succeed to him, this will would be a law, if it were only registered in the memories of those by whom and for whom it was ordained, no less than if the words which signified it, cut in wood, or engraved on stone or brass, were exposed to the view of all, or inscribed or impressed on paper or parchment, were deposited among the popular archives.

Surely laws of civil institution might be established, if the arts or writing, sculpture and printing had not been invented.

They are indeed exceedingly beneficial, enabling men to preserve the records of acts necessary to be known by monuments more faithful than tradition, more intelligible than hieroglyphics, for which those arts have been happily substituted.

But the columns, or tables, or folios, or skins which exhibit the words signifying the will of the legislature are not theirselves the legislative will—are not the statutes.

A statute being the legislative will, the repeal of a statute is a change of the legislative will.

The lawmakers then, in 1785, having willed that all a mans children, or, if he had not children, his father, or, if the father were dead, his mother, brothers and sisters, &c. should succeed to his undevised lands of inheritance; and that this should be the law, after the first day of january, 1787; and having on the 8 day of december, 1792, willed that all a mans children, &c. should succeed to his undevised lands of inheritance, rehearsing the identical words contained in the statute of
294 1785; *when after this the legislature added that the statute of 1785 was and should be repealed, what could they mean?

We cannot suppose them to have meaned that the will of the legislature had changed between 1785 and the 8 day of december, 1792. the fact is proved to be otherwise by the continuance in force of the statute, which alone can indicate a continuance of the legislative will.

The legislative will could not alter between repealing one statute and enacting the other, because no time intervened—they were simul ac semel, they were both, if the former were at all, uno flatu, in the same breath.

The only other meaning of the repealing section is that the legislative will was changed in 1792. but that meaning is repugnant to the statute which containeth the repealing section, and which willeth the same course of descent which the statute of 1785 willed.

The repealing section therefore is rejected, except in cases where the statute made in 1785 is altered by subsequent statutes, among which cases is not the present case of sisters demanding a partition with a brother.

II. The statutes of 1785, if it were repealed by that of the 8 day of december, 1792, was resuscitated by the statute of the same session.

This, as is believed, must be manifest to him who will translate the language of the three statutes into equivalent terms with such explications of them by way of paraphrase as are evidently requisite to adapt a law in general terms to particular cases; for

Then it would be read thus: the operation of the act passed during the present session, by which an act passed in the year 1785, directing that lands of inheritance shall descend to all the children of an owner dying intestate, &c. was repealed, is suspended until the first day of october, 1793. and consequently until that time the statutes said to be repealed would not be repealed, unless it was between the 8 and 28 day of december, 1792.*

Decree for the plaintiffs.†

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*BETWEEN 295

ARCHIBALD HAMILTON and company, *plaintiffs*,

AND

WILLIAM URQUHART, executor of Nathaniel Flemyng, *defendent*.

Sept., 1794.

Bonds‡—Statutory Scale of Depreciation—Application.—The statutory scale of depreciation not applied to a bond in 1777, under the exception allowed by the stat. of 1781;—and the value of paper money during the dealings between the parties before the depreciation began, not being shown to have been less than of money current at this time.

IN this cause, heard the day of september, 1794, the court decreed so much of

*See appendix.—Note in edition of 1852.

†[This decree was, in 1802, affirmed by the Court of Appeals. See the Report in 3 Call 289, and cases there cited.—Ed.]—Note in edition of 1852.

‡**Bonds.**—See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

a debt, secured by bond in 1777, as appeared to have become due for dealings in preceding years, to be paid, without being reduced according to the scale of depretiation, established by the act of general assembly, passed in the november session of 1781, or according to any other scale; that statute, in the last section thereof, being understood to have authorized an examination into the origin of the demand, and a rejection of the scale, and the substitution of some other mode of adjustment more equitable, where that shall be discovered to have graduated the decrement in value of paper money in particular cases inadequately;* and the value of paper money, during the period of dealings between the plaintiffs and the testator of the defendent before the statutory period of depretiation began. not being shewn to have been less than the value of money current at this time.

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*BETWEEN 296
WILLIAM WILSON, *plaintiff*,†
AND
ANGUS RUCKER, *defendent*.

Sept., 1794.

1. **Lost Military Certificate—Bona Fide Purchaser—Rights of Owner.**‡—R. lost a military certificate, and obtained from the Auditor a duplicate, which however, he returned as soon as he knew the original was found.—In the mean time, the original had been purchased by the plaintiff for value and without notice. HELD: that R. was entitled to the certificate, with interest thereon received; or to the principal and interest.
2. **Chancery Practice.**—A court of equity may decree a plaintiff to pay money to a defendant, who had not demanded it by a cross bill.

THE defendent lost a military certificate, which was his property, and procured a duplicate thereof from the auditor for public accounts, in the manner prescribed by the statute of may session, 1783, chap. 1. before the date of the duplicate, another man sold the certificate, then in his possession, to the plaintiff, who paid a valuable consideration for it, at that time not knowing it to have been lost by the defendent. the duplicate was returned.

These facts were stated in a special verdict, found on a new trial of the issue, in an action of trover, brought by the present defendent against the present plaintiff in the district court of Dumfries; which new trial this court directed by (a) consent of parties.

297 *Opinion of the court the day of september, 1794.

A military certificate is transferable by simple delivery of it; and therefore the holder of it is presumed to be the owner, and to have derived a right to it immediately from the officer or soldier to whom it was originaly granted.

But against this presumption proof of the contrary may preponderate: and here is sufficient proof of the contrary.

That the man from whom the plaintiff bought the certificate, had acquired a right before the loss, may be confidently denied, because a jury, whose veracity in such a case cannot be controverted, affirm it at that time to have been the property of the defendent.

And that it was assigned by the defendent afterwards, is so incredible that it may be denied with confidence justified by these considerations; 1, the plaintiff in his bill doth not alledge such an assignment to have been made, which undoubtedly he would have alleged, requiring a discovery, if he had even suspected it to be true; 2, the defendent procured a duplicate of the lost certificate, which he must have known to be worthless if the original should be produced: and which was accordingly returned, to be canceled, when the original was discovered to have been found, and claimed by another; and 3, no man, as is supposed, would have bought the lost certificate from the defendent, if he had offered it for sale.

Payment of value for the certificate doth not alter the question, which is only, whether one can transfer a right which he hath not to another?

Nor is this case like the case of lost money found and paid away, where the identity of the money cannot be proved. cannot be proved, is said, because where the money can be identified, e. g. if the lock of a casket or chest or seal of a bag in

[*By the statute, in case of tender and refusal, or of non-payment caused by the creditor, or where "other circumstances" would in the opinion of the Court make the statutory table unjust, the Court may award such judgment as may seem just and equitable. 10 Hen. Stat. 473.—Ed.]—Note in edition of 1852.

†For the decision of the court of appeals in this case, see Wilson v. Rucker, 1 Call 500.

‡**Lost Military Certificate—Bona Fide Purchaser—Right of Owner to Bring Trover.**—See *foot-note* to Wilson v. Rucker, 1 Call 500.

(a) The causes, for which the plaintiff, by his bill, prayed a new trial, with an injunction in the mean time, to be awarded, were, 1, the jury without hearing the question of right argued by counsil, and although they were instructed by the counsil of both parties, that the question would be discussed before and decided by the court, and that assessment of the damages, subject to the opinion of the court, was the only matter refered to the jury, nevertheless returned a general verdict for the defendent: and having resumed their seats by direction of the court in order to hear the arguments of counsil, one of the jurors, whilst they were attending to those arguments, being seised with a convulsion paroxysm, was necessarily removed, and was not able to reassociate with his fellows before the term for the courts session ended; notwithstanding all which the court, having rejected a motion for the plaintiff to set aside the verdict, and award another trial, recorded the verdict, and entered a judgment accordingly. 2, one of the jurors informed the plaintiff, after having heard what had been urged by his counsil, he the juror was not satisfied with his former opinion, and that he believed, upon a second consideration of the matter, a different verdict would have been rendered. and 3, the damages* were alleged to be excessive. whether for these causes or any of them a court of equity ought to have directed a new trial? was not determined in this case, the defendent without answering the bill, having consented that the new trial be directed. see the cases between Hoomes and Kuhn, Cochran and Street, and Cobbs and Mosby 28 day of october, 1791.—Note in edition of 1795.

[*Which cases are all in this volume.—Ed.]—Note in edition of 1852.

which it was deposited appear not to have been broken, it is not distinguished from the case of any other thing found, or taken from the owner by stealth or violence.

Neither is this case like the case of a bill of exchange with a blank indorsement, which the holder may fill up with his own name, or like the case of an order payable to bearer, by the terms of which those who possess the draughts are empowered to receive the money.

DECREE, (b)

298 *That the plaintiff restore the certificate with all the interest thereon received, to the defendent; or pay the value of the principal money and interest to him; and also in either case pay the costs.*

BETWEEN

PHILIP NATHANIEL DEVISME and Henry Smith, of the city of London in the kingdom of Great-britain, merchants and partners, *plaintiffs*,

AND

HENRY MARTIN and company, of London, merchants, Hudson Martin and Nathaniel Anderson, *defendents*.

Sept., 1794.

1. **Conflict of Laws—Bankruptcy†—Law Governing.**—If a British subject be declared a Bankrupt in England, having debts due him in this Commonwealth, his British creditors cannot recover satisfaction out of said debts in our Courts: for

2. **Same—Same—Same.**—The English Law will govern in our Courts in such a case and by that Law said debts would be transferred to the assignees in Bankruptcy.

IN this cause, the question was, whether the right to money, due to a bankrupt, from citizens of this commonwealth, was so transferred to the assignees of his effects that a british subject, who was a creditor of the bankrupt, resident in England, and did not clame any benefit from the assignment, could recover satisfaction for his demand out of that money? upon which the court, the 26 day of september, 1794, delivered this

299 *OPINION.

That the question controverted between the parties, in this cause, which is, in truth, a question between british creditors, on one side, and the assignees of a british debitor or debitors, declared a bankrupt or bankrupts, according to the laws of their country, on the other side, discussed before an american court, should be decided by those principles which ought to govern the decision, if the same question were discussed before an english court; and that by the english statutes concerning bankrupts, all the personal property of a bankrupt, wherever it be, is so transferred to the assignees that an english subject cannot recover a debt, contracted before the assignment, by an action against the bankrupt himself, or satisfaction for it out of his effects in the hands of others, although a creditor, who is not a british subject, and consequently not bound by the laws of Great Britain, (a) and perhaps too a british

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(b) This decree condemning a plaintiff to pay money to a defendent who had not demanded it by a cross bill, is believed to be supportable upon the same grounds as a decree against a plaintiff bringing a bill for an account. besides, if this court could only have dissolved the injunction, the defendent could have recovered no more than the damages assessed by the first verdict; for the district court could not have entered a judgement on the second verdict, the action not then depending.—Note in edition of 1795.

*In this case W. took two appeals: one from the judgment of the District Court: and the other from the decree of the H. C. C. The Court of Appeals, 1 Call. 435-450, reversed the decree of the H. C. C. in discharging the appellant from the damages recorded against him, on his delivering up the certificate and paying the interest received, since that option gave him an unreasonable advantage: and in the other alternative, the modification of relief was improper.

The abstract of the case says:

1. If a military certificate be lost, and after sold to a bona fide purchaser without notice, still the original owner may maintain trover for it, against the innocent vendee.

2. The Court of Chancery may on granting a new trial in the same Court, order the verdict to be certified into the Court of Chancery and proceed to make a final decree in the cause. See Myers et al. v. Friend et al. 1 Ran. 12: Mayo v. Bentley, 4 Call, 556.—Note in edition of 1852.

†**Bankruptcy.**—See principal case cited in Banks v. Greenleaf, 6 Call 275.

For a collection of the Virginia and West Virginia cases on the subject of bankruptcy, see monographic *note* on "Bankruptcy and Insolvency" appended to Dillard v. Collins, 25 Gratt. 343.

(a) Upon the principles stated in the note (e) to the case between Page, executor of Cary, plaintiff, and Pendleton, &c., defendents, the english statute laws bind english subjects and regulate their personal rights every where, unless the case mentioned in the next following note to this case may be an exception. if an english subject die intestate, his relations, whom the english statute of distribution appoint to succede, will be intitled to his personal estate which may, at that time, be in Virginia, not those relations whom our statute of distribution, so far as it differs from the english, appoints: for example: brothers and sisters of the half blood will share equaly by the one, and but half so much by the other. &c. if an english trader be declared a bankrupt, and his estate be assigned by those who have the administration of such affairs, in that country, the title of the assignees would be supported, in the courts of this country, and the right of such creditors as are subject to the laws of England would be bound by the assignment.

If the bankrupt happen to have property which lies out of the jurisdiction of the law of England, if the country, in which it lies, procede according to the principles of well regulated justice, there is no doubt but it will give effect to the title of assignees. by Loughborough, H. Blackstones, reports, p. 691. this position is too general, and is not sufficiently qualified by what follows it in p 693.

'Solomons vs. Ross, in canc. 26 january, 1764, before mr. justice Bathurst, who sat for lord chancellor Northington. messieurs Deneufvilles, merchants and partners at Amsterdam, corresponded with Michael Solomons and Hugh Ross, merchants in London. on the 18 day of december, 1759, the Deneufvilles stoped payment. on the 1 day of january, 1760, the chamber of desolate estates in Amsterdam took cognizance thereof, and, on the next day, they were declared bankrupts, and curators or assignees appointed of their estates and effects. on the 20 day of december, 1759, Ross, who, was a creditor of the bankrupts to the amount of near 300 *3000 pounds, made an affidavit of his debt in the mayors court of London, and attached their moneys in the hands of Michael Solomons, who was their debitor to the amount of 1200 pounds. on the 8 day of march, 1760, Ross obtained judgment, by default, on the attachment. and thereupon a writ of execution was issued against Michael Solomons, who was taken into execution, but, being unable to pay the 1200 pounds, gave Ross his note

subject not having a domicilium in England, (b) may recover such debt, by an action against the bankrupt, or satisfaction for it out of his effects.

In consequence of which opinion the bill was dismissed.

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302 *CASE UPON THE STATUTE FOR DISTRIBUTION.

On the words, 'provided that there be no representations admitted among collaterals, 'after brothers and sisters children,' which are literally transcribed into our statute, english courts have decided that the collateral kindred, whose representatives succede to the shares, to which their parents, if they had been living, would have succeeded, must have been brothers and sisters of the intestate:

So that although B, the surviving brother, and D, the child of C, a deceased brother, would succede to the goods, of A, dying intestate, and childless, &c.

Yet B, the surviving uncle, should succede to all, excluding D, the child of C, a deceased uncle, from succession to a part of the goods of A, in the same circumstances.

So, if B, and C, had been nephews of A; or if B, had been the uncle and C, the nephew, who, by the case in 1 Atkyns rep. 454, or in equal degree of kindred to A.

The argument of *North, C. J.*, (in T. Ray. Rep. 496,) in support of these decisions, examined by the Chancellor; who *holds* that

The children of those next of kindred to the intestate in equal degree, however remote, are not excluded from succession, to the portion to which their stock, if living, would have succeeded. His reasons for such an explication of the Statute.

ONE, who had occasion lately to consider the question, arising on a paragraph of the statute, enacted by the general assembly of

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payable in a month; on which Ross caused satisfaction to be entered on the records of the judgement. a few days after, one Israel Solomons, who had a power of attorney from the curators to act for them in England, filed a bill, making himself and the curators plaintiffs, praying that the defendent Michael Solomons might account with them for the effects of the bankrupts, which were in his hands, might pay and deliver the same over to Israel Solomons for the use of the curators, and be restrained from paying or delivering them over to Ross. Michael Solomons then filed a bill, by way of interpleader, praying an injunction, and that he might be at liberty to bring the 1200 pounds into court. this money was accordingly paid into the bank, in the name of the accountant general, persuant to an order in the court. The decree directed, inter alia, 'that the stock purchased with the money paid into the bank should be transferred to Israel Solomons, for the benefit of the creditors of the bankrupts, and that Ross should deliver up the note, given by Michael Solomons for 1200 pounds, to be canceled.' H. Blackstone, p. 131. in the notes.

Similar decrees were made in two other cases there stated.

The principle of the decrees doth not appear.

In the first and second, it is supposed to be this; the laws of Holland divest the bankrupts property out of him, and vest it in the curators or assignees, in that country, for the purpose of distributing the property among his creditors, and that the assignment comprehended the bankrupts right to moneys due to them in England: for

It is a clear proposition, said Loughborough, H. Blackstone, p. 690, not only of the law of England, but, of every country in the world, where law has the semblance of science, that personal property has no locality. the meaning of that is, not that personal property has no visible locality but that it is subject to that law which governs the owner.

This proposition is not free from ambiguity. the sense intended by the author of it is believed to be this: that the owners right to a personal thing, which is in one country, is subject to disposition of the law of another country, whereof the owner is a member; and, in that sense, is admitted to be true, with respect to the owner himself, and to all other people who are members of the same state with him: but is not admitted to be true with respect to men who are not members of the same community.

The writer of these notes, differing in this point with three capital english judges, is aware, that he will be regarded with a fastidious eye by men, whose veneration for the westmonasterian oracles is equal to the veneration of the antients for the dodonaen and delphic oracles; but, when he has reason, the only despot, *to which he professeth unconditional submission, on his side, he will venture to differ with any man. he disapproves the determination in the case between Solomons and Ross, on these considerations,

1. That Ross, if he were an english subject, as he is supposed to have been, was not bound by the laws of Holland. this is assumed for a proposition incontrovertible.

2. That a creditor, in justice, hath a right to so much of his debitors estate as is equal to the demand, or to a proportion of the estate, if it be
301 not sufficient *to satisfy the demands of all the creditors. the truth of this proposition is admitted, by the bankrupt laws both of England and Holland, appointing the assignees in one, and the curators in the other, distributors of the estate among the creditors; so that the assignees and curators are the trustees for and representatives of the creditors, and are chosen by them in one, and, perhaps, in the other too.

3. The law which authoriseth this appointment, if it do not bind the foreign creditor, can not legaly deprive him of his right to recover what is due to him, because the law was enacted without his consent, either individually, or as a member of the community.

4. The right of Ross to satisfaction for his demand against Deneufvilles out of moneys in the hands of Solomon their debitor, whether, in Loughboroughs language, it had or had not locality, was as much subject to the law which governed Ross, that is the law of England, as the right of the bankrupts to the same moneys was subject to the law which governed the Deneufvilles, the owners, that is the law of Holland; and, by the law of England, Ross was authorised to procede as he did to attach those moneys,—now where such an opposition between two laws upon the same subject happeneth, why the law of Holland, which favoured the right of the curators, should prevail against the law of England, which favoured the right of the english creditor, or, in other words, why the court should have prefered the title of the curators to the title of the creditor using the process of attachment, is not discerned.

The most just mode seemeth to be, in whatever court the matter be discussed, to accomodate it by a proportionable distribution of the bankrupts effects among all the creditors of every country.

If the assignees of an english bankrupt bring suits in this court to recover money due from his debitors, and parties, not english subjects, demand a satisfaction of their demands out of the same money, the court will appoint a receiver of the money and not allow the assignees any part thereof, until they shall have thrown the effects collected by them into a common fund, for the benefit of all the creditors. —Note in edition of 1795.

(b) Because, 1. such a subject is not represented in the the british parliament, and, therefore, as is conceived, ought not to be bound by its acts, although the english courts have determined otherwise, and the american courts too, before the late revolution, admitted british subjects, residing in the plantations, as they were then called, to be bound by acts of parliament, the terms of which specialy comprehended the plantations. and 2. The bankrupts effects in England may be all distributed among the creditors there, in some cases, before the creditors in the plantations could have notice of the bankruptcy in time to clame their shares.—Note in edition of 1795.

*John Horne Tooke.—Note in edition of 1852.

Virginia, in the year 1705, for distributing the goods of an intestate,* disagreeing with english judges in their exposition of the same paragraph, in their statute for that purpose, submits to censure the following result of his disquisition, not without hopes of shewing, as he hath endeavored to shew in other instances, that the judicial determinations in England do not deserve the respect with which they are honored in this country.

By the 22 & 23 Car. 2. Cap, 10, it is enacted, 'that all ordinaries and ecclesiastical judges, upon granting administration of persons dying intestate shall take bond of the administrator, with two, or more sureties, with condition that the administrator shall make a true and perfect inventory of all the goods and chatels of the deceased, and exhibit it in the registry of the ordinary court by such a day, and that the said ordinaries, and judges respectively shall and may, and are enabled to
303 proceed *and call such administrators to account for and touching the goods of any person dying intestate, and upon hearing and due consideration thereof, to order and make equal and just distribution of what remaineth clear (after all debts, funerals, and just expenses of every sort first allowed and deducted) amongst the wife and children, or childrens children, if any such be, or other wise to the next of kindred, to the dead person, in equal degree, or legally representing their stocks, pro suo cuique jure, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his majesty's ecclesiastical laws.

'Provided always that all ordinaries, and every other person, who by this act is enabled to make distribution of the surplus of the estate of any person dying intestate, shall distribute the surplusage of such estate, or estates, in manner and form following, that is to say, one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legaly represent such children in case any of the said children be then dead, other than such child, or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life-time by portion, or portions equal to the share, which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his life time, by portion not equal to the share, which will be due to other children by such distribution, as aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child, or children, as shall have any land by settlement from the intestate, or were advanced in the life-time of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated; but the heir at law, notwithstanding any land that he shall have by descent, or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise, from the intestate.

'And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the said intestate, the residue
304 of the said estate to *be distributed equal to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them.

'Provided that there be no representations admitted among collaterals after brothers and sisters children; and in case there be no wife, then all the aid estate to be distributed equally to, and amongst, the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives, as aforesaid, and in no other manner whatsoever.'

This statute differs not materialy from the Virginia statute, on the same subject, otherwise than that the latter appoints the next of kindred by the father, if no children be, to succede with the wife.

On the words, 'provided that there be no representations admitted among collaterals, after brothers and sisters children,' which are literaly transcribed into our statute, english courts have decided that the collateral kindred, whose representatives succede to the shares, to which their parents, if they had been living, would have succeeded, must have been brothers and sisters of the intestate:

So that although B, the surviving brother, and D, the child of C, a deceased brother, would succede to the goods of A, dying intestate, and childless, &c.

Yet B, the surviving uncle, should succede to all, excluding D the child of C, a deceased uncle, from succession to a part of the goods of A, in the same circumstances.

So if B, and C, had been nephews of A: or if B, had been the uncle and C, the nephew, who by the case in 1 Atkyns rep. 454, are in equal degree of kindred to A.

The reasons of these decisions, explained in a celebrated argument of chief justice North, with which T. Raymond hath crowned his book of reports, p. 406, more fully than any where else, shall be here examined.

His first reason is, 'all other relative terms generaly expressed through the whole act have the intestate for their correlative, so (wife) is meant wife of the intes-

*This statute is not now in force; but questions have arisen, are now depending, and may still arise upon it, in cases where the intestate died before it was repealed.—Note in edition of 1852.

tate, (children) are children of the intestate, (heir at law) is of the intestate, so that, in the most plane and obvious sense, the intestate ought here to be taken for the correlative to the words brothers and sisters.'

Observations: first, until the connection between his proposition 'all other relative terms generaly expressed through the whole act have the intestate for their correlative,' and his inference. 'so that in the most plane and obvious sense of the
305 *words, 'that there be no representations admitted among collaterals after brothers and sisters children,' the intestate ought here to be taken for the correlative to the words brothers and sisters,' which connection hath not been discerned, be proved, the inference is a non sequitur.

Second, this ratiocination is a mistake of the question, which is not of what tribe of collateral kindred, whether brothers, uncles, nephews, &c. the children shall represent their parents, but, to what degree the representation of those collateral kindred, who if they were not dead, would have succeded, shall extend. if these restrictive words had not been inserted, descendents of collateral kindred, more remote than their children, would have legaly represented them. representatives of nearest kindred may be branched into children, grandchildren, great grandchildren, &c.

Third, the proposition is not true. if he, who stated it, had completed, as fair argument required him to complete, the series of instances in which the suitas, whence the inference was drawn, occurred, he would have found, in one place, after the words, 'children of such persons dying intestate,' the terms 'and such persons as legaly represent such children, in case any of the said children be then dead,' which are relative terms, and have for their correlative, 'children of such persons dying intestate;' in another place, after the word, 'children,' the terms, 'nor representatives of them,' which are relative terms, and have for their correlative, 'children;' in another place, after the words, 'next of kindred to the dead person, in equal degree,' the terms 'representing their stocks,' which are relative terms and have for their correlative, 'next of kindred, in equal degree;' in another place, after the words, 'next of kindred of the intestate, who are in equal degree,' the terms, 'and those who legaly represent them,' which are also relative terms, and have for their correlative, 'next of kindred of the intestate, who are in equal degree;' and in another place after the words, 'next of kindred, in equal degree, of or unto the intestate,' the terms 'and their legal representatives,' which are likewise relative terms, and have for their correlative, 'next of kindred, in equal degree, of or unto the intestate.' and the proposition, to be true, ought to have been stated thus: of the relative terms, generaly expressed in the act, some have the intestate for their correlative, others have his children for their correlative, and others have the intestates next of kindred, that is collateral kindred, for their correlative. is the deduction from it, 'so that in the most plane and obvious sense, the intestate ought to be taken for the correlative
306 to the words, brothers and *'sisters,' sound logic? yet it hath been so deemed in westminster hall, for almost six score years!

His second reason is, 'because the distribution is given by the act for their relation to the intestate, and not for their relation to the collaterals; therefore the relation mentioned ought naturaly to refer to the intestate, and not to the collaterals. there may be cases put wherein brothers and sisters children of collaterals may be no kin to the intestate, if they were by the half blood, and it cannot be pretended that such shall have a share in the distribution. now why should the words be taken in the sense that comprehends those, that have no title to distribution?'

Observations: first, 'that distribution is given, by the act, to next of kindred, for their relation to the intestate,' is admitted: that the legislature, moved by the same consideration, called the representatives of collateral kindred to succession in place of him or her for whom they are substituted is admitted also; and most frequently such representatives are of kindred to the intestate; and when the case shall happen otherwise it is not so unreasonable as at first it might seem; because, he who is represented, if he had survived the intestate, and received his share, is presumed to have designed to will it, when he should die, to the same representative, who may not be of kindred to the intestate. but the statute having appointed representatives of collateral kindred, in general terms, to succede to the shares of their stocks, the argument, that representatives who are not of kindred to the intestate, may in some cases succede, if such succession be unreasonable in those cases, doth not conclude against representatives who are of kindred to the intestate. the conclusion then, which ought to have been particular, is universal, and the argument vitious.

Second, a position, here taken for granted, that the representatives of defunct collaterals, even so near as brothers, must be of kindred to the intestate, may be proved, by necessary consequence from westmonasterian authority which may be a good argumentum ad hominem, to be untrue, thus:

The case between Smith and Tracey (2 Mod. rep. 204) was, A dies intestate, having three brothers B, C, and D, of the whole blood, and a brother, E, and a sister F, of the half blood: and, by judgment of the court of kings bench, 28 and 29, Car. 2. the brother and sister of the half blood E, and F, succeeded to A's goods and credits, taking equal shares with his brothers of the whole blood, B, C, and D.*

*The law here is supposed to be different. see the case of Bailey and Teackle.—Note in edition of 1852.

307 *Vary the case, by supposing E and F, to have died, leaving children, in the life time of A; these children, representing their parents, would have succeded to their shares, being the children of a brother and sister.

This will, as is believed, be granted.

Then vary the case again, by supposing the mother of E, and F, who appear by the opinion of the court not to have been uterine brother and sister of A, B, C, and D, to have borne G, and H, children, by another husband, and E, and F, to have left no children; G and H would have represented E, and F, as legaly as the children of E and F, and would have succeded to the same shares.

This is believed to be a consectary from the judgment in the case between Smith and Tracy.

Yet G and H would have been, in Norths language, 'no kin to the intestate' A.

Third, the question, at the end of this second reason as it is called, 'why should the words' (they were the words provided that there be no representations admitted among collaterals, after brothers and sisters children) 'be taken in the sense that comprehends those that have no title to distribution,' is not a question for which those words taken in any sense, of which they are capable, can minister occasion. other parts of the statute 'comprehended those that have title to distribution,' dividing collaterals, who should succede, into two classes. they were distinguished by these characters, first, 'next of kindred,' who must be in the same degree, or in equal degree; and, second, 'their legal representatives,' that is, the representatives of those, who are next of kindred. the former were defined by the terms, 'next,' and 'in equal degree,' the latter were undefined, otherwise than that they must have been in existence, at the death of the intestate. they might have been children, grand children, great grand children, or more remote, in some of which cases the portions would be inconsiderable. to prevent this were the forecited words inserted. they do not declare, because unnecessary would have been here a declaration comprehending those collaterals, or kindred, whose representatives should be intitled to distribution. they do nothing more, as hath already been observed, than terminate the progress of representation, in the immediate offspring from the collaterals, providing that representation shall not be admitted, after brothers and sisters children, that is, shall not be admitted in any degree of kindred after, or more remote than, the children of brothers and sisters children, that is, shall not be admitted in any degree of kindred after, or more remote than, the chil-
308 dren of brothers and sisters, *and (one, who feels the argumentum ad judicium more forcibly than the argumentum ad verecundiam, as I. Locke, in his essay on human understanding b. iv. chap. xvii. § 19—22, calls them, ventured to add) brothers and sisters of the collaterals. in the words, 'provided that there be no representations admitted among collaterals, after brothers and sisters, children,' interpreted consistently with the sense of them, which is complete, and without interpolation, for which no cause appeareth, the legislature contemplated a single object, namely, the limit beyond which the right of representation shall not be asserted. but the author of this argument will have it. that the legislature contemplated, besides that, another object, namely the collaterals, the right of whose representatives shall not be asserted. this is the second instance, but is not the last, of a mistake of the question for it occurs in two other parts of this composition by North.

His third reason is, 'because as these words provided that here be no representations, &c. 'comprehend' (comprehend again) 'more than ought to have distribution in some instances, so they fall short, and leave out many, that by parity of reason ought to have distribution, and therefore this sense, they would put upon the words, is very improper.'

'As for instance:

'Suppose the next of kin are nephews, by several brothers, and some of them are dead, leaving children, these children are not brothers children to the collaterals, and cannot within the words,' provided, &c. 'clame' although, by the way, the child must clame, if they can clame at all, not by those words, which give to no one) 'any share; but if by chance any of them, had had uncles surviving, then they had been brothers children to the collaterals,'

So, if the next of kin are cousin germans, and some of them are brothers to one another, others are not; the children of such as them as had brothers that survived the testator,) it should be intestate) shall have a share, but the children of such who had no surviving brothers shall have no share which is most absurd, for they ought to have a share as they relate to the intestate and not as they relate to the collaterals.'

Observations: first, the question, upon the words, 'provided that there be no representations, admitted among collaterals, after brothers and sisters children,' is, as before, not who are 'comprehended by the words brothers and sisters' but, beyond what degree of kindred, the representatives of collaterals, whosoever those collaterals be, shall or shall not succede?

Second, in the first example, for il-
309 lustration of the third reason, *is taken for granted this position: the brothers and sisters of collateral kindred, whose representatives, not more than children, shall succede must all, by the words of the statute, be συναδελφοι—brothers and sisters every one of every other—brothers and sisters by the same parents, or by one common parent; a position, if not admitted, necessary to be proved, because, without it, a concatenation of the premises and the conclusion from them, stated in this third reason, is defective. the position is not admitted, but, on the contrary, its redargu-

tion, to be here essayed, by the medium of that example, varied for adapting the position to cases equaly within its scope, is not despaired. for,

Suppose the nearest kindred of A to have been B and C, sons of a deceased brother, and D and E, daughters of a deceased sister; B and D to have died in the life time of A, both leaving children, the former F and G and the latter H and I; and afterwards A to have died intestate, without alteration in his family. of F, G, H, and I, may be truly predicted, that they are brothers and sisters children; for by the hypothesis the father of F and G is the brother of C, and the mother of H and I is the sister of E; so that F and G are children of a brother and H and I are children of a sister; and that which is true of each pair of children must be true of both. consequently the position is false. But if F, G, H, and I, were children of different parents, so that neither of them had a brother or sister, it would be nothing to the purpose, as will appear.

Third, an absurdity, by the second example, attributed to the exposition, admitting representation of collateral kindred, who were not brothers and sisters of the intestate, is a consequence of two sophisms, already detected in the argument of North, one ignoratio elenchi, or a mistake of the question, the other a petitio principii, or a supposition of what is not granted. and if, 'that the children of such cousins german, as had brothers, that survived the intestate, shall have a share but the children of such, who had no surviving brothers shall have no share be most absurd,' as he says, which is not denied; this argument may partly shew the pravity of his interpretation.

Of the scholia appended to this third reason, that, which supposeth, for the words, 'provided that there be no representations admitted among collaterals after brothers and sisters children,' if the legislature had not designed to exclude from succession representatives, more remote than brothers and sisters children of the intestate, would have been substituted the words, 'provided that there be no representations admitted among collaterals after their children,' shall
310 only be noted, because no *other is thought to deserve notice, and this for the purpose of answering, that the former may be interpreted and ought to be interpreted, in the sense of the latter, which answer is proposed to be verified in the sequal.

His fourth reason is, 'because the excluding representations in a remote degree agrees with the reasons, upon which distribution is grounded. for 1, nephews and nieces to the intestate are of so near relation, the intestate having been as a parent to them, that they are of great regard, whereas remoter degrees have no regard but for their proximity (because there are none nearer) and therefore no reason to admit representations amongst them, to bring in a more remote degree to share with those that are nearer of kin. 2. again, nephews and nieces cannot be many, so that the division cannot come into very many parcels; but in a remote degree there may be very many of the same degree, and to admit a subdivision to the children of any deceased would make the shares of such children very inconsiderable, not worth demanding.'

Observations: first, the reason, upon which distribution is grounded, is an intestates affection for all his kindred, more or less warm, as the objects of it were related to him nearly or remotely; a thermometer, analogous with which the portions of the distributable subject are graduated; successors nearest, and in the same degree, taking equal portions, and successors in a remoter degree taking the portions, not of themselves who are not, but of their stocks, who were, in the same degree. if so, the position, that, 'excluding representations in a remote degree, agrees with the reasons upon which distribution is grounded,' is so far from being true, that representations, among lineal successors, are admitted in remotest degrees, and among collaterals, would as extensively have been admitted, (in every case where they are designated by the appellation, 'next of kindred,' the words, 'and their representatives,' or words of the same import, immediately following) if the representations had not been abscinded, by other words, after the degree of brothers and sisters children. whose brothers and sisters will be a fitter subject of enquiry elsewhere.

Second in the phrase, 'representations in a remote degree,' the term 'degree' may mean the degree of kindred, either between the representatives and their stocks, or between the intestate and his collateral kindred. in the former sense, the reason is not to the purpose; for no man denies that representations are not admitted among collateral kindred, whosoever they be, after or beyond the degree of brothers and sisters children; in the latter sense, the reason is not more pertinent, if
311 the object *which the words of the statute, truly intrepreted, shew the legislature to have contemplated, was to declare, not of what collateral kindred representation shall not be admitted but, after or beyond what degree of kindred between the collaterals surviving, and the representatives of those who were dead, representation shall not be admitted: and that this was the object hath been partly, as is believed, and will hereafter be perhaps fully proved. the notion stated in this reason, of 'the intestates having been as a parent to his nephews and nieces,' seemeth altogether imaginary,* and the argument drawn from the remark, that when the multitute of successors is numerous, the portions of representatives, by means of subdivisions, would be inconsiderable and worthless, which, however, would not happen so frequently as the contrary, is not an

*Horace had a different notion of the uncles parental affection towards his nephews and nieces, as may be collected from these words: metuentes patruae linguae XII. ode. II. lib. and ne sis patruus mihi. Sat. III. lib. II. v. 88.—Note in edition of 1852.

argument against the right of a representative to his modicum, if the words of the statute have intitled him to it. the argument, if it prove any thing, proves that the statute ought not to have admitted, not that it did not admit, representations, wherein those subdivisions would be necessary.

His fifth and last reason is, 'because, by the opinion of the learned, the law and practice of the spiritual courts before this act did exclude all representations of collaterals, after the intestates nephews and nieces.' to which he adds, 'the whole scope of the act was to make their jurisdiction as to distribution legal, which before was condemned by the kings courts, and the words of the act (legaly representing) (pro suo cuique jure) and according to the laws in such cases (and the rules and limitation* set down) shew that there is a reference to their laws. now if there were an opinion this way before the act; there is great reason to believe, this clause, 'provided there be no representations, admitted among collaterals after brothers and sisters children,' was founded upon that opinion.'

Observations: first, we might learn from North himself, for in the introduction to his opinion and reasons he admits, 'that all acts of parliament are to be expounded according to the true meaning to be collected from the words of them; and that must be a rule in this case,' to which rule however he doth not appear in a single instance throughout his argument to have adverted. he flew the way at the start, and never recovered it. to prove that this act of parliament, if it be expounded ac-
312 cording *to that rule, contradicts the law and practice, as they have been stated, of the spiritual courts, in this particular instance, will be attempted, and if the attempt be successful, there is no reason to believe the clause in question was founded upon the opinion of those courts, and to expound it that way;' that is to expound the clause, which, in the only sense whereof it is capable, without interpolation, is reconcileable with other parts of the act, so as to contradict those other parts of the statute.

Second, the terms, 'legaly representing,' and 'pro suo cuique jure,' are intelligible surely without reference to the laws of ecclesiastical courts; the words, 'according to the law in such cases,' if they refer to their laws at all, refer perhaps to those only, by which degrees of consanguinity are computed; and the words, 'rules and limitations set down,' which are defectively quoted, and which in the statute are, 'the rules and limitation HEREAFTER set down,' shew that the reference is, NOT to THEIR LAWS but, to the STATUTE.

After his reasons, the chief justice proceeds to solve objections to his argument. of the solutions notice shall be taken of that only, which is in these words: 'i confess a law clearly penned shall have its force in cases which it does reach, though it does not reach all cases: but where a law is penned, so that it may be expounded one way or other, and there is a question of the meaning of it, it is more natural to believe it was meant in that way that is clear, and reaches all cases that are in parity of reason, than in that way which has absurd consequences, as this hath, both by including those which were not intended, and leaving out those which stand in the same degree, as i shewed before.'

Observations: first, the statute is thought to be so 'clearly penned,' that the 'learned judges of Westminster hall, and the learned doctors of Doctors commons,' who were adjutant ministers to the chief justice on this occasion, are challenged to discover in the words of the act, if not sophisticated, that amphibolia, which is here attributed to it by the terms, 'it may be expounded one way or other.'

Second, the statute, understood, 'in that way that is clear,' but different from the 'way' approved by the chief justice, will reach all cases within the scope of the legislative providence, and will have no 'absurd consequences.'

His conclusion is, 'i conceive this act was intended for a plane rule, and i think it much better to interpret it in the most plane and obvious sense which will establish the succession of personal estates, according to reason and symmetry than to strain to find out another sense for the sake of re-
313 mote *kindred, that are of no regard, which will produce apparent absurdities, and subject personal estate to fancifull and intricate disputes that will need another act to compose and settle.'

Observations: first, the act 'in the most obvious sense' of the words, that is, the sense, in which the archdeacon of Huntington understood them, is a 'plane rule.' they will not bear the sense, in which they are otherwise understood by North, unless after the words, 'brothers and sisters children,' be supplied the words, 'of the intestate.' this supplement is called 'interpretation,' and perhaps may be so called by the westmonasterian vocabularies.

Second, the reasons for the intepretation have been examined.

Third, the intrepretation, by words which measure degrees between stocks and their representatives, would measure degrees between an intestate and his collateral kindred, and this interpretation matching things not relating to one another is called symmetry! symmetry not more daedalean than

Humano capiti cervicem pictor equinam
Jungere si velit ——— ——— ———

Fourth, 'another act which North supposed to be needful for composing and settling the fancifull and intricate disputes' which he imagined would be raised on this, if his interpretation be rejected, is not the proper remedy for the evil apprehended by him. the remedy would be to give to judges what perhaps the legislature of Great britain have not more power to bestow, than other legislatures. for, if so plane an act as this

*The word 'hereafter,' occurs at this place in the statute.—Note in edition of 1852.

could be so mistaken, as it hath been by him and his successors, what would be the effect of another act?

HIS reasons stated in the argument of the chief justice having been examined; the statute itself shall now be considered, in order to discover the true meaning, from the words, thereof.

The statute, after requiring ordinaries and ecclesiastical judges to take bond from him, to whom they grant administration of the goods and credits of a person dying intestate, with condition to make and exhibit an inventory of them, enables and requires those ordinaries and judges to call the administrator to render account of his transactions, 'and to order and make just and equal distribution of what remaineth clear (after all debts funerals and just expenses of every sort, first allowed and deducted) among the wife and children, or childrens children, if any such be, or, otherwise, to the next of kindred, to the dead persons in equal degree, or legaly representing
314 their stocks, pro suo *cuique jure, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his majesty's ecclesiastical laws.'

THE phrases, 'legal representatives,' 'pro suo cuique jure,' 'according to the laws in such cases,' and 'the rules and limitation hereafter set down,' are thought by North to prove that the statute had a reference to the ecclesiastical laws, but, 1. if it had such a reference the reference by the first three phrases was only to those laws which determine who are the legal representatives of an intestate next of kindred, which was not pertinent to the question in the case discussed by him, namely, who of the intestates next of kindred shall be represented; as hath repeatedly been observed before. not more pertinent is the solution by him of the second objection to his opinion, T. Raym. p. 505. which solution is thought too trifling to deserve a recital. 2. the fourth phrase, correctly quoted, shews that the statute referred to the rules and limitation set down in itself. this will lead to the true question, namely, whether, by those rules and limitation, representation is admissible among collateral kindred, who are more remote than the intestate brothers and sisters?

The rules in the statute, mingled with the limitations (for of these are two) so that their connection is interrupted, stated separately for the sake of perspicuity, are,

'Provided that ordinaries and every other person, by this act enabled to make distribution of the surplus of the estate of any person dying intestate, shall distribute the surplusage of such estate in manner and form following that is to say, one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate and such persons as legaly represent them, in case any of the said children be then dead, and in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the said intestate, the residue of the said estate to be distributed equaly to every of the next of kindred of the intestate, who are in equal degree, and those who legaly represent them. but in case there be no wife, then all the said estate to be distributed to and amongst the children, and in case there be no child, then to the next of kindred, in equal degree, of or unto the intestate, and their representatives, as aforesaid, and in no other manner whatsoever.'

Of the rules, those which call chil-
315 dren of the defunct, and *representatives of such of them as may be dead, to the succession, are without any limitation, otherwise than that, a child who had been advanced by settlement of the defunct, with a portion not equal to the filial portion, can clame only the compliment, or so much as with the advancement added to it will be equal to the filial portion, out of the distributable subject. but such foristamiliated child, if he were an heir at law, and advanced by settlement of land upon him, shall have a full portion of the surplus.

The rules, which, if no children or representatives of them be, called the next of kindred to the succession, comprehend,

First, those kindred who are in the ascending line, that is, father and mother, &c. for the opinion in the duchess of Suffolk's case, 'that the mother is not of kin to her child,' although unanimously once approved by numbers of temporal, as well as ecclesiastical, judges sufficient to entitle it to a place among what are called authorities, seemeth to have been since reprobated. the right of the mother indeed, if the father be living, is transferred to her husband; but if he were dead, she took the whole before the statute of 1 James 2. ordained a communion with brothers and sisters and their representatives: and if no parents be, the rules comprehend,

Secondly, those kindred who are in the collateral line, and who may be analysed into brothers and sisters; if none such be, uncles and aunts, and nephews and nieces; (for, according to the determination of a case before mentioned to be reported by T. Atkyns, 1 vol. p. 454 they are in the same degree of relation) if none such be, cousins german, &c. of the intestate. and those rules, if not controuled, by the limitation, with the words, 'and their legal representatives,' applied to every ramification of the syllabus, 'next of kindred,' may be read thus:

In case there be no children nor any legal representatives of them, the said estate to be distributed equally to the brothers and sisters of the intestate, and their legal representatives; if none such be, to be distributed equally to the uncles and aunts and nephews and nieces of the intestate, and their legal representatives; if none such be, to be distributed equaly to the cousins german of the intestate, and their legal repre-

sentatives; and so forth; the words, 'and their representatives,' being added after every tribe of the intestates kindred, in equal degree.

These evolutions of kindred and applications of representatives are the sense and meaning of the rules, without the limitation, in explicit terms; so that

The question is reduced to this: whether that sense and that meaning are altered by this limitation: 'provided tnat there
316 be *no representation admitted among collaterals after brothers and sisters children, otherwise than that no representatives shall be admitted among collaterals in any degree more remote from their stocks than children?'

That they are not altered otherwise will appear, as is conceived, without 'straining,' by inserting the limitation after every one of the tribes of collateral kindred and their representatives: when the rules, united with the limitations of them, will be read,

'In case there be no children, nor any legal representatives of them, the said estate to be distributed equaly to the brothers and sisters of the intestate, and their legal representatives;' provided that there be no representations admitted among [these] collaterals after brothers and sisters children; if no brothers and sisters be, to be distributed equaly to the uncles and aunts and nephews and nieces of the intestate, and their legal representatives; provided that there be no representations admitted among [these] collaterals after brothers and sisters children; if no uncles and aunts and nephews and nieces, or any such, be, to be distributed equaly to the cousins german, of the intestate, and their legal representatives; provided that there be no representations admitted among [these] collaterals, after brothers and sisters children; and so forth.

According to this reading, liable to a single objection which shall be removed, the children of those next of kindred to the intestate in equal degree, however remote, are not excluded from successions, to the portion to which their stock, if living, would have succeeded.

Harmony by this reading is produced of all parts of the statute one with another, not a single word thereof being understood in a 'strained' sense, or in any other than the ordinary sense; and the system of successio in bona defunctorum hath perfect symmetry; every rule being applied to one or otner tribe of the intestates kindred, whose representatives are appointed in the places of their stocks to succede; and the limitation being commensurate with the rules in every instance, except that the operation of one which would have included representatives in all degrees, is restrained by the other, the office of which was, not to destroy any rule but, to limit the extent of it, excepting the representatives of collaterals of all denominations, after or beyond the degree of children of those collaterals, who may have died before the intestate.

Not to allow the 'rules set down in the statute' to be applicable to representatives of every tribe of collaterals, would, in the phrase 'next of kindred of, or unto,
317 the intestate in equal *degree, and those who legally represent them,' deprive the words, 'those who legally represent them,' of more than half their meaning, and would deprive the words 'in equal degree,' if they have any, of all, meaning.

The words 'in equal degree,' applied to those collaterals, who survive and succede in their own rights, repeat the substance of the words, 'next of kindred,' and therefore signify nothing; for collaterals, not in equal degree, that is in a more remote degree, cannot be next, of kindred to the intestate. but the words, 'in equal degree,' supposed to have been inserted for some purpose, are significant, applied to dead collaterals, who, if living, would have been in equal degree with the survivors, and may be understood in the sense which this paraphrase of the rule and limitation expresses:

'The surplusage to be distributed to the next of kindred to the intestate, and [if any of them] who are in equal degree [be dead to] their representatives, provided [although representations are admitted among children of the intestate, how remote soever those lineal representatives be from their stocks, yet] that there be no representations admitted among collaterals after [if the representatives be more remote in degree from their stocks, than] brothers and sisters children.' this will be congruous with the antithesis, intended manifestly by the legislature, of childrens representatives to collaterals representatives: whereas North imagined the antithesis to be of the representatives of one tribe of collaterals, that is, brothers and sisters, to the representatives of all other tribes of collaterals.

Here, indeed, the words 'in equal degree,' are taken out of their places, and transfered to other places. but the metathesis is thought to be justified by this consideration: immediately after the words, 'next of kindred of or unto the intestate, who are in equal degree,' the words, 'and those who legaly represent them,' and after the words, 'next of kindred, in equal degree, of or unto the intestate,' the words, 'and their legal representatives,' prove incontestably, that the legislature, who must have known, that the degree of an intestates kindred could not be the same in all cases, contemplated representations among the kindred in the different degrees, and meaned to admit representations in all cases, where the kindred to be represented and those who succeded in their own rights were in equal degree of kindred to the intestate.

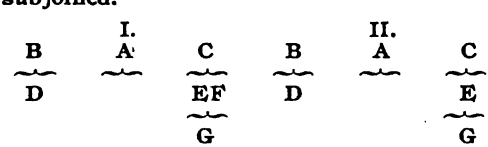
This meaning appeareth so manifest that, to make it more so is not the intention of the paraphrast. he intended to shew that the meaning of the words, 'in equal degree,' removed from the place where, if not
318 mute, their voice is no more than *useless tautology, conspires with the supposed design of the legislature.

The proviso therefore, that there be no representations admitted among collaterals after brothers and sisters children, is an exception to each general rule.

The objection to which the explication, opposite to Norths interpretation, of the statute, was mentioned to be liable, as it is stated in his language, is 'that, as it would comprehend more than ought to have distribution, in some instances, so it falls short, and leaves out many that, by parity of reason, ought to have distribution.' these words occur, in his third reason; and the substance of them is repeated (T. Raym. 505) where he commends the interpretation 'in his way,' affirming that by it the statute 'reaches all cases' that are in parity of reason,' and prefers it to the explication in that 'way which,' according to him, 'hath absurd consequences, both by including those which were not intended, and leaving out those, which stand in the same degree.'

The objection supposeth the proviso, containing the limitation or exception, to be the part of the statute, by which representatives of collaterals clame the shares of their stocks: but untruly; for they must clame, if they can clame at all, by those parts of the statute to which that exception is applicable. But let the objection be to the foregoing application of both, or either.

The objection and the answer to it will be understood best by references occasionally to the cases exemplified in the schemes subjoined.



In the first scheme D. and F, surviving nephews, if they were next of kindred, to A, the intestate, would succede, being comprehended in that part of the rule, which is contained in these words of the statute, 'the surplusage to be distributed to the next of kindred, 'of or unto the intestate.' G, the child of E, is as much comprehended in the remaining part of the rule contained in these words of the statute, 'and their representatives,' for he is the representative of his father, a deceased nephew of the intestate, and one of his next of kindred, as D and F are comprehended in the former part of the rule. but North objects that G, in the first scheme, is inadmissible
319 *to the succession and cannot represent his father, for two reasons, first, the case of G was not comprehended in the proviso, 'that there be no representations admitted among collaterals after brothers and sisters children,' for altho' he was the child of a brother, his father was not a brother of the intestate; and secondly, because, if G in the first scheme should succede, by parity of reason, G, in the second scheme ought to succede too, but the latter is likewise inadmissible doubly, for the collateral, whom he represents was αναδελψος— not a brother to the intestate. or to any other man.

Answer: the words, 'provided that there be no representations admitted among collaterals after brothers and sisters children, have been proved to be an exception to the general rule, that distribution to be to the next of kindred of or unto the intestate, in equal degree, and to their representatives.' if this be so, let be granted, that the case of G, in either scheme, is not included in the exception; the consequence unavoidable is the reverse of Norths, G would not be inadmissible, but would succede. if the exception had not been inserted, he would have succeded being comprehended in the rule 'the surplusage to be distributed to the next of kindred and THEIR representatives;' and if he be not included in the exception, his title remains the same as it would have been if the exception had not been inserted. this consequence is said to be unavoidable, and truly; unless the interpretation of North, as he calls it, can be maintained. but the interpretation, for the true shape of limitation or exception, exhibits this metamorphosis of it: 'provided, that there be no representations admitted among [any other] collaterals [than those collaterals who are brothers and sisters of the intestate, nor among them] after [the] brothers and sisters children;' which would convert unnaturaly the limitation of a rule or the exception to it, into a rule, and abrogate the statute in more than two thirds of the cases which it would comprehend if not mutilated by this monster. to maintain it a pentad of reasons have been pompously paraded; but they are all foreigners: none of them being furnished by the statute, were chiefly pressed into the service from Doctors commons, and make no better figure at a review than the band of 'tattered prodigals with which 'Falstaff was ashamed to march through Coventry,'*

The objector supposeth, that G, in the first scheme, and G, in the second scheme, who are confessed to 'stand in the same degree,' and who therefore, if either,
320 ought each, to 'have a *share in the distribution,' are not in the same predicament, for one was the child of a brother, the other the child of him who never had a brother or sister, or who had survived his brothers and sisters.

But, not to urge that this objection is perverse, first, the word, AFTER, implieth intervals or degrees between the antecedent and consequent terms in any series of arithmetical progression. of the series, to which the proviso containing the limitation or exception refers, the collateral E, is the antecedent or first term, his children is one of the consequent terms, his grand children is the next consequent term, and so on through the series of representatives. the proviso is a canon measuring the intervals or degrees of kindred, not between the intestate and his collateral kindred but, between the collateral and HIS representa-

*Shaksp. Henry IV.—Note in edition of 1852.

tives, admitting the second term, and rejecting all the terms AFTER the second, or children; so that the proviso may be most properly read and understood in this sense:

'Provided that there be no representations admitted among collaterals AFTER [that is, if the degree of kindred between the collaterals and their representatives be remoter than the degree of kindred between] brothers and sisters [and their] 'children'—most properly, because, without a spurious interpolation, the proviso cannot as is conceived, be understood in any other sense. nor can the objector retort that the words between brackets in the paraphrase are unjustifiable interpolations, because, if they were expunged, the proviso might undoubtedly be expounded in the same sense without contradicting or altering the meaning of a single word contained in the statute. by this exposition G would be in the same predicament in both schemes; the difficulties, which staggered North, will be removed; and the phantom of absurdities, which bewildered him, and perhaps misguided his followers, will vanish.

If the preceding criticism and lection be not satisfactory,

2. The representatives remoter than children of a collateral, who had no brother or sister, may be included in the proviso by the argumentum a pari ratione. statutes in compendious and general terms, not animadverting upon subjects of a criminal nature may justly comprehend cases, not precisely described in the text, but equaly within the reason and scope of the legislative providence. in legibus et statutis brevioris styli, extensio facienda est liberius; at in illis, quae sunt enumerativa casuum particularium, cautius. F. Bacon, de augment. scient. lib. VIII. cap. III. aphor. 17. that this statute, as to the part relating to the present question, is brevioris styli and not enumerativum casuum particularium must be agreed; and that the 321 *reason for including in the proviso the representatives of him who had, and of him who had not, a brother, is the same no man will doubt but he who ascribes to the legislature, in matters of such moment, levity more than puerile. 'if the next of kin are cousin germans, and some of them are brothers to one another, others are not, that the children of such of them as had brothers that survived the intestate, shall have a share, but the children of such who had no surviving brothers shall have no share,' North admits would be 'most absurd;' he might have added fantastical and futile. this would have been a good argument for including the children of those cousins german, who had not brothers, in the same predicament with the children of those who had surviving brothers, but surely not for excluding the latter from the shares which the act gave to them in terms unequivocal, and free from ambiguity.

If representatives remoter than children of a collateral be not included in the proviso, either ex vi terminorum, or a pari ratione,

3. The consequence, as hath been observed, is that the case is a casus omissus, and that will not prevent operation of the statute in cases not omitted.

If the explication, here opposed to Norths interpretation, of the statute be correct, the case of Carter versus Crawley, and other cases, decided conformably with that interpretation, deserve to be ranked with the case of Rose versus Bartlett, Cro. Car. 292. the case of Ratcliff versus Graves et alios 1 Vern. 196. and so many more that

Non mihi si linguae centum sint, oraque centum,
Ferrea vox———————————
Omnia———percurrere nomina possim.

These animadversions, not intended for those learned judges, learned doctors, learned professors, learned practitioners of law, if any such be, who relish all the crudities which have been disgorged, and admit for true science all the jargon which hath been babbled, and for sage doctrine all the garrulities which have been parted, at times in Westminster hall, to men of tastes less depraved, judgments more sound, and spirits too liberal to be the slaves of authority, are inscribed by

THE EDITOR.

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*BETWEEN 322

WILLIAM FOWLER and Susanna his wife, *plaintiffs*,

AND

LUCY SAUNDERS, an infant, by James A. Patterson, her guardian, *defendent*.

March, 1798.

Slaves—Fraudulent Gifts—Statute Does Not Comprehend Delivery in Consideration of Marriage.—The Statute of 1758 for preventing fraudulent gifts of slaves,—(that a gift not declared by testament in writing, or deed proved and recorded, should not pass the right to slaves,)—upon which Statute, if a gift had been, the plaintiffs relied, did not comprehend and avoid a delivery of slaves in consideration of marriage. This case arose as follows:

Same—Same—Same—Case at Bar.—A father, upon the marriage of his daughter, delivered to her husband certain slaves. Afterwards, by his will, he lent to her husband all the negroes then in their possession, (with their increase,) for their lives, and after, to be equally divided among her children. if she have lawful issue. The defendent *S.* was her daughter. She then married the plaintiff *F. S.* being still an infant, her guardian demanded the slaves as her property, on the ground that the testator had permitted them to remain in the service of S.'s father, although said testator had never given them to her father but by his will aforesaid. At the time of the testator's death, they had been in the possession of *S.'s* father about three years; the plaintiffs had had possession of them about two years. It was agreed that the right to them should be submitted to a Court of Chancery. See these facts in S. C. 4 Call. 361.

IN this cause, brought on, by consent of parties, and heard on the bill and answer, and on the testament of Thomas Sale, exhibited and read, the court, on the

day of March, in the year of our lord one thousand seven hundred and ninety-eight, after consideration of the arguments by counsil, professed the sentiments, and pronounced the decree, which follow:

The statute, for preventing fraudulent gifts of slaves, enacting, in the year one thousand seven hundred and fifty-eight, that a gift, not declared by testament in writing, or deed, recorded, after having been legaly proved, should not be sufficient to pass the right of slaves, upon which statute, if a gift had been, the plaintiffs relied,—this statute did not comprehend this case,—a delivery of slaves, in consideration or for cause of marriage, than which no consideration or cause is more estimable or meritorious;—did not comprehend this case, in which a fraud, condemned in the procemium of the statute, is attempted to be, by the constitutory part of it, justified, for the benefit of his family, who contrived it.

A gift, if it may be called a gift, when it is in consideration of marriage, is strictly not a gift purely gratuitous, whereby 323 the *donee gaineth the thing given, without meriting it by way of a recompence, supposed to have been the kind of gift contemplated by the legislature, but, is a convention, wherein the parties perform and remunerate, alternately, each bestowing on and taking from the other some thing beneficial.

Nor, if slaves, delivered by the father of a wife to her husband, in consideration of their intermarriage, may be said to have been given, could the gift be one of those gifts, by means of which frauds detrimental to creditors and purchasers were practised; to prevent which mischiefs was the prefaced object of the statute;—not one of those gifts, because 'the donor' did not, in the language of that act, 'remain in possession of the slaves, as visible owner thereof.'

The meaning of the legislature was planely this: donors of slaves, who nevertheless retain possession of them, defraud people, who believe the possessors, being the visible, to be the real, owners: for prevention WHEREOF,—for prevention of injury by this deception, which secret gifts occasion, proposing such a disunion of the right and possession, as that they may be in different persons at the same time; and to the end that people may have the means of knowing the true owners; no gift of any slaves, not authenticated in the mode now prescribed, shall be good to pass any estate in such slaves; that is, with a commentary, necessary to produce harmony and symmetry in the act, no such unauthenticated gift of any slaves, whereof the donor 'retaineth possession,' shall be good. this evidently remedies the mischief and all the mischief which the legislature said they intended to PREVENT.

The other sense, in which, as is pretended, the statute may be understood, is this: 'for prevention of frauds by secret gifts of slaves, which, notwithstanding, remain in possession of the donors, as visible owners thereof, and to the end that creditors and purchasers, recurring to archives, where monuments of acts, which separate the right from the possession of slaves, ought to be deposited, may discover whether these visible owners, possessors, be the true owners, or not; no gift of slaves, whereof the donor DOTH NOT retain the possession, but of which, on the contrary, he hath DELIVERED possession to the donee, so that the right and possession are, not in different persons but, in the same person, and people believe the donee, who is the visible, to be the true, owner, and therefore are not defrauded, if the gift be not recorded, shall be good; that is, to prevent deception by gifts, disuniting the right and possession, gifts, which unite the right and possession, shall not be good, unless they be recorded.'

324 *The statute, thus expanded, makes the remedy transcend the limits by which the evil intended to be prevented is defined, directly opposeth the design of its authors, and to him, who is now criticising this interpretation, appeareth to be a monstrous absurdity. for uno flatu, the legislature, according to this interpretation, hallows the fraud which it damns. retention of the right, when the possession is resigned, is as much a fraud as retention of the possession, when the right is resigned; and more dangerous, because to guard against this fraud is more difficult than to guard against that; but, if this interpretation prevale, when the right was given, and, with it, the possession resigned, the gift, not in writing, and recorded, was void, and the possession must be restored; a doctrine said to be sanctified by supreme authority.

If slaves, delivered to the husband, in consideration of marriage, more truly than slaves, delivered to a purchaser in consideration of money paid, may be said to have been given, the forementioned statute, if it comprehend such a gift, is, by force of the other, enacted in the year one thousand seven hundred and eighty-seven, mentioned in the answer, confined in its operation to gifts of slaves, whereof the former owners had, notwithstanding such gifts, remained in possession.

The plaintiffs counsil objected that the intermarriage of the defendents father and mother, at which time the right of the former, if any he had, originated, doth not appear to have been posterior to the restraining statute, and if it were, as by the facts stated in the bill and admitted by the answer it might have been, prior, that statute would not aid the defendent.

To which is answered,

first, against the plaintiffs, the intermarriage would be presumed to have been posterior, if to prove or presume it had been necessary, because, if the contrary had been true, they could have proved it. but it was unnecessary, for,

secondly, this statute is a declaratory law, and, although it seem retroactive in a manner, yet is it not obnoxious to censure,

as those laws, which are reprobated, because looking at the same time, behind as well as before, like *Janus, *Franc' Bacon. they attribute energy to rights before they had existence, inflict punishments for actions before they could be known by the perpetrators of them to be criminal, and the like; a declaratory law, in its aspect towards the past, hath nothing so absurd or truculent. it shews the meaning of the former law according to which it ought to have been understood at its sanction, and must be understood in future, but so as not to perturb settlements by judicial sentences. it doth not ordain any new
325 *constitution; but is an interpretation, and consequently coevous with the law interpreted, in the same manner as if the substance of the one had been in the other originally.. lex declarator ia omnis, licet non habet verba de præterito, tamen ad præterita, ipsa vi declarationis, omnino trahitur, non enim tum incipit interpretatio cum declaratur, sed efficitur tanquam contemporanea ipsi legi. Franc' Bacon de augment' scient,' lib' VIII cap' III, aphor' 51.

So that a gift of slaves in consideration of marriage, accompanied with a resignation of the possession, if it must be called a gift, is sufficient, without registration or even scripture, to transfer the dominion.

But, say the plaintiffs, a gift or any other disponing act. which is essential to such translation, is not admitted, and cannot be proved, ever to have existed; and, if not, they conclude that the defendent can not have a title; for, then, as they added, the case is no more than this: a father, when his daughter was married, delivered slaves to her husband, and did not demand restitution of them from him, during his life time, not so long however as three years; all which might have happened, and the father might nevertheless have retained the property.

This conclusion, in which the plaintiffs counsil seemed to acquiesce, with full persuasion that it is legitime, is believed to have been formed with temerity, and not to be deducible from sound principles.

Although evidence of the particular words uttered by father and husband in the treaty, of which an alliance between them was the subject, is not and can not be produced, we must not hence infer that the parties were mute during the transaction. when we see the husband removing, with his wife, to his own mansion and domain, from those of the father, her filial portion, delivered by him,—removing slaves, perhaps cattle, things needful and convenient for housekeeping, and so forth,—and when we see the husband, during all his lifetime afterwards, exercising over these subjects, with the license, the powers, of an uncountrouled owner, and this with the knowledge of the former owner,—evidence cannot be requisite to convince us, and therefore we venture to assume, that some pact or other intervened; and that this pact must have been, either that the husband should restore the slaves to the wifes father conditionally, or should restore them in all events, or that, not obliged to restore them at all, he should have the property of them in himself.

The plaintiffs would load the defendent with the obligation to prove, by written evidence or oral testimony, the facts on which her title must have been estab-
326 lished,—perversely—for *presumption favoureth her title sufficiently, to throw on the plaintiffs the burthen of labouring to prove facts by which the credit of that presumption would vanish:—cruely as well as perversely; the defendents age, if it equal, doth not excede ten or eleven years, of which seven had elapsed, before she, deprived of one parent by death, and, by collusion of the other with a stepfather, worse than completely orphanized, is cited to prove transactions which were before her birth.

That a conditional restitution of the slaves was contemplated in the supposed pact between the father and his daughters husband, when they were delivered, is barely imaginable. the plaintiffs indeed, quoting some words from the fathers testament, written several years after the marriage, would insinuate, that he never intended to dispose of the slaves so that her husband would have more than a life estate in them. but what the testator did or said, at that time, cannot be evidence of any fact derogatory from the marital right, and deserves less, if it could otherwise deserve any, attention, when he is observed, in the same testament, bestowing on his other daughter her portion absolutely, the only apparent reason for which difference shews him to have been susceptible of a duplicity, which ought to detract from his credit.

Was then the pact a mere simple loan, implicating a right of resumption in the lender, whensoever he should be pleased to demand the subject, or did the pact transfer the property of the subject to the husband; of which pacts one is necessary to be presumed, every other being excluded by hypothesis?

The pact, if it were not a loan, must have transfered the property, et vice versa.

When of two propositions, of which one is true, but of which one only can be true, neither is affirmed by certain proof, that which presumption favours must prevale.

Presumption here favoureth the proposition, that the pact transfered the property, since that effect may be wrought with as little diplomatic formality in the case of a slave as in the case of a horse, an ox, and the like. for

first, the husband merited the property, having performed what in legal estimation was equivalent to that property, and therefore owed not restitution;

Secondly, the slaves were delivered to the husband by the father, as the plaintiffs are understood to have admitted by the bill. tradition of the subject, the right to which is transferred, typifies a transition of that right and the consent of the owner with more emphasis than any mode of transfer-

ing dominion heretofore invented: and,
327 *thirdly, the husband, during all his life time retained possession of the slaves, employing them in his service and enjoying the fruits of their labour

From these topics the presumption, that the father transfered the slaves to the husband, is so imperative of our assent that we cannot withold it, since the plaintiffs have not, on the contrary, proved the slaves to have been lent.

If, supposing no conventional words to have been spoken by father and husband, apt to transfer the property of the slaves, we admit only to have intervented a delivery, simple otherwise than as it was connected with the motive to it, by the father, this with acceptance and fruition by the husband was sufficient to vindicate the title of the latter. the will of the parties is all that is essential naturaly to translation of dominion, and occurrences manifest that will in this case. if herds, flocks, supellectile ware, culinary utensils, and other personal property, had been, as probably they or some of them were, delivered and removed at the same time with the slaves, no man would have made a question whether the property of these chatels was transfered to the husband, and yet, if the statutes of 1758, and 17 7, which are not considerable in this tome of the disquisition, be praetermitted, the property of slaves whatever be their number, if possession of them be delivered in performance of any contract, may be transfered with as little judicial ceremony as a single quadruped, or article of house or kitchen furniture.

After all that hath been said in this and similar cases, in every one of which the statutes of 1758 and 1787, so often mentioned, seemed to, not only counsil but, judges to be of decisive importance, those statute were introduced impertinently. the statutes apply to the case of a DONOR REMAINING in possession,—to the case of one who having DISPONED the right, RETAINED possession; but in this case, if there was a gift, the DONOR did not REMAIN in possession, but, having ISPONED possession to the DONEE, is pretended to have RETAINED the right.

The court therefore would have dismissed the bill; but the parties, in case of a decision, in affirmance of the defendents title, having proposed, that an account of the slaves and their profits be taken, doth adjudge, order and decree, that the plaintiffs do discover the names of the slaves which were delivered by the defendents grandfather to her father on his marriage, and of their increase, and render an account of the profits of the said slaves since the death of her father, and deliver such of the slaves as survive, and pay the said profits, to the defendents guardian for her use, an account of which profits commissioners
328 *are appointed to examine and adjust, and to report, with the names of the slaves, to the court; saving to the plaintiff Susanna her rights, if any she have, derived from her former husband.*

BETWEEN
PARKE GOODALL and JOHN CLOUGH, *plaintiff*,
AND
JOHN BULLOCK, the younger, *defendent*.

May, 1798.

Sheriffs—Failure to Return Execution at Request of Plaintiff—Liability.—If the Sheriff neglect to return an execution, at the request of the plaintiff, he is not liable to a fine; and a judgment for such fine may be enjoined; and though the answer deny such request, yet the testimony of the one witness proving it is sufficiently corroborated by the plaintiffs having rested for three years without complaint that the execution had not been returned, and there being no inducement to have it returned, as there was no property on which a new execution could be levied.

Chancery Practice—Answer†—Weight as Evidence—Oath—Though the answer deny the allegations of a bill, if a discovery be not required, the defendant is not bound to answer on oath, and against his answer whether on oath or not, the testimony of one credible witness will prevail over it.

Fine—Equitable Relief.‡—Equity may relieve against such a fine, on the principles upon which it relieves against forfeitures and penalties.

Same—Same.—The Court of Appeals, 3 Call, 44, October, 1801,—affirmed the decree of the Chancellor; and said that the fine imposed on an officer who had committed no fault, for the benefit of one who had sustained no injury, was surperlatively excessive, unconstitutional, oppressive, and against conscience. And that equity ought to give relief even if appellant *B.* had pleaded to the jurisdiction or demurred, as was done in *Pryor v. Adams*, 1 Call, 390.

A WRIT of fieri facias, for satisfaction of a judgement, rendered by Hanover county court, in an action, which the defendent had prosecuted against his father, of
329 the same name, for *4971,' 1s,' 11d,' 3q,' with interest and costs, was delivered in may of the year 1792, to the plaintiff John Clough, a deputy of the other

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*This case was decided by the Court of Appeals, in Oct. 1798, 4 Call. 361, upon the grounds not effecting the main question discussed by the Chancellor. They dismissed the Bill, as stating the case too imperfectly to bring the merits before the Court. A bill in the nature of a bill quia timet must shew reasons for sustaining it, which this did not: especially if it be against an infant and relate to transactions before her birth and of which a discovery from her was not to be expected. These were the grounds taken there.

It will be perceived, that if S.'s title were deprived from the will of her grandfather, her mother would be entitled to the slaves for her life. But the case would be different, if her father had had them in absolute right by the delivery upon his marriage. See abstract, ante, p. 322.—Note in edition of 1852.

†**Chancery Practice—Answer.**—See generally, monographic *note* on "Answers in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

‡**Fine—Equitable Relief.**—See *foot-note* to Bullock v. Goodall, 3 Call 45.

plaintiff, who was sheriff of Hanover, to be executed.

The plaintiff John Clough, by that authority, seised the whole estate of John Bullock, the father, and sold it, for 2061,' 3s,' 6d,' to the defendent, who was highest bidder, in june, 1792.

In january or february, 1795, William L. Thompson applied to the defendent for settlement of an account of taxes, fees, &c. amongst which was the plaintiff John Cloughs bill of the commission, claimed by him from the defendent, for serving his execution against his father. The defendent then refused to enter upon the settlement, unless the plaintiff John Clough should be present, and desired Thompson to appoint a time, when those three parties should meet together, at the defendents house, for adjusting this business, alleging, that, as he conceived, the plaintiff John Clough was not entitled to so much, as he had charged, for commission. at the same time, the defendent, who had enquired of Thompson whether the plaintiff Clough had returned the execution, which enquiry was answered uncertainly, said he wished the plaintiff not to return it until the settlement.

This fact, namely, that the defendent said he wished the plaintiff John Clough not to return the execution before the settlement, is testified by a single witness, and was said not to be proved, because the defendent, as was supposed, contradicted it by his answer, sworn by him to be true. but the answer doth not contradict the testimony. the bill stated, that the plaintiff in the judgement, now defendent, who, in june, 1792, bought all his fathers property, when it was exposed to sale by the fieri facias, and who acknowledged the receipt of it by a certificate, at the same time, that is in june, 1792, desired and requested the plaintiff John Clough, to retain the execution, and not deliver it into the clerks office, until they should have an opportuniy of making a statement and settlement. to this the defendent answers in these terms: 'he positively denies that he requested the complainant Clough, to retain the execution, and not deliver it into the clerks office, until they should have an opportunity of making a statement and settlement, nor did he use any expression [that is, as the court understands it, use any expression, at that time, to Clough] having any tendency to keep up the execution; on the contrary, he positively avers, that he requested m'r Clough to return the execution, and that he often repeated the request, before he made the motion for the judgment now en-
330 joined.' all this may be true; and yet *the deposition of the witness, that the defendent, in a conversation between them, 32 or 33 months afterwards, said to a collector, 'he wished John Clough would not return the execution until the settlement between him and the defendent,' may be true likewise. if the fact here contested, that is, the defendents consent to the plaintiffs retention of the execution, had been denied by the answer, in direct opposition to the testimony, the latter, accredited by probability, from the confessedly true circumstances of the fathers inability to discharge more of the judgment, and from the consequential insignificance of a return; from the enquiry whether the precept had been returned, and from the unsettled account of the commissions, would outweigh the former.

Upon this occasion, the court observed the danger, to which a plaintiff exposeth himself, when, in propounding interrogatories, he requireth a defendent, as is done in almost every bill in equity, to admit or deny facts, which the plaintiff could, otherwise, prove or disprove satisfactorily, by a single witness to each; for where a defendent affirmeth or denieth a fact, of which he is required to discover the truth or falsity, and of which to give testimony in his answer he is compelled by the plaintiff, the matter controverted must be in aequilibrio, if either a greater number of witnesses do not contradict the answer, or coincident circumstances do not add a praeponderating momentum to the testimony of a single contradicting witness; whereas if a discovery be not required, a defendent is not bound to answer upon oath, and, against his answer, whether on oath or not, in such a case; the simple testimony of one credible witness is affirmed to be prevalent over the answer; in other words the answer is no more than a partys allegation without oath.

To return from this digression—at a time, for the plaintiff John Clough to attend, appointed by the defendent, when a final settlement was completed, and at other times, the defendent acknowledged, that he did not expect to get any thing more from his father—that, in truth, his father then had no estate—adding, that imprisonment of his fathers body, which was all that his creditors could now take, would be distressing to the defendent. and here one might expect he would have rested. yet,

On the 7th of may, 1795, upon a motion on his behalf, the court of Hanover county fined the plaintiff Park Goodall, for the use of the defendent, (a) 2641,' 8s,' 9d,'
331 for the plaintiff John *Cloughs default in neglecting to return the fieri facias, in august, 1792, as the writ required; and condemned him to pay the fine with costs.

This procedure was authorized by the statute in 1791, reciting, that 'doubts have arisen in what manner judgement should be rendered against any sheriff, coroner, or

(a) Upon what principal, and by what ratio, this fine was calculated doth not appear by the sentence. if the one were 2901' 18s,' 11d,' 3q,' which remained unsatisfied of the debt recovered, and the other five per centum per mensem, the fine would have somewhat exceded 4641.' if the principal were the whole debt recovered, the words of the statute, 'it shall be lawful to fine the sheriff in any sum, not exceeding five dollars per month, for every hundred dollars CONTAINED in the judgement' would have authorized infliction of a fine somewhat exceding 7941.' of the fine actualy inflicted, that it might have been greater seems the best apology for the hyperbole.—Note in edition of 1795.

sergeant of a corporation, who shall fail to return an execution to the office from whence it issued, on or before the return day thereof;' and enacting, that, where any writ of execution, or attachment for not preforming a decree in chancery, shall come into the possession of any sheriff, coroner, or sergeant of a corporation, and he shall fail to return the same to the office, from whence it issued, on or before the return day thereof, it shall be lawful for the court, ten days previous notice being given, upon the motion of the party injured, to fine such sheriff, coroner, or sergeant of a corporation, at their discretion, in any sum, not exceeding five dollars per month, for every one hundred dollars contained in the judgment or decree, on which the execution or attachment, so by him detained, was founded, and so in proportion for any greater or lesser sum, counting the aforesaid months from the return day of the execution or attachment to the day of rendering judgment for the said fine.'

The plaintiffs counsil objected, that the fine was not appropriated by the statute, to the use, although it was recoverable on the motion, of the party injured; affirming that all fines, before the revolution were payable to the king; and observing that now such as were not differently devoted or abolished were, by the constitution, transferred to the commonwealth.

This is incorrect. not all fines, but only those inflicted for offences against the government, were formerly payable to the king. the fine in this case is appropriated to the party injured, because it is recoverable on the motion, that is, by the action, of the party injured. an action is a juridicial vindication of that which the actor allegeth to be due to him. he, therefore, who hath the right to the action, hath per hypothesin, the right to the thing demanded—recovers that which is due to him.

The plaintiff Park Goodall, the sheriff, condemned for the mulct incurred by the default of his deputy, the other plaintiff, instituted, in Hanover county court, 332 a process, and obtained a *sentence, against him, for reimbursement, but consenteth to suspend the further prosecution of that demand, unless it shall become necessary by decision of the questions, now controverted.

Whether any fine, except a (b) conditional fine, ought to have been inflicted, for not returning the fieri facias? if the fine were excessive, or otherwise unrighteous, whether, in the language of the answer, 'any matter of equity be suggested in the bill, which can give to this court jurisdiction?' and, whether such matter, although not suggested in the bill, appear in the case, as will justify the courts interposition—give it jurisdiction?

The court discussed these questions in the following terms:

The neglect to return the precept was not, could not be (c) detrimental to the defendent. he doth not even pretend it to have been so. the neglect to return the precept, if it were not and could not be detrimental to the defendent, was not injurious to him. besides if William L' Thompson may be credited, the return of the fieri facias was retarded, if not by desire, with consent, of the defendent; and volenti non fit injuria. the sentence of Hanover court, authorized to inflict a fine on motion of a party INJURED only, inflicting that fine on motion of a party (d) NOT injured, is, therefore, a void act. and after answer filed, and no plea in abatement to the jurisdiction of the court, (for surely this answer deserveth not to be called a plea in abatement,) this court is prohibited, 333 by statute in 1787, *ch' 9, to admit an exception for want of jurisdiction, or to delay or refuse justice. the defendents counsil, by these words, dictated to his client: 'this respondent cannot conceive the defence set up by the complainant Clough to be better in a court of equity than of law,' is supposed to have meditated an objection to this purpose: the statute authorising the procedure by motion against the officer who neglects to return a writ of execution or attachment, entrusted the court of common law with the discretive power, the power to moderate the fine; and the court of equity, controuling them in that discretion, in effect directly reversing a legal judgment, would usurp appellate arbitrary jurisdiction. which objection, if to listen to it, in the form, not of a plea in abatement, but, of an answer, be not prohibited, is repelled thus: the execution was returned in june, 1795. the return put the parties in the state in which they ought to be—the state in which return of the execution in june, 1792, would have left them, and in which if they had been left, the officer would not have incurred a penalty. but the court of common law could not alter their adjudications, which

(b) The court might have inflicted the fine conditionaly, reserving power to abrogate the sentence, upon the sheriffs returning the writ, and making amends for any damages and costs occasioned by detention of it.—Note in edition of 1795.

(c) How the neglect to return the writ, in this case, could have been detrimental to the present defendant, to whom the whole estate of his debitor had been transfered, and who could get nothing more from him, is not discerned. the defendant cannot avoid the objection by saying he might have been required in a controversy with some other creditor, to prove identity of the slaves taken in execution, the names of which, for enabling him and others to do so, the statute requires to be endorsed on the writ; because the debitors whole estate, which must include his slaves, whether their names were or were not endorsed, appears to have been sold to the defendant; so that any proof requireable from him would have been exhibited by that creditor himself, when he should prove the slaves, for which he was prosecuting his clame, to have been a part of the debitors estate before the sale.—Note in edition of 1795.

(d) If the argumentation in the note next preceding be fallacious, which, however, it is not yet perceived to be, the sentence ought, as is conceived, not only to have affirmed the defendent to be a party injured, but, to have specified the injury: and without such affirmation and specification, this court ventures to presume the defendent to be a party NOT injured, and, at law as well as in equity, not intitled to the fine.—Note in edition of 1795.

were prior to the return—could not put the parties in the state in which they ought to be. so that a fitter case for equitable relief than this cannot be propounded. (e).

Again, according to the testimony of the witness Thompson, when the plaintiff John Clough asked the defendent, if he then, that is, at the settlement of their accounts, wished the plaintiff John Clough to return the fieri facias? the defendent, in the language of the witness, 'signified that it was immaterial—he, the said Clough, might make his return, when it was convenient.' the defendent, if he said so to the plaintiff Clough prosecuting his motion for the fine afterwards, was guilty of a foul fraud. and in these days surely the rectitude of this courts interposition in the case of a fraud, —a fraud not appearing to have been known to the county court,—will not be reprobated. it would have been venial in the eyes of Edward Coke.

Moreover Hanover court, in their sentence, were as severe almost as they could be, condemning one to pay more than eight hundred and eighty dollars, for an omission by which no man could loose so much as the hundreth part of one dollar, and this too, notwithstanding the paragraph 334 of the statute, *which authorized the condemnation, taught them that they should exert their power with discretion—discretion, in the language of grammarians, a verbal noun, from discernere, i,' e,' to perceive, or note, a difference, suggesting, by its etymon, the requisite discrimination in the censure of human actions, and intimating that the penalties to be incurred for them should be analogous to the malignity of them, not inflicted with draconic rigor.

A short review of the principles whence is derived the power exercised by the court of equity, when it exonerates intirely from penalties or alleviates them, may be here expedient for justifying that exercise, not only in all cases of voluntary conventional assumption, but, in some cases of legislative imposition, of penalties.

Sympathy, fellow-feeling, experience early and universaly, seems a natural affection. homo sum: humani nihi a me alienum puto. Terentii hautontimor.' it disposeth every man, not perverted by the trade of rapine, or of what in cant-phrase is called speculating, to approve, at least in theory, the praecept, 'all things whatsoever ye would that men should do to you, do ye even so to them;'—a sentiment, which the spirit of justice exhales, and which the ministers of justice ought upon every occasion to inculcate.

Exaction of the penalty, denounced or stipulated for nonperformance of a duty, in every case where it would be stricto jure demandable, would contravene that divine praecept.

Agricola, bound to carry 100 measures of corn, which he had sold, and for which he had received the price, and to deliver them on the first day of may, to Mercator in a warehouse at Alexandria, doth not deliver them, for which failure, in terms of the obligation, he is obnoxious to the penalty of five hundred dollars. the warehouse is burned next day, before the commodity could have been used or disponed; so that it would, in case of accurate performance, have perished in the combustion, in this case, the people, whose system of jurisprudence would allow Mercator to recover his penalty, besides profiting by salvation of his corn, which remains unimpaired in the garner of Agricola though his default occasioned it, can have derived little benefit from that philological erudition, by which the manners of men are polished, and their sentiments refined.

The corn, destined for a transmarine market, is not put on board, so that the vessel performs the voyage, without a full lading. the product from sale of what was exported is, by mean of an accidental saturity, not equal to the freight; so 335 that *here too, Mercator is a gainer,—a gainer (f) by how much his loss would have been greater if the burden of the vessel had been complete

A cargo, deliverable on the first day of may, which arrives not until a week afterwards but as soon as the buyer could be prepared to receive it, is refused.

In these cases the penalties, if any were menaced by clauses for that purpose in the contracts, would be strictly forfeited, but, upon what principle, we will not say with what grace, could they be demanded?

They could not be demanded conscientiously, to make reparation of damage for a wrong. no damage was sustained. reparation and damage are correlatives. if the one exist not, the other cannot be due.

The penalties could not be demanded, to make atonement for an offence against society, by failure to perform a moral duty. in that case the piaculum is due to the public, if to any; certainly not to a private citizen; although the defendent seemeth to have clamed it, by these words in his answer: 'it is a neglect of duty, to which the said Clough has been much accustomed.' nor were comminations of penalties, for failures to perform private duties, invented for preservation of good or reformation of bad manners. men rarely, if ever, in their ordinary dealings, are studying ethics.

Yet in such cases, the courts of law formerly condemned the party delinquent to pay the mulct, enormous as it was. they could do or supposed they could do nothing less. they, the lex loquens, were bound to pronounce the sentence which the law prescribed, though barbarous it seem. the

(e) The court of equity relieves against the forfeiture. in case of a mortgage, after a judgment in ejectment for possession of the land; relieved before application to that tribunal was by statute rendered unnecessary, against the penalty, after a judgment for it in an action of debt upon a bond. why may not that court relieve against the fine or penalty in this case?—Note in edition of 1795.

(f) Ciceros magnum vectigal fit parsimonia. in his 6 paradox. *hoti monos sophos plousios* is translated, by english lexicographers, 'a penny saved is a penny got.'—Note in edition of 1795.

contract, which, obliging parties to perform it, is a law to them in these instances, prescribed the sentence, that the penalty for non-performance must be paid.

In some of the cases supposed, and others, which will occur to an attentive auditory, he, who might have been ruined by anothers fidelity, is not only saved by his infidelity, but would be enriched by the penalty, which is demandable by strict adhaesion to the letter of the contract. the law enjoins performance. and is deaf to deprecation. leges rem surdam, inexorabilem esse,—nihil laxamenti nec veniae habere—said the Vitellii, Aquilii, and the sons of Brutus, Livii histor,' lib' 11, cap' 3, 4.

But is not social happiness rationaly consulted, by confiding to some the power to mitigate legal ametrical severity?

336 *The law, if its text condemn one, for neglecting to do what he had obliged himself to do, which neglect is, not only not detrimental but, beneficial to another, nevertheless to pay the same penalty as it would have condemned him to pay, if the default, instead of being fortunate, had been detrimental in the extreme, ought, in such a crisis, to be dumb as well as deaf. if how to silence it on such an occasion seem a dignus vindice modus, justice, if he could, assisted by epic or dramatic machinery, introduced her in a visible form, like Pallas, whom Aeschylus fabled to have appeared in the case of Orestes, would indicate,

Horat.'

that he, who would have been unfortunate, if a default had not happened, ought not to be doubly fortunate by the default; (g)

and further, if the default had not been intirely compensated by the fortunate escape of loss, justice, suspending her balance, and putting the detriment and penalty in opposite scales, and taking out of that which contained the latter, until the beam should settle in a horizontal position, (h) would signify that she approved the liberal and benign doctrine inculcated in the court of equity, that forfeitures, intended to compensate detriment, are irrational, because, at the times when they are fixed, they cannot be subjects of isometrical com-

337 putation; and that *they are odious, because being extensive enough to cover the detriment, in any event, they must be extravagant in almost every event.

This is believed to be the rationale of the daily practice of relieving against forfeitures, by the court of equity, which, if no detriment hath been suffered, exonerates from the forfeiture, intirely, and, if detriment hath been suffered, exonerates from so much of the forfeiture as exceeds the detriment. by which accommodation parties are put into the state in which they ought to be, neither gaining nor losing more than they would have gained or lost if no default had been; the state in which they would have provided, by the contract, they should be, if the quantum of detriment, to be occasioned by the default, could then have been ascertained exactly. and thus the court of equitys sentences in relieving against forfeitures, are genuine interpretations of the parties words, and apocalypses of the spirit which prompted the words.

The defendents counsil, when a motion was made to dissolve the injunction which had been awarded, to coerce him from suing forth execution in satisfaction of his judgment, affirmed, that the power of the court of equity to relieve against penalties and forfeitures, did not extend to the cases of penalties and forfeitures inflicted by statutes, although inflicted solely for availment of private citizens. for which distinction a plausible reason cannot as is conceived, be assigned, since the vigor of obligation to pay the statutory mulct, and of the obligation to pay the conventional mulct, is unquestionably derived from the same source, consent of the obligors. that consent indeed is not yielded in the same manner. but this difference, if influential, would favor the relieving power, in case of the statutory, more than in case of the conventional, mulct, because the consent was signified, in the latter, by an act of the party himself, in the former, by an act of his representative, the legislature.

Upon principles herein before stated, an officer, sentenced to pay a fine for not returning a writ of capias ad satisfaciendum, or an attachment in execution of a decree in chancery, who, returning the precept after the sentence, sheweth, as satisfactorily as hath been done in this case, that the creditor had not been damnified, would be entitled to like relief as is afforded by the following decree:

That the injunctions, which were awarded to restrain the defendent and the plaintiff

(g) For Agricola to arrogate a merit from his own default, because it was fortunate to Mercator, would be futile. but for Mercator to have the corn by the default, and to have his penalty too by the default, whereas he must have been without both in case of no default, would be absurd. the design of the law compelling payment of penalties for non-performance of contracts was that the delinquent parties should make *autidosis* and thereby do justice. the law is the ordinary minister of justice. when the law, executing the precepts of justice, exacts the penalty, although no detriment, for which the penalty should be the retribution, had emerged, the law thwarts the design of justice, which then, by its extraordinary minister, aequity, controuls the law.—Note in edition of 1795.

(h) If, as has been supposed, the party, who hath not suffered any detriment by the default, be not entitled in equity to the penalty: he ought to take only so much of the penalty as is equal to the detriment, if any he had suffered. a penalty threatened for not performing a contract is not like a wager, in which the whole stake is lucrative. this was the primary and the sole object of the adventurers. they submit to the jurisdiction of fortune, an arbiter blind to merit and demerit. whereas, in a contract, the object is not pure lucre, but, a commerce, mutualy beneficial. the parties intend to perform, not to forfeit, sometimes. when they forsee probability, that performance may be intercepted, or may be not eligible, resorting to calculation, they adjust the penalty by an aequation of it with the detriment. but when a penalty doth not appear to have been the result of calculation, the emblem of justice is an index signifying a requisite aequilibrium of wrong and reparation, and a consequent defalcation of penalty.—Note in edition of 1795.

Parke Goodall from suing forth executions of their judgments, respectively, be perpetual.

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*BETWEEN 338

JOSEPH WILKINS, administrator of his late defunct wife Sarah, one of the grandaughters and legataries of Thomas Williamson, and widow, when she was married last, of Hartwell Cocke, *plaintiff*,

AND

JOHN TAYLOR, and William Urquhart, executors of the said Thomas Williamson, *defendents*.

March, 1799.

Wills—Construction—Bequest of Interest on Stock for Life with Power of Disposing of Both Interest and Principal by Will.—Bequest of the interest of stock to testator's daughter for life; then said interest over equally to testator's grandchildren; and "at their decease principal and interest to be disposed by them to their heirs, in such proportions as they, by their wills, respectively, may direct; and in case of the death of grandaughter S. C. without issue, her part to grandaughter E. C."

The Chancellor *held*, that this was only a bequest of *the interest* to the grandchildren, who were to reserve the principal and distribute it among their heirs respectively. The Court of Appeals *held*, it was an absolute gift to said grandchildren after said daughter's death, and, confirming the decree of the County Court, reversed that of the H. C. C., in the Appeal. 5 Call, 150.

The same point is involved in *Goodwyn* v. *Taylor*, 4 Call, 305; S. C. 2 Wash. 74; and decided the same way.

IN this cause,* upon the testament of Thomas Williamson bearing date in june, 1787, whereof the words are:

'I give to my said daughter (A) the interest of four thousand pounds in the government funds, during her life; and, at her death, i give the interest of the above money, one fourth to each of my grandchildren Sarah Cocke, Elizabeth Clements, Francis Clements, and John Clements; and, at their decease, the principal and interest to be disposed by them to their heirs, in such proportions as they, by their wills, respectively, may direct; and in case of the death of my grandaughter Sarah Cocke, without issue, i give her part to my grandaughter Elizabeth Clements.'

the question debated by counsil was, whether the plaintiffs intestate Sarah, to whom Elizabeth Clements the daughter had released her right to the interest of one thousand, part of the four thousand pounds, mentioned in the bequest, (B) was entitled to the said one thousand pounds, principal money? and the court, premising, that the release by the daughter who con-
339 fessedly *was entitled to interest only during her life to the former husband of the intestate and herself, is unimportant to this disquisition, stated these positions:

The first position; Thomas Williamson did intend his grandchildren NOT to have the PROPERTY of the money; because,

first, the subject of the explicite gift to them, which is the only gift to them, except the gift of a power to direct to what proportions the heirs should succede, the energy whereof will in the sequel be defined, was interest only, the terms being 'i give the INTEREST, of the above money, one fourth to each of my grandchildren;'

secondly, the property of the money is in terms devoted to the HEIRS of the grandchildren, in such proportions however as these, by their wills, respectively, may direct;

thirdly, the part of Sarah, that is, the part, whereof the interest was given to her, the testator, in case of her death, without issue, gave to his grandaughter Elizabeth Clements.

The second position: the term, 'heirs,' which, in a devise or conveyance of land, is said to be a word of (C) limitation of estate, that is, to declare the quantity of estate in the land to be taken by the devisee or purchaser, although it may be sometimes, as in case of contingent remainders, a word of purchase, that is may designate the persons who shall take the land, can, in a bequest of chatels, be understood only to indicate the takers, and, in this case, indicates them, namely, those whom the law hath appointed to succede to the heritable rights of one who died intestate, by characters infallible, insomuch, that, by a bequest to the heirs of A, the parties intitled may be demonstrated with no less certainty than if they had been described by the appellations children, parents, brothers and sisters, &c, successively of A; and, by the term, 'heirs,' in the bequest where the testator named the grandaughter Sarah and refered to her particularly, he intended children, which confined sense, as to her, is indubitably proved by the gift, in the event of her death without issue, that is, children then living, to another grandaughter.

The third position: words in a testament ought not to be rejected, or be rendered ineffectual, if they be significant, and may be interpreted in a sense which is not contrary to law. (D)

The fourth position: the sense of the terms, 'at their decease,' that is, at the decease of the grandchildren, 'the principal money and interest to be disposed by them to their heirs,' unconnected with the preceding member of the paragraph, is
340 *defective, because among those terms is not any verb which governeth, in the language of grammarians, or acteth upon, the words principal and interest; but the words, 'i give,' occurring before, are understood, in like manner as if they had been repeated after the word 'decease,' and thus supply the seeming chasm in the sense, consistently with the intention of the testator, as will appear hereafter.

The fifth position: that by the term, 'disposed,' is not understood, 'given,' implying

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*Mr. Green here refers to 10. Sim. 491. Blewitt v. Roberts; 9 Sim. 161, Archibald v. Wright; 2 Keen, 54, Cooper v. Bowler, &c.—Note in edition of 1852.

(A) &c. refer to notes at end of the case.—Note in edition of 1795.

a power in the grandchildren to dispone the principal money to whom, as well as in what proportions, they pleased; because that would contradict the testators declared will, that the grandchildren should not have the property of the principal money, but is to be understood 'distributed;' impowering them, not to give the money, or to designate the donees but, to adjust the portions thereof which the donees, designated by the testator, should take.

One proper sense of the word 'disposed' is distributed simply, as appeareth by these examples of writers in the language from which the word hath been adopted into our language:

Pompeius ex urbe profectus iter ad legiones habebat quas a Caesare acceptas in Apulia hibernorum causa, DISPOSUERAT. Caesar,' b' c' 1' I. Pompey went from the city to the legions, which received from Caesar, he had DISPOSED, that is, DISTRIBUTED, in winter quarters in Apulia.

Scipio retentum secum Laelium, dum captivos obsidesque et praedam ex consilio jeus DISPONERET, satis, &c. Romam-mittit. Livii, 1' 26. Scipio, having retained with him Laelius, until, by his advice, he should DISPOSE, that is, DISTRIBUTE, the prisoners, hostages, and plunder, after dispatching these affairs, sends him to Rome.

DISPONERE diem is used by Tacitus, Suetonius, and others, to signify division of the day into portions for particular occupations devoted to each.

Opus et requiem pariter DISPONIMUS ambo. Persii, sat' 5. we both DISPOSE, that is, DISTRIBUTE, the same hours to labour and rest.

The sixth position: the meaning of the whole bequest is exhibited truly by this paraphrase, variant from the text only by supplement of the ellipsis and insertion of the synonyma embraced by crotchets: 'i give the interest of the above money, one fourth to each of my grandchildren Sarah Cocke, Elizabeth Clements, Francis Clements and John Clements, and, at their decease, [i give] the principal and interest, to be DISPOSED [that is, DISTRIBUTED] to
341 their heirs, in such *proportions as they, by their wills, respectively, may direct.'

Scholium: the comparison of adjudged cases, quoted by counsil for the plaintiff, to prove that a power to dispone a thing involveth a right to the thing, with the principal case, is altogether inept; for,

first, in the cases quoted, he, who had the disponing power, was, in explicit terms, devisee of the land or legatary of some other subject for a time; in this case, the principal money was not, in explicit terms, bequeathed to the grandchildren, nor, if bequeathed to them at all, bequeathed otherwise than by implication from the words, 'at their decease the principal money and interest to be disposed by them;' and the question is, whether the power of the grandchildren to dispone the money, which was not bequeathed to them, but of which the interest only was bequeathed to them, implicated a right in the grandchildren to the money itself and authorized arrogation of it to themselves? so that the argument from those quotations, proving, that a devise or bequest of a thing to one for a time; with a power to dispone it afterwards, transfereth to him the property, compared with the principal case, where the proposition to be proved is, that a power in the grandchildren, to whom the interest, the use of money, for a time was bequeathed, to dispone that money afterwards to their heirs, involved a right to the money, is a petitio principii, the sophism to which a candid reasoner disdains to resort:

secondly, in the cases quoted, the power to dispone was general: in the principal case, the disposition, which the grandchildren had power to make was special, 'to their heirs,' that is those whom the law appointed to succede to the inheritable property of the grandchildren; so that the argument from the cases quoted, proving that one, who hath power to dispone a thing to whom he will, must, by implication, have a property in the thing, applied to the principal case, to prove that he who hath power to dispone a thing to persons particularly designated, must, by implication, have property in the thing, and consequently may dispone it to whom he will, is a mistake of the question: nor is the case between (E) Shermer and Richardson, on which the counsil for the plaintiff relied, an exception to what is here stated; for the devisee there had power, not to dispone to their heirs only, but, to make whom she thought proper her heirs, which was equivalent to general power to dispone:

thirdly, in the cases quoted, the property was adjudged to be in him who had power to dispone, in order that the will of the testator might be fulfilled; in the prin-
342 cipal case, adjudication of *the property to be in the grandchildren, who had power to dispone, would, instead of fulfilling, defeat the will of the testator.

The seventh position: the heirs of every grandchild, by which heirs, in the case of the plaintiffs wife, the testator undoubtedly meaned children, will take, if his or her will direct not what proportions they shall have, one fourth part, in equal portions; because when a subject is given to several, to be distributed among them discriminately or otherwise, at the election of him who is appointed to perform that office,

first, the refusal or neglect of the distributor cannot injure the donees; for he is a minister only, not an owner:

secondly, if he do not exercise the power, the praesumtion is, he declined it, because he did not choose to distribute unequaly, in which case his function was unnecessary; for distribution among associates ought naturaly to be equal, if the contrary do not appear:

thirdly, if the heir be single the distributor cannot act at all:

fourthly, all the donees, who were entitled

to the whole subject of distribution, may, by mutual agreement, control the distributor, disaffiming and frustrating any partition equal or unequal by him, and therefore may prevent it.

The eighth position: the bequest of the principal money to the heirs of the grandchildren, or in other words, to those whom the law appointeth to succede to their inheritable property, was not contrary to law.

If the testator, for the phrasis, 'heirs,' (F) had substituted its periphrasis, this part of the bequest would have been read thus: 'at their, my grandchildrens, decease, [i give] the principal and interest to [those who will inherit their lands] in such proportions as they, [except my grandaughter Sarah,] by their wills, may direct, and, in case of the death of my grandaughter Sarah Cocke, without issue, [without lineal successors] i give her part to my grandaughter Elizabeth Clements, [singly not in a communion with her brethren.']

That such was the will of the testator is believed to be manifest, and that it was not contrary to any principal of law is likewise believed, because the events, upon which the bequest would become efficacious, must happen within the times during which rights by such a bequest may be in suspense: for the heirs, if any exist at all, will exist, of the grandaughters immediately, and of the grandsons at the end of about nine months at farthest, after their deaths.

If these positions be true, as they are thought by the court to be, the consequence unavoidable is a negative decision of the question, in the principal case before
343 propounded; and that the *plaintiffs wife Sarah could have disponed one fourth part of the money to her children, or their descendents only, and her sister, when she was living, could have disponed, and her brothers can dispone, the other three parts to their children, or to their descendents, and, in default of them, to their heir in the ascending line, or to their collateral heirs; but to none other.—and hence the carollary must be,

the decree reviewed is affirmed.

NOTES.

(A) She was Elizabeth Clements.

(B) The plaintiff succedeth to her, if she were intitled, and is not accountable to her kindred.

(C) By a conveyance or a devise of land to Timothy, and to his heirs, the purchaser or devisee took an estate most ample, so that it was UNLIMITED, whereas if the word, 'heirs' had been omitted, and terms
C' L' 9 b. aequivalent had not been substituted, referring to some former act of conveyance, in one instance, or signifying the testators will, in the other instance, an estate LIMITED was taken; yet, 'heirs,' in law vocabularies, is a word of LIMITATION, this must be an *αντιφζασις*. 'heirs,' is a word of LIMITATION, because it, or the aequivalent with it, was necessary to transfer an estate UNLIMITED. 'heirs of the BODY,' indeed are strictly words of limitation.

(D) By the decree of the county court, reversed by the high court of chancery, and now proposed to be restored, that the decree of the latter may consist with a decree of the supreme court in another cause, the words in Thomas Williamsons testament, 'and in case of the death of my grandaughter Sarah Cocke, without issue, i give her part to my grandaughter Elizabeth Clements,' were entirely rejected. significance of those words, 'in case of the death of my grandaughter Sarah Cocke, without issue,' in this sense: 'the contingent gift to Elizabeth of Sarahs part shall be effectual, when a failure of the latters progeny shall happen, either at the time of her death, or at a more distant period,' is undeniable. the words can have no third meaning.

About the end of last century, english judges would have understood that event to have been within the scope of the testators contemplation, by which he would have been thwarted, and she who was the object of his beneficence, would have been disappointed, in a fond or a servile compliance with what those judges called a rule of law, that is, a rule of interpretation commented by themselves, or coming
344 to them by tradition from *their predecessors, and in contradiction to the testators words, uninfluenced W r (1' e' Washingtons reports 1 vol') 102. 'by the RESPECT, which all men have agreed to pay to the WILL of the dead.'

W r 104. Succeeding judges, 'in the progress of their struggle for the intention against a rigid unjust rule,' would, as until lately was believed, have understood the other event to have been contemplated, according to the plane meaning of the words; whereby the wish of a grandfather, and the hope of her whom he most favoured of his offspring, might have been gratified, without violating any principle of law truly so called, or contravening, except peradventure in one instance, any cases adjudged, to be found in the term reports, transatlantic or cisatlantic, or other modern publications, of responsa prudentum.

W r 273 300 (E) 'I am free to own, that, where a testators intention is apparent to ME, cases must be STRONG, UNIFORM, and apply POINTEDLY, before they will PREVALE to frustrate that intention;' by the president of the court of appeals: of which the converse is: 'I am free to own, that, where a testators intention is apparent to ME, cases, which 'are STRONG, UNIFORM, and apply POINTEDLY, WILL 'PREVALE to FRUSTRATE that intention.'

Observations and questions:

1 This, although delivered in the first person, 'i' and 'me,' is supposed to have been the sentiment, unanimous sentiment,

of the conclave; because the report, corrected 'from the notes of him' who was praeses, doth not show that any were dissentient; because it is 'declared to be the opinion of the court,' that is, for any thing hinted to the contrary, the whole court; and because it seems then to have been settled, and to have become a rule of property.

Pref' to W r. W r. 302. Ibid.

Strength of the authority, said Holt some where, is the reason of the resolution.

2 Strength of a case, distinct from its uniformity and pointed application, is believed to be its ratiocination, cogent of assent to propositions intended to be verified.

3 By uniformity in the cases is understood, either a harmony of them with one another, or a symmorphosis, a likeness in form, in meaning, with that to which they were compared.—which ever be the sense, aptly may be here remembered these words of the president, delivering the opinion of himself and his assessors, in the case between Shermer and Shermers executor: 'several cases have been cited, but they seem *to verify the saying of a judge: "that, in disputes upon wills, cases seldom illucidate* the subject, which, depending on the intention of the testator, to be collected from the will, and from the relative situation of the parties, ought to be decided upon the state and circumstances of each case," to which i will add: that i have generaly observed, that adjudged cases have more frequently been produced to disappoint, than to illustrate, the intention.'

W r 271. 345 *So it is written.

Now: in the dispute between Godwin and his wife, plaintiffs, and these defendents, when the court of appeals, upon this will of Thomas Williamson, determined, that his grandchildren were entitled to the money, which by the bequest before recited they were empowered to dispone to their heirs, determined so upon authority of the cases cited, and principaly, as hath been said, upon authority of the case between Shermer and Shermers executor:

was not 'the intention APPARENT TO' the sage president, and to every other member, that the grandchildren SHOULD NOT, but that their heirs, in some proportions or other, SHOULD, have the principal money? whether that intention was illegal, is not now the question:

were the cases cited, in panoply complete, with all their armature, so STRONG, whatever or wherever their vigor was, and the harmony of them with one another, or the symmorphosis, likeness in form, in meaning of them with the principal case, such, that they PREVALED to FRUSTRATE that intention? do the six first paragraphs, that is all but one, of the courts opinion in the case upon Shermers will, apply to the case upon Williamsons will? if the strength of Shermers case applied to the other, be in that part where some insects are armed with stings, and if it be potent there, doth it not oppugn ineluctably the reversal which it was adduced to authorize?

did the cases cited 'illucidate,' elucidate, or dilucidate 'the subject' of disquisition, and assist the judges to discover the POLAR STAR, which directed them in the construction of the will, and guided the decision,' so that it shone more brightly than it shone before? men use the darkened lens of a telescope, when they contemplate the suns disc, or the faculae, or maculae, or other phaenomena, on the face of that luminary, that they may not be dazzled or blinded by the splendor of its rays, but use every optic aid, that the medium, through which opake bodies are viewed, may be pellucid as possible. some judges, when they propose to discover a testamentary polar star, condense, by confusing with a mist called authorities, the medium through which the object is confessedly to be discerned, *obscure its atmosphere with a soot called technical words, and leave certain people doubting whether the star, which the testators words indicated, defining it with such accuracy that an un-law-learned man, who would credit the information of his senses and hearken to the suggestion of an unperverted understanding, would swear it could not be mistaken, was or was not the star, which should 'direct the judges in the construction of the testators will;'—doubting, because law-illumined astronomers had, by the τεχνη 'ερμηνευτικη, skill in the art of interpretation, discovered, and had, by an irreversible and therefore infallible judicial sentence, declared, that the star, upon which ordinary observers were gazing, was as different and as distant from the star, 'which is to guide the judges decision' as Mercury from Herschel. in truth, law-interpreters have deprived the STAR, intention, of POLARITY, rendering it planetic, erratic, so that they seem to verify the saying of a judge 'a will may be any thing, every thing, no thing.'

W r 102. 346 W r 103. W r 271. W r 102.

Did the case upon Shermers will,

giving the profits of his whole estate to his wife for her life; impowering her to make whom she pleased her heir or heirs of one half;

giving that half, not to her heir, but to whom she should think proper to make her heir or heirs; in effect, giving to her immediately dominion, full dominion, of the half, so that she might have disponed it, to whom she pleased, when she pleased, for a disposition at any time would have been effectual, and how she pleased:—did this case apply POINTEDLY to the

case upon Williamsons will,

giving, not the money, but, the interest of the money, to his grandchildren;

not empowering them to make whom they pleased their heirs;

giving the money, not to those whom the grandchildren should think proper to make their heirs, but, to those who by law would be made heirs of the grandchildren, refering apportionments of shares among the heirs to discretion of their respective ancestors; and is not the case upon Sher-

mers will, if it apply to the case upon Williamsons will, in any point, in point-blanc opposition to it?

do not these words of the venerable pres-
W r 272 ident 'he, John Shermer, does not give her, his wife, a power to dispose, but to name the person or persons she might chuse to succede to her part, TO WHOM the testator GIVES the money,' and the reversal of the decree, in Godwins case, upon Williamsons will, if this were founded on that, strike an ear, not the most
347 *acute, with a διαφωνια, a dissonance in the cases; did he, Thomas Williamson, give to his grandchildren a power to name the persons who should succede to the money; on the contrary, are not those successors, or rather proprietors of the principal money, named by himself; and did he give the money to those whom the grandchildren should chuse to succede; on the contrary, did he not give the money to those whom he chose to succede?

W r 302 If the opinion in Ayletts case be, as it is there called, a 'PRINCIPLE,' so 'SETTLED that it had become a RULE of PROPERTY,' is not the converse of the opinion a 'PRINCIPLE' too, and must it not 'become a RULE of PROPERTY,' as well as its antitype.

If judges can form rules for interpreting
W r 99 wills of 'testators IGNORANT of
100 the technical sense affixed to words by professional men'—testators, unassisted by those professional men, 'often when their wills are made in extremity reduced to the necessity of resorting to any person, however unskilfull, who may be at hand' ——if the judges can convert these rules into 'PRINCIPLES, SETTLED RULES of PROPERTY,' can declare, that against them, where the adjudged cases approving them are said to be STRONG, although not a single reason, as in the case of Rose and Bartlett, and other cases, is pretended in justification of them, to be UNIFORM and to apply POINTEDLY, terms not defined, nor perhaps defineable, intentions of testators, APPARENT intentions, WILL NOT PREVALE—may not judges 'mould testators wills into any forms, which whim,
W r 99 fancy, or worse passions, may suggest?'

When the testator is admitted to have intended one thing, is not to adjudge him to have intended another thing, and that this shall PREVALE against that, the same as to adjudge that what IS his will IS NOT his will, and sufficient, when this is named interpretation, to justify a prosopopoeia of common sense hooting such jargon?

Further observations upon rules formed by judges, for interpretation of testaments, that is, for explanation of words in them, so that they may be understood by those who did not understand them before:

Judges, probably, if they had not been perplexed by rules juridicaly praescribed by themselves or their praedecessors, would have expounded a testators words, unless they were terms of art, in the sense which other men, as well acquainted as their-
selves with the language, attributed to
348 them*, resorting to those *sources of invention, which circumstances, too many for enumeration, too various for specification, suggest for investigating his intention:

—would have expounded his words, if they were terms of art, simple and unaequivocal, in the sense attributed to them by skilfull professors of the art;

—would have expounded his words, if they were terms of art, but aequivocal, so as to be intelligible, in a demotic, popular, or in a technic, artificial sense,—in one of which the testament would have been valid, in the other void—would have expounded his words in the former sense, and rejected the latter; prefering that to this, ut res magis valeat, by the benignity, quam pereat, by the malignity, of the law —the law, which favours the praesumtion, that the testator intended what he could do, rather than that he intended what he could
W r 99 not do. When judges, who 'disclame all legislative power to change the law,' pronounce, that a will shall not be performed, because the testator had not declared his meaning in language, which was prescribed by rules of interpretation, rules of construction, as they sometimes are called—(truly called so, for properly construction is building, taken for exposition by a metonomy, and wills are often, according to rules of construction, built, not interpreted, by english judges)—although his meaning was declared in language which could not be misunderstood—rules, of which he had never heard—rules, which although attempted to be dignified by their makers classing them with rules of law, are defective in a quality essential in the constitution of laws, having never been so promulged that they can be known by those who are not professionalists—do not judges, forming these rules, and adhaering to them so that cases where they have been recognized 'will prevale against APPARENT intentions' of testators, assume authority to fabricate types 'for
W r 99 moulding testators wills?' do they thus 'regard the testators own words, and compare them with his circumstances, and the relative situation of the devisees?'
do they not oppose their rules of
349 construction to the law, making *the commandment of it, THAT THE WILL OF THE TESTATOR ORDAIN-

*Marcus Pomponius Marcellus, cum ex oratione Tiberium reprehendisset, affirmante Ateio Capitone, et esse latinum, et, si non esset, futurum, 'certe jam inde mentitur, inquit, Capito. tu enim Caesar, civitatem dare potes hominibus, verbis non potes.' Sueton' de illust' grammat.' 22. interpretation of words, which are not legal terms of art, is not peculiarly within the judicial sphere, and legal judges can, by their cases, precedents, authorities, rules of construction, or whatever else they please to call them, no more 'ESTABLISH for PRINCIPLES, and RULES of PROPERTY' false interpretations of such words than a roman emperor, as he was told by honest Marcellus, with a generous boldness, although he might grant freedom of the city to foreigners and barbarians, could denizate or naturalize a soloecism:—a power which the base Capito, with the servility of a cringing court favourite yielded.—Note in edition of 1852.

ING WHAT IS LAWFUL SHALL BE PERFORMED, of none effect by their traditionary interpretations? if this be not, 'what is, assumption of a legislative power'—power 'to change the law,' to abolish the law? ought such rules of interpretation, if it must be called interpretation, to 'become RULES of PROPERTY?' if english judges change some of their rules, as frequently they have done, will their apes, dictu nefas, be found among judges—in the latitude—of Virginia!

One would suppose, rules for interpretation of testaments should tend to illustrate intention, should be consistent with themselves, be simple.

W r 272 But, as we are taught, 'adjudged cases,' in which we find these rules, 'have more frequently been produced to disappoint than to illustrate the intention.'

W r 102 Instead of consistency, 'apparent clashing of the cases relied upon,' in some instances, where these rules have been applied, is confessed, and in numberless others may be shewn.

Instead of simplicity, judges by the W r 102 canonic art, skill in forming rules, for interpretation of wills have 'tied a gordian knot.'

Why gordian knot? the του ζυ ου της αμαξης ὁ δεσμος, the vinculum inextricabile, to which is here alluded, is said to have

Quint' been serie vinculorum ita adstricta,
Curt' lib' ut unde nexus inciperet, quove se
3. Cap' 1. conderet, nec ratione, nec visu, per-
W r 100 cipi posset. now we learn, that the judges tying this knot, were instigated by the 'spirit of the feudal system;' so that the judges, who have been since struggling,' we are not told how long, 'since to untie it,' and who possibly knew unde nexus inceperat, and therefore could have found one end of the cord with which the knot was tied, must have been clumsy, if they could not find, quo se condidit, the other end. the pellaean hero, if he had been so lucky as to discover the begining of the cord, with which the phrygian knot was tied, would have been more dexterous, and probably by ravelling it, would have fulfilled an oracle, instead of eluding it, by the discission. this expedient, however, is commended:

W r 102 for we are informed, 'it would have been better if they, ENGLISH judges, had cut it, the knot, at once.' yea verily? would it have been better? if so, why did not, why do not, Virginia judges imitate the macedonians example, since, 'by the american revolution, and some of our laws,

W r 100 we have happily got rid of the feudal system;' and the spirit of it in this part of the globe hath been exorcised? they would

have been, they will be, acquited of
350 temerity *which was ascribed to him,

Quint' and might have avoided, may
Curt' lib still avoid, agonies which english
3 Cap' 17 judges suffer, in their 'struggle for the intention against rigid unjust rules of law,' that is, rules of interpretation.

The english structure of canons, rules for interpretation of testaments,' 'unfortunately admitted,'—'unfortunately truly for all but those, who, like Demetrius and his

W r 102 suit, 'by this craft have their
Act' wealth,—a structure of rule for ex-
Apost' pounding testaments, that is, for
Cap XIX. 'counteracting defeating, inten-
W r 103 tions of testators' (for to call it interpretation and exposition, if not ironically, must be nonsense) a structure

W r pas- agreed to be an imp of the feudal
sim stock—may be resembled rather to the cretan labyrinth. for expediting us from its meanders, our Daedalus, who

Virg' ——————ipse dolos tecti ambages-
que resolvit,
Caeca regnes filo vestigia, —— ——

the general assembly shewed the clew, execrating, in our system of jurisprudence, every part formed of feudal materials, or fashioned in feudal style. How we shall profit by the indication may be augured by the case of Ayletts executor against

W r 300. Aylett, and by the *eulogy which
*W r 110. no doubt was extremely delectable to him whom it blandished, and 'whose laborious researches on such occasions were pleasing to the court.'

(F) Let us suppose the testator to have used instead of the word, 'heirs,' the syllabus of it, taken from the statute directing the course of descents, when the bequest would have been written thus: 'at my daughters death,

'i give the interest of the money to my grandchildren Sarah Cocke, Elizabeth Clements, Francis Clements, and John Clements, one fourth to each; and at their decease,

'[i give] the principal and interest† to their children, to their descendents, to be disposed by them, in such proportions as they, by their wills, shall direct;

†'if no children nor descendents of my grandaughter Sarah Cocke be, i give her part to my grandaughter Elizabeth Clements;

'if no children nor descendents of my other grandchildren be, [i give their parts of] the principal and interest to

their father,' here supposed to be the
351 same man. the testator probably *did

not intend this: but such must have been the effect, if the father were living;

'if the father be dead [i give their parts of] the principal and interest to their mother,' also supposed to be the same woman, 'brothers and sisters, and their descendents or such of them as there be in such proportions;' and so forth.

That the testators words may be understood in this sense is incontestable, and that they ought, even in opposition to 'cases strong, uniform, applying pointedly,' to be understood in this the demotic sense, by which his intention may be fulfilled, rather than that his intention should be counteracted, defeated, by exposition of

†transpositions, by which the construction, in either sense, without the least change of meaning is more perspicuous.—Note in edition of 1852.

the word, 'heirs,' in the technical sense, is ———: 'hold here

Shaksp' ———give thy thoughts no tongue.

*Cro' Car' sub finem.

MANTISSA.*

'The rule is laid down, in Rose and Bartlett, by all the judges, that where Wr 302 a testator, having both freehold and leasehold lands, in a particular place, devises ALL his lands in THAT place, only the freehold lands shall pass,'

'Le report del case argue en le common banke devant touts les justices de mesme le banke en le quart an du raygne de roy Jacques, entre 'Matthew Stradling, plant,' et Peter Styles, def,' en un action propter certos equos coloratos, anglice, pyed horses, port per le dit Matthew vers le dit Peter. le recitel del case. Sir John Swale, of Swalehall in Swale dale fast by the river Swale, k't, made his last will and testament: in which, among other bequests, was this, viz. 'out of the kind love and respect that i bear unto my honoured and good friend mr Matthew Stradling, gent,' i do bequeath unto the said Matthew Stradling, gent,' ALL my black and white horses.' the testator had six black horses, six white horses, and six pyed horses. le point. the debate therefore was, whether or no the said Matthew Stradling should have the said pyed horses, by virtue of the said bequest. this case was argued by Atkins, apprentice, pour le pl,' and by Catlyne, serjeant, pour le defend.' le court fuit longement en doubt, de rest matter; et apres grand DELIBERATION en judgment fuit donne pour le pl, nisi causa. motion in arrest of judgement, that the pyed horses were mares; and thereupon an inspection was prayed, et sur ceo le court advisare vult.'

Scriblerus's reports.

352 *These two cases 'apply POINTEDLY.' the resolutions of them are contradictory.

Stradling versus Styles, although, adjudged, if indeed the case ever existed, long before Rose versus Batlett, as may be conjectured from divers considerations, doth not appear to have been cited in the argument of the latter case; probably for these reasons; first, the reports of master Scriblerus had not been published; second, if they had been published, they would have been disregarded, not being authorized by the judges, imprimatur; last, the name of the supposed author is believed to be fictious, and to have been assumed by a certain COMMON SENSE, who, long a probationer, had not, in the time of George Croke, knight, reporter of Rose versus Bartlett, been able to become a licentiate, in Westminster hall, even of an ouster barristers degree.

'Thus settled' (the principle in Shermers Wr 302 case) 'it has become a rule of property' (that is a law, which the judges who assumed authority to ordain it, have, and their successors will have, equal authority to abrogate) 'which the court cannot depart from without disturbing MANY titles enjoyed under this LONG ESTABLISHED PRINCIPLE.'

If the present judges shall not abrogate these rules and principles, their successors will not want logic to prove that those who can make, who can ESTABLISH, can defeat, can DEMOLISH, RULES of property, that is, LAWS.

*Wr 134 If precedents be requisite, they are at hand. '*FURNISHED,' by the court of appeals: for example:

Wr 302 'The court cannot depart from a rule of property,' by which they mean a judicial rule of interpretation, as it is explained by themselves, 'without disturbing titles.' then they may depart from the rule, if it be a bad rule, and if departure from it will quiet more titles, than adhaesion to it will disturb.

Again for a more POINTED example.

'The judges after laying down the true rule, built upon intention, unfortunately admitted that, if there be no words of limitation the common law rule must prevale; by which they tied a gordian knot, which they have since struggled to untie. it would have been better if they had cut it at once.'

Wr 102 and in many more places. Now, with what was this knot tied? with 'rules of interpretation, rules of construction, principles, rules of property.' 'what are rules of property,' but laws? who 'tied the knot?' judges. who formed the rules? judges. who 'have struggled to untie the knot?' judges. who 'would have done better if they had cut it?'

353 *judges. 'at once;' when? not before the knot was tied by preceding judges, surely. what is the proper, instead of the metaphorical sense of 'tying, struggling to untie, cuting, the knot?' forming rules of interpretation, rules of construction, principles, rules of property, was tying.' endeavoring to change them was 'struggling to untie. declaring them to have been originaly contrary to law was 'cuting.'

Consequently the court of appeals authorized abrogation of rules for interpretation of testaments.

Here upon the concession of the court of appeals, that, for interpretation of wills, 'the rule built upon intention' is the 'true rule,' deserves to be remarked. if it were a true rule, it was a common law rule. if it were a common law rule, the rule 'the judges unfortunately admitted to prevale against it,' is a false rule, and the proposition that it was 'the common law rule,' involves a contradiction.

'From the rule of property,' the rule of construction, 'settled by judges and chancellors,' in the case of Rose and Bartlett, and some other cases, in England, 'the court could not depart.' in the case, of Wr 302 notable celebrity,* between Ayletts executor and Aylett, 'without dis-

*If in this case the intention appeared CLEAR, Wr 302 that the 'lease—hold land should pass. the court would give a decision according to this principle.' IN SUPPORT OF THE INTENTION; but WE can discover NO SUCH INTENTION.' these words have been read by some people without STARING!—Note in edition of 1852.

turbing MANY titles, enjoyed under this LONG ESTABLISHED PRINCIPLE.' will obsequence of that glaringly false unjust principle, or deviation from it, think you, produce the most quietude or disturbance in this country? probably the case hath frequently happened, 'where a testator, having both freehold and leasehold lands, in a particular place, devised ALL his lands in that place,' and been settled, without litigation, by the parties, who had not been informed of this 'LONG ESTABLISHED PRINCIPLE,' according to his 'apparent intention.' and perhaps 'MANY titles have been enjoyed peaceably and quietly under' such settlements. we hear of a single instance, in this country, where any person had questioned, whether 'only the freehold lands should pass by such a devise:' in other words, whether the postulate of Euclid, in his elements, that the whole is greater than its part,' ought to be granted. if so, when Washingtons reports shall be, as they quickly will be, in the hands of every leguleius, indefatigable in his 'researches' after adjudged cases, W r 110 and ambitious to deserve the 'opinion, that what is not produced by 354 him, in favour of the *side he advocates, does not exist,' this case of W r 302 Aylett, 'for which nothing can be said, but that in Ayletts will are no words or circumstances to shew an intention, which do not appear in the case of Rose and Bartlett, instead of being a finis litium, will multiply them, and be as prolific as the fabulous hydra, or that species of the true hydra called the polypus.

[NOTE. Bill of review in this case was allowed, March 1796. The decree reviewed and affirmed, ut supra p. 342. l. 8, 1799; and case taken to Court of Appeals. 5 Call 150.--Ed.]—Note in edition of 1852.

BETWEEN
THOMAS HINDE, *plaintiff*,
AND
EDMUND PENDLETON and Peter Lyons, administrators of John Robinson, with his testament annexed, *defendents*.

March, 1799.

Auctions—Employment of By-Bidder*—Case at Bar.—The pltff., known to have a feeling of attachment to certain slaves that were sold at auction, was induced to bid and buy them at an exorbitant price by a by-bidder. One of the defts. suspecting that some would decline bidding in order to favor the pltff., instructed the auctioneer not to let the slaves be sold under a reasonable value. The auctioneer then employed the by-bidder, without any special instructions to do so. Judgt. for the purchase money injoined, and the sale set aside as to the excess of the price and an issue directed, or a reference to a commissioner by consent, to ascertain a fair price.

A NEGRO woman slave and her four children had been in possession of the plaintiff and his wife, the parent many years, and the others from their respective births, probably believed by the possessors, during the greater part of that time, to be their property.

After the woman slave was discovered to have been, by the father of the plaintiffs wife, who had received her from him, conveyed long before to John Robinson, the testator of the defendents, the five slaves, by direction of one of the defendents, were sold by auction.

The plaintiff, at the time and place appointed for the sale, attended with his wife, who manifested a tender affection for the slave, and such anxiety to retain them, which was increased by a reciprocal abhorrence in them from a separation, that she seemed resolved to buy them at any price.

The defendents were not at the sale. one of them, suspecting that some people, disposed to favour the plaintiffs wife, 355 might *decline bidding against her, instructed the agent who managed the sale not to let them be sold under a reasonable value.

The agent employeth a by-bidder, not being particularly instructed so to do by the defendents: the slaves are exposed to sale, in four lots, for tobacco; the plaintiff is the highest bidder for all; the sum of the prices bidden is somewhat more than 52000 pounds of tobacco, confessed to be enormous, for payment of which the plaintiff, with a surety, executed a bond.

The defendents, in an action for the tobacco appearing due by the bond, recovered a judgment, to enjoin which the plaintiff commenced this suit, in his bill claming a property in the slaves, by a gift, which he alleged the father of the plaintiffs wife to have made at their intermarriage, or, if that title could not be maintained, insisting that the conduct of the agent in employing a by-bidder, was so unfair that in equity the obligor ought not to be charged, by the bond, with more than the true value of the slaves, far exceded by the price which was bidden by the plaintiff, and which he was urged to bid by the agents practices upon the solicitude of a distressed woman.

The answer of the defendents to the bill did not admit the gift to the plaintiff, and he did not prove it, nor would the gift if he had proved it, have been effectual against the prior conveyance to the testator of the defendents.

In the answer the first named defendent in a dissertation endeavoured to prove the employment of a by-bidder not to be unlawful or exceptionable in general, and stated that not long before this transaction, the plaintiff, at a public sale, gave 255 pounds for a negro boy thirteen years old and that other extravagant prices were given about the same time; adding, he supposed the just creditors of mr Robinson, for whose benefit the defendent acted, had a right to be avaled of the prevailing temper though it should be thought a phrenzy.

By the court, 10 day of march, 1791:

The act of by-bidding is a dolus malus. 1, the by-bidder, offering a price for the

*See Appendix, Wythe, 448.

thing proclamed to be sold, professeth a wish to buy it; which profession is false: for he, not only doth not wish to buy the thing but, wisheth another man to buy it, and tempteth him to bid more for it. 2, the by-bidder, instead of being one who would be a buyer, as he pretendeth to be, is in truth the seller disguised, lending his own person to the seller. his office is dramatic, no less than the office of an actor in theatrical exhibitions. they both represent others; and the object of both is to deceive. in this latter character however they differ thus: they use their art to persuade, one that he is, the other
356 *that he is not, whom he personateth.

(a) by which duplicity in the by-bidder the true bidders are deluded, who suppose the design of themselves and this by-bidder to be the same, that is, to buy the thing as cheap as they can, and do not suspect that a bidder, apparently desiring to buy, is insidiously watching the eagerness of others to buy, and graduating his offers by that scale, instead of his own estimate of the value, and his own ability to pay the value.

Now a simulation, a feigning himself to be what one is not, i. e. a true bidder, and a dissimulation, an industrious concealment of what he is, that is a seller or sellers substitute, from others interested in knowing what he is, and this with a design to profit by their credulity and ignorance, exhibit a complete and lively contour of that, which, if it must not be called by the name of a dolus malus, or by a name of like meaning, must want a name.

Again, the offer of a by-bidder, from the nature of the transaction, is a nullity. a sale by auction is a compact between the seller and highest bidder, whereby the property passeth from one to the other. the highest bidder therefore must be a bidder to whom the property can pass. but to a by-bidder can be no such transition of the property. for, if the thing proclamed for sale be, in the auctionary language, stricken off to the by-bidder, the property remaineth unchanged; he being the agent, and consequently, his offer being the offer, of the seller.

The inconvenience, if the practice of by-bidding be not tolerated, of which the active defendent seemed apprehensive, from combinations formed to the injury of the seller, may be honestly prevented by his preliminary declaration, that his property shall not be disposed of at less than a certain price, and an exposition of it to sale at that price, or a greater, if a greater be bidden. but a deception, exercised in order to counteract a combination to injure the seller, which may or may not be formed, doth not consist with the praecepts in any system of ethics hitherto approved.

The same defendent, by his answer, seemed to think, that the plaintiff ought not to be relieved in this instance, because, in another instance of a public sale, he had bought a slave at a more extravagant price, and other people had made similar indiscrete bargains about the same time, against
357 which on that *account, the parties suffering by them had not been relieved. upon this is observed: in the cases, to which the defendent alluded, the parties, if by intromission of by-bidders they were led to give extravagant prices for things which they bought, have not been relieved, because perhaps they have not sought relief. if by-bidders did not intromit, the parties were not intitled to relief. the man, who suffers himself to be so much the dupe of epidemical phrenzy, which is supposed to have been prevalent at this time, or of his own desires, as by those standards, to measure the value of things which he buys, instead of measuring the value of them by their utility to him, and congruency with his faculties, can not, on that principle, be discharged from an improvident bargain by the court of equity, the judge of which neither is the curator, nor hath the power which the roman praetor had (b) to appoint a curator, for a prodigal.

And finally, the employment of a by-bidder, on this occasion, was peculiarly exceptionable. in other cases, a man, who bids against a secret by-bidder, will be restrained by the consideration that the price, bidden by his ostensible competitor, excedes the true value. but in this case the plaintiff did not consider the true value; to gratify a wife, for a family of servants, endeared to her probably by an intercourse of obsequious attention and faithful ministration, on one side, in return for benign treatment and provided care on the other, he bid the pretium affectionis, which is unlimited, and which therefore was——

WHAT THE BY-BIDDER AND HIS PROMPTER PLEASED.

The sale ought not to be set aside intirely, as the active defendent proposed, although the last price, bidden by the plaintiff, above a true bidder, can not be now discovered, because this incertainty was occasioned by the defendents agent and by-bidder; but the sale ought to be effectual upon payment of so much tobacco as is equal to the value of the slaves at the time of the sale.

For ascertaining this value, an issue would have been directed; but, by the parties consent, it was referred to commissioners, upon whose report, in may 1791, the injunction, awarded when the bill was filed, was perpetuated as to all the tobacco recovered by the judgment, except so much thereof as was equal to their estimate.*

(a) Another difference between them is, men most commend him who most deceives them, because

Doubtless the pleasure is as great
Of being cheated as to cheat.

as Butler hath observed, when they are cheated out of their senses only: but when by deception they are injured in their property, they are not disposed to commend him who deceived them.—Note in edition of 1795.

(b) Prodigi, licet majores viginti quinque annis nati sint, tamen in curatione sunt agnatorum, ex lege duodecim tabularum. sed solent Romae praefectus urbi, vel praetores, et in provinciis praesides, ex inquisitione, eis curatores dare. Justiniani institut. lib. I. tit. XXIII. § III.—Note in edition of 1795.

*The foregoing case was accidently omitted in its proper place, about p. 111; and since the omission was discovered has been intentionally retained for the last.—Ed.]—Note in edition of 1852.

APPENDIX.

The materials of this Appendix were collected by Mr. Green, for an edition which he meditated of Wythe; and were placed at the disposal of the present Editor, under the circumstances and in the manner mentioned in the Preface. Together with the dissertations now published, were communicated sundry detached observations upon the cases which our author reports, and numerous references to decisions in pari materia: But, these having been received too late for insertion at their appropriate places, in the body of the work, most of them are omitted: Some, however, of the more important are here preserved, in an arrangement which (it is hoped) will be found not inconvenient.

No. 1.

LAPSE—JOINT-TENANTS.—TENANTS in COMMON.*

"*Tangitur hic disputatio de jure accrescendi, qua nulla in toto jure nostro creditur esse vel subtilior vel perplexior.*"

VINNIUS.

By the common law,—unless the will order it otherwise,—

1. Where a testamentary gift of either real (1) or personal (2) estate is made to several as tenants in common, whether mentioned *by name, (3) or described as a class, if designated so as to be capable of definitive ascertainment, either at the date of the will, (4) or upon an event which may and does happen before the period appointed for vesting; (5) the death of some of them before it has vested, whether in the testator's lifetime, (6) *or after his decease, (7) occasions a lapse of so much as would, in the opposite event, have become theirs:

2. Where devisees (8) or legatees (9) are

*This article was in its inception designed as an annotation to the case of Pendleton v. Hoomes, Wythe 4, (new edit. 94)—Since it was written, some changes affecting the subject of it have been made, by the "Code of Virginia:" But, as cases arising upon wills, executed on or before and not re-published after, 30 June, 1850, must still be determined by the law in force aforetime; (V. C. 849, ch. 122, sec. 22; ch. 216, sect. 1:) the text is allowed to remain unaltered, and the changes that have been mentioned are pointed out in the notes.

(1) 8 Mod. 123, Goodright v. Opie; 9 Mod. 157, Barker v. Giles; 11 Mod. 392; 2 P. Wms. 280; Sel. Cas. Ch. temp. King, 17; 3 Bro. P. C. 2d edit. 104. S. C. Mosel, S. C. cited; 42, Page v. Page; 2 Stra. 820, S. C.; Willes. 293, Doe v. Underdown; Andr. 2d edit. append. viii. S. C.; 2 Wm. Blackst. 737, S. C. cited; 1 Ves. sen. 70, Sperling v. Toll; Belt's Suppl. 1st edit. 52, S. C.: 5 Ves. 744, Reade v. Reade; 1 Sugd. Pow. 6th edit. 530. *et seq.*

(2) 1 P. Wms. 700, Bagwell v. Dry; 2 P. Wms. 489, Page v. Page; 532, Cray v. Willis; 1 Atk. 494, Owen v. Owen; 1 West's Hardw., 593, S. C.; 1 Ves. sen. 542, Peat v. Chapman; 2 Ves. sen. 93, 99, Painter v. Salisbury, cited; 285, Jackson v. Kelley; 1 Bro. C. C. 503, Ackroyd v. Smithson; 2 Dick, 566; 3 P. Wms. 22, Cox's note 1, S. C.; 5 Myl. & Cr. 62, Easum v. Appleford; 3 Hare 84. Norman v. Frazer; 1 Collyer 416, Harris v. Davis; 1 Ired. Eq. Rep. 31, Nelson v. Moore; 2 Ired. Eq. Rep. 330, Hester v. Hester; 7 Ired. 9, State (use of Barnes) v. Shannonhouse; 10 Serg. & R. 351, Craighead v. Given.

(3) As in all the cases cited in notes 1 and 2.

(4) 2 Sid. 53, 78, Packman v. Cole; Rich. Wills, 2d edit. 170. S. C.; 2 Stra. 905, Man v. Man; W. Kel. 71, S. C.; 3 Ves. & B. 54, Ackerman v. Burrows; 13 Price 332. Bone v. Cooke; McClell, 168, S. C; 3 Myl. & Cr. 688. Barber v. Barber; 11 Sim. 397. Bain v. Lescher; 7 Beav. 49, Havergal v. Harrison; 3 Ired. Eq. Rep. 426, Johnson v. Johnson; 5 Binn. 115, Weishaupt v. Brehman.—The decision of Sir Joseph Jekyll, in Hunt v. Berkley, Mosel. 47; 1 Eq. Abr. 243; 1 Atk 495, n. S. C. cited 1 West's Hardw. 595; though not irreconcileable with the doctrine here stated, if the peculiar ground, on which he placed it, be attended to, has nevertheless been repeatedly overruled,—that ground having been disapproved.

(5) Whether before or after the death of the testator.—In Allen v. Callow, 3 Ves. 289, the testatrix gave a certain sum to and among all and every the children of E. B., living at her (E. B's) decease; and after the date of the will, E. B. died, leaving four children, of whom two subsequently died in the lifetime of the testatrix. As the cause came before the court, there was no occasion to decide, but the Master of the Rolls expressed his opinion, that the death of E. B. had so ascertained the legatees, as that the subsequent deaths among them had caused a lapse of two parts out of four: And this is admitted by Mr. Jarman, to have been, when he wrote, the common opinion. But he maintains, with great force of argument, the contrary proposition, viz. that where the gift is to a class, as such, the persons who shall compose it eventually cannot be reduced to final certainty before the death of the testator. 1 Jarm. Wills, 297-298. And two subsequent cases have been decided in accordance with his views. 3 Hare, 438, Gaskell v. Holmes; 4 Hare 250, Lee v. Pain. It may therefore be regarded as a point now settled, that such shall be the construction wherever there is not a sufficient indication of a different intention. But surely it cannot be doubted, that as the testator may postpone until some time after his death the period for ascertaining the constituent members of the class, (14 Ves. 256, Hughes v. Hughes; 2 Beav. 25, Wordsworth v. Wood; 4 Myl. & Cr. 641, S. C.; 2 Jarm. Wills, 73 *et seq.*) provided he do not exceed the allowed limits of executory devise, (4 Beav. 248, Griffith v. Blunt; 12 Sim. 218, Comfort v. Austin; 1 Jarm. Wills, 226, *et seq.*; Lew. Perp. 455-463, 511-533;) so he may by a clear manifestation of his will, annex that period inseparably to an event which either shall certainly, (if at all,) or may contingently, happen in his lifetime. See the observations of Lord Brougham, 7 Cond. Engl. Chanc. Rep. 130, Palin v. Hills; 1 Myl. & K. 470, S. C.

(6) As in all the cases cited in notes 1, 2 and 4. [The possible number of such cases is not diminished by the provision in Va. C., 1849, ch. 122, sect. 11; that "a will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."—For, as Mr. Jarman has observed, upon the same words in Stat. 7 Wm. 4; 1 Vict. c. 26, s. 24; this enactment "relates to the subject-matter of disposition only, and does not in any manner interfere with the construction in regard to the objects of gift." 1 Jarm. Wills, 291-292. Accord. 1 Wms. Ex'rs 4th edit. 182.]

(7) 9 Sim. 363. Hustler v. Tillbrook; 2 Edw. Ch. Rep. 156, Marsh v. Wheeler. See also, 3 P. Wms. 20, Cruse v. Barley; 3 Ves. 236, 536, Mackell v. Winter; 4 Ves. 399, Booth v. Booth.

(8) Orl. Bridgm. 384, Davy v. Kemp; Carter 2, s. c.; 1 Vern. 425. Cock v. Barrish; 1 Salk. 328, Bunter v. Coke; Cas. temp. Holt 248, s. c.; 9 Mod. 157, Barker v. Giles; 11 Mod. 392; Sel. Cas. Ch. temp. King 17; 3 Bro. P. C. 2d edit. 104; 2 P. Wms. 280, s. c.; 331, Rider v. Wager; 2 Yeates 525, Robinson v. Martin; 4 Greenl. 486, Anderson v. Parsons.—See 1 Metc. 358, Sackett v. Mallory.

(9) Prec. Chanc. 87, Scoolding v. Green; 1 Eq. Abr.

constituted joint-tenants, such of them as survive are, in similar circumstances, entitled to the whole:

3. Where a devise (10) or bequest (11) is to a class as such, of which the members are unascertainable, indeterminate, and contingent until the period of vesting; if, when that period arrives, there be living any persons, or a single person, (12) 364 answering *the description, to them or him, as alone constituting the class, the entire subject is deemed to be given. In every particular the effect is the same, as if such persons or person, and none other, had been expressly nominated to take it. Whoever become eventual, are likewise from the beginning sole, objects of the testator's bounty. And therefore, as to the question of lapse by death, in cases of this description, it can never be material whether the devisees or legatees, if eventually more than one, would take under the will as joint-tenants, (13) or as tenants in common. (14)

In cases of the two former descriptions (15) the law has undergone 365 *a modification in Virginia, (16) where devisees or legatees dying be-

298, s. c.; Mosel. 187. Cray v. Willis; 3 Ves. 628, Morley v. Bird; 2 Yeates 525. Robinson v. Martin.

(10) 4 B. Monr. 24, Rogers v. Moore's devisees. See also Wythe 94, Pendleton v. Homes.—It is on this ground, though not so explained in the reports, that the decisions in Hayes v. Ward, 2 Ridg. P. C. 85. (on the first question put to the judges.) and Ballard v. Ballard, 18 Pick. 41, seem properly to rest. To prevent a misconception of the last mentioned case, in reference to the question mainly discussed in the text, it is proper to observe, that though the devise in it was in terms which would have made the devisees joint-tenants by the common law, yet in fact it made them tenants in common by force of a statute of Massachusetts enacted in 1785, not mentioned nor alluded to in the report, but noticed in the cases of Shaw v. Hearsey, 5 Mass. Rep. 521; Miller v. Miller, 16 Mass. Rep. 59: and Annable v. Patch, 3 Pick. 360; and which, as to this matter, was the same in effect with the enactment in Mass. Rev. Stat. ch. 59, sec. 10, 11.

(11) 2 Cox 190. Viner v. Francis; 2 Bro. C. C. 658, S. C.; 4 Madd. 377, Thornhill v. Thornhill, (which quoad hoc seems to be good authority still, notwithstanding it has been in another respect impugned. 8 Sim. 356, n. Collins v. Collins: 356, Smith v. Smith; 2 Keen 701, Le Jenne v. Le Jenne; 2 Hare 271, Gray v. Garman; 2 Myl. & K. 295, Knight v. Gould; 4 Myl. & Cr. 95, Shuttleworth v. Greaves; 7 Beav. 296, Castle v. Eate; 1 Collyer 320, Cort v. Winder; 2 Con. and Law. 528, Shaw v. McMahon; 4 Dr. & War. 431, 438, S. c.; 7 Yerger 606, Frierson v. Van Beuren. See also 2 Vern. 743, Bird v. Lockey; 3 Pick. 213. Miles v. Boyden; 2 Dev. & Batt. Eq. Rep. 52. Vaughan v. Dickens; 11 Gill and J, 328, Young v. Robinson.—The decisions of Lord Thurlow, in Martin v. Wilson, 3 Bro. C. C. 324, and Lord Loughborough, afterwards on the same will, *ibid.* Belt's note 2; appear to be now exploded, notwithstanding the countenance so recently shewn them by Chancellor Walworth, in Mowatt v. Carow, 7 Paige, 341-342.

(12) 13 East 526, Doe v. Sheffield; 2 McCord's Ch. Rep. 440, Swinton v. Legare. See also, 2 Vern. 106, Crooke v. Brookeing; 2 Stra. 1172, Oates v. Jackson; 7 Mod. 439, S. c.; 3 Bro. P. C. 2d edit. 442, Wicker v. Mitford; Harg. Law tracts, 511; 1 Harg. Jurisc. Exerc. 222, S. C; 2 Beav. 221, Blease v. Burgh.

(13) 2 Atk. 220, Buffar v. Bradford; 1 Cox 248, Freemantle v. Freemantle; 1 Jac. & W. 388, n. Vaux v. Henderson; 2 Ridg. P. C. 85, Hayes v. Ward, on the second and third questions put to the judges. See also 13 East 526, 537, Doe v. Sheffield.

(14) As in all the cases cited in notes 10 and 11, and the two first cited in note 12.

(15) In commenting on the recent English statute of wills, 7 Wm. 4 & 1 Vict. ch. 26, s. 33, (2 Jarm. Wills, 764,) which contains a provision *in pari materia* with the acts cited in the next succeeding note; Mr. Jarman expresses the opinion, that it does not touch the case of a devise or bequest to several as joint tenants, because by the common law the death of some of them in the testator's lifetime occasions no lapse, the prevention of which is the avowed object of the statute. And he subjoins that, upon "the same reasoning," the case of a devise or bequest to a class is equally without its reach. 1 Jarm. Wills, 318. But how sound soever in England, especially since the statute has received there the construction, which is mentioned in note 26 *post;* this argument would be manifestly fallacious, if applied to the acts above alluded to. Both they and the statute direct, not only that the devise or bequest shall not lapse, but moreover that it shall take effect, or be good and available, or vest, in like manner "as if the devisee or legatee had survived the testator," or had died "immediately after the death of the testator."—Now, under such circumstances, how would the devise or bequest have taken effect? In the case of a gift to several individually, as joint tenants, the predeceased would have been among the takers; and though the *jus accrescendi* would upon their dying afterwards, have carried all to the survivors, in England,—upon which ground, if not upon that mentioned by Mr. Jarman, the statute has produced, in such cases, no change whatever there; yet in Virginia and Pennsylvania, the like consequence would not have ensued, (see note 22.) and therefore, in cases of this description, the law *has* received here the modification mentioned in the text. See 1 Tuck. Comm. edit. 1836, B. 2, p. 298. As to cases of the first description, or devises and bequests to designated individuals as tenants in common, see note 81. But [though not upon Mr. Jarman's "reasoning,"] the case of a testamentary gift to a class, of which the members are unascertainable, endeterminate, and contingent until after the testator's death, seems to be unaffected by either the acts or the statute: for, in such a case, only those who answer the description at the proper time being devisees or legatees, it is impossible that any devisee or legatee can die in the testator's lifetime. [And in accordance with this view is a decision of the Supreme Court of Pennsylvania, made since this note was written. 10 Barr, 360, Gross's estate.] *Tamen vide* 18 Pick. 41, Ballard v. Ballard.

(16) By "an act to prevent the lapsing of legacies and devises, in certain cases, by the death of the legatee or devisee in the lifetime of the testator," passed 15 Jany. 1818, (Sess. Acts, ch. 19, sect. 1;)—the material words of which are as follows, except the words within brackets: "Whensoever any estate of any kind shall or may be devised or bequeathed by the testament and last will of any testator or testatrix, to any person being a child or other descendent of such testator or testatrix, and such devisee or legatee shall, during the lifetime of such testator or testatrix, die, testate or intestate, leaving a child or children, or one or more descendents of a child or children, [who shall survive such testator or testatrix;] in that case such devise or legacy to such person, so situated as above mentioned, and dying in the lifetime of the testator or testatrix, shall not lapse; but the estate so devised or bequeathed shall *descend and pass to the heirs, devisees, distributees, legatees, or legal representative, as the case may be, of such devisee or legatee, in like manner to all intents or purposes in law or equity, and subject to like debts, charges, liabilities, and conditions in all respects, as if such devisee or legatee had survived such testator or testatrix, and had then died testate or intestate.*" The words within brackets were added at the revisal of 1819; and at the same time those in italics were omitted, and in lieu thereof the following were inserted: "Vest in said child or children, descendent or descendents of such legatee or devisee, in the same manner, as if such legatee or devisee had survived the testator or testatrix, and had died unmarried, and intestate:" And with these alterations the act of 1818 was then re-enacted. R. C. 1819, ch. 104, *sect.* 5.—A like modification of the common law was introduced in Pennsylvania, by "an act to prevent devisees and legacies from lapsing in certain cases," passed 19 March, 1810, in the following words: "From and after the passing of this act, no devise or legacy in favour of a child or other lineal descendant of any testator shall be deemed or held to lapse or become void by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue, surviving the testator, but such devise or legacy shall be good and available in favour of such surviving issue, with

fore the testator are related in a certain manner to him, (17) and (18) leave issue living at his death. (19) But

366 *it remains unaltered in every other respect, where the will creates a tenancy in common; (20)—whether it does also in the contrasted case of a will that creates a joint tenancy depends on the effect of a statutory provision in these words: "if partition be not made between joint-tenants, whether they be such as might have been compelled to make partition or not, (21) or of whatever kind the estates or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtsey or dower, or transmissible to executors or administrators, and be considered to every other intent and purpose, in the same manner as if such deceased joint-tenants had been tenants in common." (22)

367 *Judge Lomax, in his Treatise on the Laws of Executors and Administrators, (23) states his impression, (it would be unwarranted by what he has said, and

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like effect, as if such devisee or legatee had survived the testator: Provided always that nothing herein contained shall be construed to affect any devise or legacy contained in the last will of any testator who shall have deceased before the passing of this act: And provided also, that nothing herein contained shall be construed to defeat the intention of any testator, to exclude such surviving issue or any of them." Dunl. Laws of Penn. ch. 175. On this act arose the case of Newbold v. Prichett, 2 Whart. 46, which is mentioned in note 26, *post*.

(17) [This is altered by V. C. 1849, ch. 122, sect. 13, which enacts, that "if a devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done, if he had survived the testator, unless a different disposition thereof be made or required by the will."

(18) See 7 Mass. Rep. 86, Fisher v. Hill; 18 Pick. 41, Ballard v. Ballard. See also 1 Ashm. 242, Commonwealth v. Nase; 2 Ired Eq. Rep. 330, Hester v. Hester.

(19) Devisees and bequests, which by their terms do not vest in the instant of the testator's decease; but are contingent upon the devisee's or legatee's surviving until some subsequent period, are clearly not within the statute or any of the acts mentioned in notes 15, 16, [and 17.] 1 Jarm. Wills, 313; 1 Tuck. Comm. edit. 1836, B. 2, pp. 298, 443.—And this was doubtless designed, inasmuch as such devises and bequests stand, in this respect, on the same ground as testamentary gifts to classes of which the members are unascertainable as long as the testator lives. But it was owing probably to mere inadvertence, that the statute in England and the acts of 1819 [and 1849] in Virginia were so worded, as to leave it at least doubtful whether they operate in favour of any descendent of a pre-deceased devisee or legatee, but such as unite in themselves the condition of being *in esse* both at the death of such devisee or legatee and also at the death of the testator. 1 Jarm. Wills, 312-313; 1 Rop. Leg. 4th edit. 466. In reference to cases arising under V. C. 1849, it is material to remark two passages in a work of uncommon learning and, in general, of uncommon accuracy; the first in these words,—"It has been decided, that [7 Wm. 4. & 1 Vict. cap. 26, sect. 33,] does not apply to a testamentary appointment:" and the second in these,—"The authorities demonstrate, that if the bequest be made after the act came into operation," the act will apply to a case where a child died before the will was made, but after the act came into operation." 2 Wms. Ex'rs, 4th edit. 1050. Both of which passages, however, must be trusted with some degree of caution. As to the first, the case to which it infers is, in another learned work, mentioned as follows; "It has been decided by Griffiths v. Gale, [12 Sim. 354,] that the section does not apply to a child, to whom a share of a fund is given by the testamentary appointment of a parent, in exercise of a power of selection, and which child dies in the lifetime of the donee of the power. The language of the judgment would seem to apply to all testamentary appointments whatsoever; but it may be questioned whether the 33rd coupled with the 1st section of the act does not apply to testamentary appointments under *general* powers, which give the donee an absolute control over the property; and especially where, in default of appointment, the property is given over absolutely to the donee." See V. C. 1849, chap. 122, sect. 1, 13. And as to the second, it is observable that in each of the only two authorities that seem to support it, [1 Roberts. 363, Skinner v. Ogle; 4 Notes of Cases 74, S. C. 5 Hare 306, Winter v. Winter; 5 Notes of Cases 2, n. S. C.] the *will* was made in the lifetime of the legatee, though before the statute went into operation, being afterwards revived by codicil; and in one of them only did the legatee die before the making of the codicil. If he were dead before even the will was made, *quaere* whether [at least in Virginia] the decision ought not to be different; agreeably to that which was made in Linsday v. Pleasants, 4 Ired. Eq. Rep. 320.—Where he died after the will was made, but before the statute went into operation, it was held that a codicil reviving the will subsequently to the latter period did not bring the case within the section we are considering. 5 Notes of Cases 1, Wild v. Reynolds.

(20) 1 Ashm. 242, Commonwealth v. Nase; 2 Watts 185, Allison v. Kurtz; 2 Leigh 642, Frazier v. Frazier's exrs. From the marginal abstract of this (last mentioned) case it would seem that the bequest in it was to the legatees as joint-tenants; but it appears in the report at large (p. 645,) and it is particularly noticed in the opinion of the court, (p. 649,) that it was to them as tenants in common. This inadvertance, which was not material in regard to the point then in the reporter's view, seems to have occasioned some perplexity to a learned writer, (1 Tuck. Comm. edit. 1836, B. 2, p. 298,) and for that reason, and because it connects immediately with the point principally discussed in the text it has been thought advisable thus to point it out. See note 78.

(21) See 3 Rand. 187, 190, Thornton v. Thornton.

(22) Enacted in Virginia, 28 Nov. 1786, (R. C. 1819, ch. 98, sect. 2;) and in Pennsylvania, 31 March, 1812, (Dunl. Laws of Penns. ch. 190,) in precisely the same words, with the addition of the following: "Provided always, that nothing in this act shall be taken to effect any trust estate." [The following are the provisions *in pari materia*, contained in V. C. 1849, ch. 116. "§ 18. When any joint-tenant shall die, whether the estate be real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, curtsey, dower, or distribution as if he had been a tenant in common. * * * § 19. The preceding section shall not apply to any estate which joint-tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument, that it was intended the part of the one dying should then belong to the others."] In both these states the question propounded in the text is believed to be as yet unaffected by direct authority properly so called. In North Carolina there is a statute, passed in 1784, which, from the account of it in 3 Griff. Law Reg. 322, appears to be similar, and in that state the question has been recently stated, and waived by Ruffin, C. J. as follows: "A distinction prevails in England between legacies given to two or more, jointly or in common. The former upon the death of one of the donees, survives to the other, whether the death be before or after the testator's. That is supposed to result from the right of survivorship incident to the joint tenancy.—Whether that be the reason or not, or whether our act of 1784, destroying the *jus accrescendi*, will have any effect upon the point here, it is not material to inquire in this case, since the words of this will clearly create a tenancy in common" 3 Ired. Eq. Rep. 429, Johnson v. Johnson. See further concerning the North Carolina authorities, in note 61.

(23) Vol. 2, pp. 50-51. In Sloan v. Hanse, 2 Rawle 28, counsel *arguendo* made the same point; but the facts of the case did not raise the question, which, therefore, was not noticed by the court nor is any reasoning of the counsel in support of their position reported. See note 78.

might be doing him injustice, to represent it as his deliberate or even positive opinion,) that since this statute, "the rule would be the same where the [devise or] bequest was made to the [devisees or] legatees as joint-tenants, as where it was made to them as tenants in common." But his reasons are not given (24) And a careful consideration will (perhaps) bring us to the opposite conclusion.

It is manifest, that the statute has no direct operation but where an interest has become vested, in "those [of the joint-tenants] who die first." (25) In diametrical opposition to what happens in every case of lapse, (26) it gives the parts
368 of those *so dying as their property, to their heirs or devisees if real, to their executors or administrators if personal, and to either (according to its kind) subject to every liability that would have attached, had the deceased themselves
369 been the sole owners. *Nor, except where it so disposes of them, does it in terms withhold those parts from the survivors, or declare that they shall be, to any intent or purpose, considered as if the deceased had been, not joint-tenants, but tenants in common. And therefore, (28) the effect ascribed to it, by the learned writer just now quoted, must be produced (if at all) indirectly, and as a consequence of its having abolished, in whole or in part, what before was the foundation of the doctrine it is supposed to have subverted.

What then was that foundation? It has been suggested, (29) that it was the jus accrescendi; (30) which, until the stat-

(24) Beyond what may be gathered from the brief expression,—"as survivorship has been abolished."

(25) 3 Rand. 189. Thornton v. Thornton. Until the death of the testator his nominated devisees or legatees cannot with any propriety of speech, be called either joint-tenants or tenants in common; since, during his life, the property is not theirs, in any sense whatever. Of this the following proof and illustration is remarkable, from the singular combination of the circumstances. A. made B. her universal legatee, giving him all she might possess on the day of her death, and died in the lifetime of B. The latter having previously made a similar will in favor of A., died afterwards without revoking it. And it was held, that the property bequeathed by B. to A. vested, under the Maryland act of 1810, ch. 84, in her personal representatives; and that her disposition of her whole estate in favour of B. did not carry the estate bequeathed to her by B., since as to it she had had a mere expectancy of benefit, to be derived from his will, and not such an interest as to render it the subject of any testamentary gift she could make. 7 Gill and J. 362, Glenn v. Belt

(26) According to all the cases, amounting now to a very great number, by the common law, [which, as to the particulars here stated, is not altered in any manner *contrary* to what is here stated, by V. C. 1849, ch. 122, sect. 14,] the subject of every lapsed devise or bequest, to the extent of the lapse, passes as the property, not of the devisee or legatee, but of the testator, and (according to its kind and the particular provisions of his will) to the heirs or next of kin, or other devisees or legatees, of the latter. And where it goes, by his will, to the persons who answer the description of heirs, next of kin, personal, or legal representatives, or the like of the pre-deceased devisee or legatee, they take not in those characters respectively, nor by derivation from the person, towards whom their bearing such relation is what brings them within the description, and so entitles them,—but as purchasers immediately from the testator.—3 Bro. C. C. 224, Bridge v. Abbott; 1 Myl. & K. 470, Palin v. Hills; 2 Beav. 67, Cotton v. Cotton; 2 Yeates 578, Ware's lessee v. Fisher; 1 Gratt. 302, Dickenson v. Hoomes.—In commenting on the recent English statute, cited in note 15, Mr. Jarman expresses the opinion that, in cases within its operation, the subject of the devise, or bequest is, to all intents and purposes, constituted the disposable property of the devisee or legatee, whose death makes the contingency that is provided for; and that, as such, it must follow the disposition of his will, so far as that is capable of disposing, and does dispose of after-acquired property. 1 Jarm. Wills, 314. And this exposition, —which is advocated by another learned writer, (Sugd. Wills, 111-113,) though controverted with much earnestness by a third, (Worth Wills, 4th edit. 459-466,)—has been since established by a decision in point. 3 Hare 157, Johnson v. Johnson. But, upon the same point precisely, the Pennsylvania statute *in pari materia* has received the contrary construction. 2 Whart. 46, Newbold v. Prichett.—See also 7 Gill & J. 362, Glenn v. Belt, stated in the last preceding note. And the Virginia statute, in its present form, [prior to code of 1849,] clearly requires the same interpretation; although, as it was first enacted, it did, with equal clearness treat the subject of the gift as the property of the pre-deceased devisee or legatee, not only in regard to its devolution, but also in regard to its liability for his debts. Even under the existing law, [as it stands in R. C. 1819, ch. 104, sect. 5,] the opinion has been expressed by a writer of great respectability, (1 Tuck. Comm. edit. 1836, B. 2, p. 298, n.) that it is liable for them: but that appears to be a mistake. Whoever will compare the original and amended forms of the act, will probably think the comparison sufficient to prove this; but, if more be required, all doubt upon the point must be moved by the following extract, replete with sound argument, from the opinion delivered by Sergeant J. in Newbold v. Prichett, 2 Whart. 49. "If a benefit was contemplated to the devisee or legatee himself, [or to his creditors,] there is no reason why it should not be conferred on him [or them] whether he had issue or not. It is plain, that it was for the issue only, the law was passed.—They are to take with like effect, as if the devisee or legatee had survived the testator; but it is only they, who are to take. And where there are no issue, [that outlive the testator,] a lapse occurs as before." As was said by the Supreme Judicial Court of Massachusetts, respecting a similiar statute of that State, the issue in such cases "are *purchasers*, and take by a sort of statute devise," or bequest TO THEM. 7 Mass. Rep. 87, Fisher v. Hill. See also 3 Munf. 50, Patton v. Williams. The exact truth seems to be, that in all cases coming within the acts now in force [prior to 1st July, 1850,] both in Pennsylvania and in Virginia, there is—despite the contrary language *mis*employed by the respective legislatures, and necessarily, in order to effectuate their design,—a lapse; nay, more—the acts themselves have introduced a lapse, in case of joint devises or bequests, (see note 15,) where but for them, if the doctrine maintained in the text be sound, there would have been none;—but then the lapse does not "occur as before," that is to say, the consequences are not now the same as formerly, nor in those cases the same as in others. On the contrary, the acts have made them to be almost, but (as I have pointed out in note 19) not altogether, the same as if the testator had erased the name of the pre-deceased devisee or legatee, wherever it occurred in his will, and in lieu thereof inserted some appropriate designation of his issue.

(27) The statute says, "tenants in common." But the effect is the same, as might be proved in detail by an accurate induction of particulars; it seems, however, sufficient to refer to the paragraph of the text corresponding to notes 78-84.

(28) From the premises perhaps we might, without any serious risk of error, deduce the conclusion that wherever an interest has not become vested in the joint-tenants, during their lives, the statute has not been productive of any change whatever. But the more limited inference in the text seems sufficient for the occasion; and it has the advantage of being indubitable.

(29) See note 22. From the turn of his expression this appears to have been Judge Lomax's opinion.

(30) "Note, it was said by Chief Justice Holt, and not denied by the rest of the court, that if a devise be to A. and B. and their heirs, and A. dies before the testator, the other shall have the whole *by survivorship*." 1 Show. 91, Eddlestone v. Speake; Cas. temp. Holt 222, S. C. See note 125 *post*. In what sense the Chief Justice used this expression may be collected from what he said on another occasion, "There

was a case in my Lord Bridgman's time of Davis and ——. It was a devise to two persons and their heirs, and one of them dies during the life of the testator: and the question was, whether the survivor should take the whole or not; and it was held he should: *which shews plainly, it was a will and a disposition from the time of making it.*" Fitzg. 231, Bunker v. Cooke; (which notwithstanding the general ill repute of the book, is affirmed by Sir Thomas Parker, in a letter to Lord Hardwicke, published in 1 West's Hardw. 509, to be an authentic report, furnished by Mr. D'Anvers;) 11 Mod. 129; Gilb. Dev. 135, S. C. *in totidem verbis.* And that it was his deliberate opinion appears from the fact, that this exposition of the doctrine, on which the case he quotes was founded, was used by him as an argument in support of the judgment he was then delivering.—But it may be observed, 1. that the argument was cumulative and unnecessary, since the only point there determined was, that the testator had not power to devise after-acquired real estate. See Ram. on Leg. Judgm. ch. 5. 2. It proves too much, since, if it were true in the extent evidently contemplated, a lapse by reason of death after the date of the will could not in any case, occur.—3. It is wholly different from, if not also contradictory to, Lord Chief Justice Bridgman's own exposition of the grounds of his decision, as appears both from the imperfect report in Carter 3-6, Davies v. Kempe; and from the excellent report by Bridgman himself, since published from his MSS. Orl. Bridgm. 384-390, Davy v. Kempe.—4. It conflicts with the unanimous opinion of the twelve judges, in the case of Ashburnham v. Bradshaw, (including Denton, J. who did not hear counsel for all the parties, and for that reason only did not sign the certificate publicly sent to Lord Hardwicke,) as appears by a written communication from one of them, published from Lord Hardwicke's papers, 1 West's Hardw. 507-508—Their doctrine was, "that a will was [is] a revocable disposition *in praesenti*, to take effect *in futuro*, and that there are two times a will has respect to, the time of making, and the time of its taking effect by the death of the testator. The time of making the will concerns the capacity of the giver, [which was the only point to be considered in Bunker v. Cooke;] the time of its taking effect, by the death of the testator, concerns the capacity of the taker;" which is the only thing to be considered in every question of lapse.—5. And lastly, it is opposed to the decision of Lord Hardwicke, in the case of Buffar v. Bradford, 2 Atk. 220; where the testator gave a certain part of his personal estate to his niece B. and the children born of her body,—there being none at the date of the will. Afterwards she had a son, and then died before the testator. And Lord Hardwicke said the son, "being born in the lifetime of the testator, would have taken with his mother as joint-tenants, if she had lived; as she is dead, he shall take the whole *by way of remainder;*" *—though, it is observable, he and his mother were not co-existent either at the date of the will, or at the death of the testator, and (what makes the opposition to the opinion of Holt more pointed,) the legatee, who took all, was that one of the (so-called) joint-tenants, who was not in being when the will was made. It is true, that in such a case the result would now be (probably) the same even if the gift had been to them as tenants in common; but that would be by force of the doctrine concerning gifts to classes, which had not been established in the time of Lord Hardwicke, and was not settled even so late as the times of Lord Thurlow and Lord Loughborough; (see note 11;) and moreover the actual ground of the decision, as furnished to us by the report, proves what the *opinion* of Lord Hardwicke was on the point we are now considering. See further concerning his opinion Ambl. 186, Humphrey v. Tayleur; 1 Dick. 161. S. C. and more and stronger objections to the opinion of Holt, in the text. Yet Willes, C. J. appears to have agreed with him. Willes 295, Doe v. Underdown; Andr. 2d edit. Append. ix, S. C. Lord King, however, was on the other side. Sel. Cas. ch. temp.

*The meaning of this expression, which is altogether different from the ordinary technical sense of the term *remainder*, may be gathered from a similar expression, in the following extract from Dr. Strahan's translation of Domat's Civil Law, p. 2, b. 3, tit. 1, sect. 9, art. 11, vol. 2, p. 95, edit. Lond. 1722. "If a testator bequeaths one and the same thing to two or more legatees, without any mention of portions, as if he gives and bequeaths a house to such a one and such a one,—if one of them cannot, or will not, receive his portion, it *remains* to those who have taken, or shall take, theirs."

370 ute *abolished it, (31) was the most remarkable incident of a joint-ten-
371 ancy, *peculiar to it, and considered therefore its distinguishing characteristic. (32) But the suggestion, though plausible, appears to be mistaken. Even in the cases which have been mentioned, of the death of a devisee or legatee between the making of the will and the period of vesting,—inasmuch as he never had an actual interest, and never was in fact a joint-tenant,—it is obvious that the jus accrescendi (33) could not operate directly; and that it did not indirectly is, if not obvious, at least susceptible of convincing proof. For it was not only where some of the devisees or legatees died after the date of the will, that the others, by the common law, took the whole, in case the gift was to them as joint-tenants; but the same thing occurred also where some of them were dead before the will was made; (34) and not only where some of the persons nominated failed to take in consequence of death, but also where such failure happened either from their having never existed at any time; (35) or from their incapacity, though living, (36) or refusal (37) to take; or from the

King, 19, Barker v. Giles; 11 Mod. 394, S. C.—Mr. Jarman espouses both opinions; for after explaining the doctrine agreeably to the sentiments of Bridgman, King and Hardwicke, he puts it, in a subsequent part of his work, on the other ground. Compare 1 Jarm. Wills, 295; and 2 Jarm. Wills, 167. The true explanation of the discrepancy seems to be, that the former of these passages was written for the work just now quoted, while the latter was merely transferred from another work published several years before. 2 Jarm. Pow. Dev. 373-374. If he thought that the question was of no practical importance in England, he seems to have been mistaken, for reasons that will appear in the sequel; but certainly here, where the *jus accrescendi* has been abolished, it is a point of great consequence.

(31) See the paragraph of the text corresponding to note 85.

(32) Co. Litt. 181 a; 2 Blackst. Comm. 183; 2 Woodd. Lect. 125; 2 Prest. Abstr. 57. The passages here quoted relate to the incidents of estates, which belong to them *ex institutione legis. Ex provisione hominis*, by means of cross-remainders, certain modifications of uses and trusts, and executory devises and bequests, survivorship may be made incident to a tenancy in common. 1 Thom. Co. Litt. 774, note I; 1 Saund. Rep. 185, note 6; 2 Jarm. Wills, 457-488. And this explains the first part of a *dictum* of Bayley, J. in Doe v. Abey, 1 Maule & S. 435; the last part of which gives an intimation of the ground pretty fully discussed in the sequel here: "A tenancy in common with benefit of survivorship is a case which may exist, without being a joint-tenancy; because survivorship is not the only characteristic of a joint-tenancy."

(33) See the paragraph of the text corresponding to note 85.

(34) Bac. Abr. tit. Legacies & Devisees, L. 4, vol. 5, p. 115, edit. Lond. 1832; vol. 6, p. 159, edit. Philad. 1844.

(35) Orl. Bridgm. 387, 388, Davy v. Kempe; Carter 5, S. C.

(36) 2 Ves. sen. 645, Alexander v. Alexander.

(37) Godb. 77, Bonefant v. Greenfield; 1 Leon. 60; Cro. Eliza. 80 S. C. (compared with 11 East 288, Denne v. Judge;) 3 East 410, Hawkins v. Kemp; 2 Swanst. 365, Nicholson v. Woodsworth; 5 Madd. 435, Adams v. Taunton; 3 Barn. Ald. 31, Townson v. Tickell; 2 Bingh. N. C. 70, Begbie v. Crook; 2 Scott 126, S. C.; 3 Paige 420, *in re* Stevenson; 5 Paige 46, King v. Donnelly; 559, *in re* Van Schoonhoven; 5 Serg. & R. 523, Jones v. Maffet. How such a refusal is to be made with effect, is quite another question; as to which, besides the references above and in note 46, see Fitzh. Abr. tit. Joyntenauncye, pl. 9; Bell. Ric. 2 fol. 215, pl. 5, S. C. Bro. Abr. tit. Agreement & Disagreement, pl. 8; tit. Joyntenauncie, pl. 57; tit. Waiver des choses pl. 41; (in all which places what

will's being inoperative as to them,
372 whether for deficient *certainty of description, (38) or in consequence of a partial revocation, effected either by
373 codicil, (39) or by obliteration. *(40)

Nor was the doctrine confined to wills and testaments.—With an analogy that is perfect, it extended also to conveyances inter vivos, and in them prevailed equally whether the failure of the estate to vest in some of the nominated feoffees, grantees, or donees was caused by their incapacity to take, as being either dead, (41) whether before the inception, (42) or between it and the completion, (43) of the conveyance, or unborn, (44) or otherwise incapable; (45) or by their refusal to accept; (46) of

is said on this point rests on the authority of Brooke alone, for there is nothing to warrant it in the Y. B. 8, Hen. 4, 13, 19, which he cites (erroneously in regard to both folios,) nor in the *dictum* of Hankford, J. in the Y. B. 8 Hen. 4, 12, a Duke of York v. Luitrel, to which it is certain that one, and probably that the other of his references was intended to be made;) Y. B. 7 Edw. 4, 7, b. pl. 16, Anon.; 16 Edw. 4, 4, b, Uxenfield v. Knivett; Gouldsb. 84, Colthirst v. Delves; 134 Bulleyn v. Bulleyn; Moore 361, S. C.; 254, Butler v. Baker; 3 Rep. 25, a; 1 And. 348; Poph. 87; 3 Leon. 271, S. C.; 2 Keb. 794, Cheek v. Lisle; Cas. temp. Finch 258, Hussey v. Markham; 4 Viner 485, Doyley v. Att. Gen.; 6 Barn. & Cr. 112, Doe v. Smyth; 9 Dowl. & R. 136, S. C. 1 Russ. & M. 231, Dove v. Everard; 1 Myl. & K. 195, Stacey v. Elph; 2 Moll. 253, Bingham v. Clanmorris; 5 Wend. 224, Judson v. Gibbons; 1 Rob. Va. Rep. 94, Bryan v. Hyre; 4 Yeates 577, Milne v. Cummings.

(38) Ambl. 175, Dowset v. Sweet; 1 Ves. Jun. 414, S. C. cited. In this case Lord Hardwicke is reported to have said: "It is a joint devise; and in such case, *by whatever cause* it happens one of the joint tenants cannot take, the other shall have the whole.

(39) Ambl. 136, Humphrey v. Tayleur; 1 Dick. 161; Bac. Abr. tit. Wills & Testaments, G. I.; vol. 5, p. 531, 4th edit. tit. Wills and Testaments, H. 1; vol. 8, p. 500, edit. Lond. 1832; vol. 10, p. 555, edit. Philad. 1846; S. C. 2 Ves. sen. 645, S. C. cited.—It may be objected, that this case and those cited in the next succeeding note are not to the purpose, because, under the circumstances, the wills ought to have been read as if the names removed had never been inserted, and so the effect would not have been different, if the wills had created a tenancy in common. But such an objection admits of a two-fold answer.—1. Whatever may be the case in England since the stat. 7 Wm. 4, & 1 Vict. ch. 26, (see 1 Collyer 416, Harris v. Davis;) in point of fact the law was not so, at the respective dates of the decisions quoted. In Creswell v. Cheslyn, 2 Eden 123; Ambl. 136, Blunt's note 1; 3 Bro. P. C. 2d edit. 246; the testator gave the residue of his personal estate to three out of his five children, "share and share alike, as tenants in common and not as joint-tenants;" and by a codicil revoked one of them from being a residuary legatee, and gave her instead a pecuniary legacy; she afterwards died in the lifetime of the testator; and it was held by Lord Northington, whose decree was affirmed in the House of Lords, that the third of the residuum originally bequeathed to her did not belong to the other two residuary legatees, but should go to all the four surviving children of the testator equally, according to the statute of distributions. Which decision, though disapproved by Sergeant Hill, (2 Eden 126, n.) has been since approved by Sir Edward Sugden, when Chancellor of Ireland, in Shaw v. McMahon, 4 Dr. & War. 431, 438; and by Vice Chancellor Knight Bruce, in Harris v. Davis, 1 Collyer 416; and followed by Judge Story in a case precisely similar, 3 Mason 486, Brownell v. De Woolf. See also 1 Dana 480, Floyd v. Barker. And a like decision was made by Sir Thomas Plumer, where the testator drew his pen through the name of one of his residuary legatees, and by a codicil declared that he had rased her name out of his will with his own hand. 1 Swanst. 566, Skrymsher v. Northcote; 1 Wils C. C. 248, S. C.—2. Whatever in point of fact the law of that time may have been, it was not upon any such ground, that the decisions were placed by those who made them. See particularly the reported reasons of Lord Hardwicke, in Humphrey v. Tayleur.

(40) 3 Bos. & P. 16, Larkins v. Larkins; 4 East 419, Short v. Smith.

(41) Whether civilly, (Y. B. 3 Hen. 6, 23, Herle v. Noble; 14 Hen. 8, 29, pl. 7, Anon.; Bro. Abr. tit. Nonabilitie, pl. 2; tit. Faites, pl. 87; Perk. sect. 204; Spec. Law Cases, 148, edit. 1641; Shepp. Touchst. 71, Prest. edit.) or naturally, 6 Monr. 15, Overton v. Lacy; Watk. Conv. 92-93, Prest. edit.—See in Virginia, act of 24 Feb. 1820, Sess. Acts, ch. 28, sect. 2; Supp. R. C. 1819, ch. 97, sect. 2; [V. C. 1849, ch. 144, sect. 12.]

(42) As in the cases cited in note 41.

(43) "If a warrant of attorney be made to make livery of seisin unto two men, and one of them die before the livery of seisin made, and the attorney make livery of seisin according to the deed unto the other feoffee who is living, it is good unto him for all the land. And so it is, if one of the feoffees be professed frier before the livery of seisin made: *causa patet, &c.*" Perk. sect. 192. (In the edit. Dubl. 1792, the reference in the margin is 22 Ass. pl. 29; and in the edition quoted 13 Vin. 187, pl. 8, it is 22 Ass. 9; neither of which is correct: Some endeavors have been made fruitlessly to discover the authority meant.) S. P. Perk. sect. 204; Moore 281, Battey v. Trevillion; Co. Litt. 52, b, Hargrave's note 6; Shepp. Touchst. 212. So, if a reversion were granted to two, while attornment was necessary, and attornment were made to one after the death of the other, the whole would belong to the survivor. 2 Rep. 67, b—68 a, Tooker's case; Orl. Bridgm. 386-387, 387-388, Davy v. Kemp; Carter 5, S. C. Co. Litt. 310, a; Shepp. Touchst. 259-260, 264, Prest. edit.—In the former of these cases the feoffment, (Perk. sect. 182; Co. Litt. 52, b; Shepp. Touchst. 212;) and in the latter the grant, (Orl. Bridgm. 387, Davy v. Kemp; Carter 5, S. C. Co. Litt. 309, a, b; 314, b; Shepp. Touchst. 260;) would have been wholly void if all the feoffees in the one, had died before livery, and all the grantees, in the other before attornment.

(44) Y. B. 17 Edw. 3, 29, Prior of St. Augustine de Grimesby's case; 18 Edw. 3, 59, pl. 21, Anon. (*semble* S. C.) Cro. Eliz. 121, Stevens v. Lawton; 1 Leon. 138; Owen 40, S. C. Co. Litt. 9, a, Hargrave's note 3; 2 Ired. 277, Newsom v. Thompson.

(45) Whether absolutely, (1 Rep. 100, b—101, a, Shelley's case; Orl. Bridgm. 388, Davy v. Kemp; 394-395, Shelton v. Bide; Shepp. Touchst. 71, 82, 235, Prest. edit.) or relatively; as "if a man makes a feoffment to a stranger and to his own wife, and makes livery to the stranger in the name of both, it will be good to the stranger, and void as to the wife:" (Critica Juris Ingeniosa, 133, edit. 1661; Bract. lib. 2 cap. 5, sect. 6, fol. 13, a. edit. 1569; Fleta, lib. 3, cap. 4, sect. 6, pag. 180, edit. 1685;) and the stranger will take the whole. Perk. sect. 208; Shepp. Touchst. 220.—In this case, if the feoffment (supposed to be made by deed,—see note 48;) had been made to the stranger, and another who was capable of taking from the feoffer, the livery to one would have constituted them both joint-tenants, in the absence of any disagreement or disclaimer on the part of the feoffment to whom livery was not made in his own person. 2 Roll. Abr. 8, (letter Q.) pl. 4; (letter R.) pl. 9; 9, (letter T.) pl. 2, 4; 91, (letter L.) pl. 5; Bac. Abr. tit. Feoffment, B. I. And on the other hand, if the feoffment had been made in terms which were appropriate to create a tenancy in common, he, to whom livery was made, would not have taken, in consequence of his co-feoffee's incapacity, more than the share which would have been his had his co feoffee been a person capable of taking. 1 P. Wms. 18, Fisher v. Wigg; 1 Ld. Raym. 628; 1 Salk. 391; 12 Mod. 301; Comyns 92, S. C. 3 Prest. Abstr. 84. See also Litt. sect. 299; Shepp. Touchst. 71, 82, Prest. edit.

(46) Fitzh. Abr. tit. Disclayme, pl. 23; Y. B. 33 Hen. 6, 53, Duke of Warwick v. Bishop of St. Davids; 4 Leon. 207, pl. 332, Anon. 1 Ventr. 130, Smith v. Wheeler; 2 Keb. 774, S. C. 2 Freem. 13, pl. 11, b. Anon.; 4 Ves. 97, Crewe v. Dicken; Shepp. Touchst. 70, 285, Prest. edit. 2 Prest. Abstr. 225-228; 3 Prest. Abstr. 104-107. *Secus* where the terms of the deed create a tenancy in common. *Ibid.*—In Treadwell v. Bulkley, 4 Day 395, a deed was made by a debtor to six of his creditors, of whom one refused to take any benefit of it; and the question was whether the whole vested in the other five, or that one sixth part remainded in the grantor. The report does not state distinctly the terms of the deed, but from what appears of it; and from the reported arguments of counsel it may be inferred that in England it would have created a joint-tenancy. Yet the court decided, that the effect was the same, as it

374 by an *original defect of the instrument, as either containing of them
375 *no sufficient description, (47) or being not adapted to work a transfer to them, while yet it would accomplish a transfer to the rest; (48) or by a subsequent partial exercise of a power of revocation. (49) In all these cases it is apparent that, both in the actual circumstances, and also in any that could have arisen consistently with the terms of the will, when it became operative, or of the deed in its state
376 of final efficacy, and with the *facts existing when it was made, the jus accrescendi (50) was totally foreign and inapplicable; and yet the result was the same as in the class of cases mentioned in the beginning. The fair inference is, that in those cases also it was no way instrumental in producing the result. And so the true foundation of the doctrine which pervades them all, and which is (simply),—that the entire estate, if joint, shall vest in so many (whether all or a less number) of those effectually nominated, as at the proper time, are in being, sufficiently ascertained, and neither incapable nor refusing to take it,—seems to be now laid bare; and to be, (51) that it must needs be so, where there is not an overruling direction to the contrary, (52) from the very nature of a joint estate, which is such that each joint-tenant takes, conjointly with the rest the entire estate,—separately nothing. (53)

would have been in England if the deed had created a tenancy in common; in other words, that one sixth part of the estate remained in the grantor. It does not appear that any statute of Connecticut was applicable to the case, and the contrary would seem to have been the fact. See 3 Griff. Law Reg. 75; 1 Swift's Syst. 271-273. But (as will be seen by adverting to some observations on the law of Curtsey, published in the Pennsylvania Law Journal, vol. 5, pp. 483-486,) the courts in Connecticut have, without assistance from the legislature, modelled the law of real property there very much at their own discretion, with little regard to the common law of the mother country. As to this particular subject of joint estates, Judge Swift remarks, (1 Swift's Syst. 272:) "In England on the death of either of the joint-tenants, his right remains and goes to the surviving tenants. But in this state *we have never adopted* this odious and unjust doctrine of survivorship." And from 1 Root 48, Phelps v. Jepson, it appears that the right of survivour has been exploded there. Indeed it could never exist, unless by positive enactment, where the effect of a joint conveyance was such as that of the deed in Treadwell v. Bulkley was said to be by Reeve, J. with whom the other Judges concurred. According to him, if such a deed be made "to two persons, they take each one half; if to three, they take each one third; and the dissent of one cannot increase the proportions of the others. The legal operation of such deed is, to give each one third, and no more; so much so, as if it had been detailed at length in the deed." The case is in conflict with all the authorities cited at the beginning of this note, and with those (strictly analogous) cited in note 37; of which not one was there brought to the notice of the court; and it is at war also with the case of Trask v. Donoghue, 1 Aik. 370, not before cited: I mean that it is so, upon the ground of adjudication actually taken by the court. Perhaps upon another ground, presented in the reported argument of the counsel for the successful party, the same result in the particular case might have been attained. It seems, therefore, to be not an authority, on this point, in Virginia.—Yet it agrees with the civil law, according to the common opinion. See note 93.

(47) "If an estate in possession be made to one and the right heirs of J. S. [who was then alive,] the heir of J. S. after his death shall have nothing [thereby,] but he, that is *in esse* to take at the time, shall have all." 1 Rol. Rep. 325, Herbert v. Binnion, *per* Coke. C. J. Yet, in such case, the person who proves in event to be the heir of J. S. may be living at the time of the conveyance, and every way capable of taking, if he were only described so as to be ascertainable.—Whoever shall verify the above reference will find Sir Edward Coke saying, in the same connexion, "if there be a lease for life, remainder to the right heirs of J. S. and J. D., if J. S. die before J. D., yet his heir, shall have but a moiety;" (according to the book: but as it is stated 14 Vin. 133, pl. 9, "Lease for life to A. remainder to the right heirs of J. S. and J. D., if J. S. dies, and then A. dies, living J. D., yet the heir of J. S. shall take but a moiety;") of which no explanation is there given; and at first it may seem to be opposed to the doctrine stated in the text. But a satisfactory solution is furnished by what he tells us elsewhere. "If lands be demised fer life, the remainder to the right heirs of J. S. and J. N.; J. S. hath issue and dieth, and after J. N. hath issue and dieth; the issues are not joint-tenants, because the one moiety vested at one time, and the other moiety vested at another time." Co. Litt. 188, a. S. P. 5 Rep. 8, a. Windham's case; 13 Rep. 56-57, Sammes's case; 2 Roll. Abr. 89, (letter G.) pl. 1; 91, (letter L.) pl. 1; 2 Blackst. Comm. 181; Watk. Convey. 87-88, Prest. edit. 1 Lom. Dig. 475-476. See 1 Ld. Raym. 311, Sussex v. Temple; Comb. 467, S. C.; 2 Bro. C. C. 233, Stratton v. Best; 4 Sim. 129, Woodgate v. Unwin; 2 Jarm. Wills, 159, 161. If, however, a gift be made to one for life, remainder to the right heirs of two others, who are both at the time of making the gift dead, "there the remainder is in jointure, and survivour [by the common law] will hold place." Bro. Abr. tit. joint-tenants, jointour, and survivour and Joynt Actes, pl. 12. See Y. B. 38 Edw. 3. 26, a, b, Anon, Butler's Fearne, 311-312.

(48) "If one joint-tenant enfeoffs his companion and a stranger, the stranger takes all "Critica Juris Ingenoisa, 134, edit. 1661; Co. Litt. 335, n.—"If a man intendeth to make a feoffment by parol to A. and B., and he and B. come upon the land, A. being absent, and make livery to B. in the name of both B. and A. and to their heirs, this shall enure only to B.;" (Co. Litt. 359; a.; 49, b; Shepp. Touchst. 211, Prest. edit.) and shall vest the whole estate of the land in him. Y. B. 10 Edw. 4. 1 Case's case: Bac. Abr. tit. Feoffment, B. 3.—"If a covenant be made to stand seised to the use of a person related to the covenantor by blood or marriage and of a stranger, the whole will vest in the relation," (2 Sand Us. & Tr. 82, 4th edit.) and nothing in a stranger, 2 Roll. Abr. 788, pl. 4, Smith v. Busbie; Cro. Car. 529; W. Jon. 418, S. C.—an instance of this kind might arise under a will, attested by one of several joint devisees or legatees. 4 Gratt. 103, Croft v. Croft.

(49) Ambl. 188, Humphrey v. Tayleur.

(50) See the paragraph of the text corresponding to note 85.

(51) This is what judges of the greatest eminence have, at the moment of their acting upon the doctrine, assigned as the ground of it; and, whatever speculations may have been indulged concerning it under other circumstances, in no case wherein it was the actual basis of the decision has it been put on any other. In the leading case of Davy v. Kemp, Orl. Bridgm. 384; Carter 2; Sir Orlando Bridgman said: "John [the devisee who alone survived the testator] is by the will to take,—and, being a joint-tenant, he is a taker of the whole, though not solely. —The testator devised the whole to both, and not a moiety to each."—In Humphrey v. Tayleur, Ambl. 136; 1 Dick. 161; Lord Hardwicke explained the doctrine in the same manner. And (what is remarkable) both he and Bridgman, in the cases before them respectively, adverted to the *jus accrescendi* for the purpose, not of building any thing upon it, but if shewing that it did not furnish an unanswerable objection.—*I close my citations on this head* with mentioning that one of the greatest real property lawyers of the present age has stated his opinion to the same effect; (Shepp. Touchst. 71, Prest. edit.) and with a reference to Roper on Leg. 121, 1st edit. where a like exposition will be found.

(52) See the latter part of note 26, and note 77.

(53) No subject in our law has been involved by the writers upon it, collectively considered, in more confusion and perplexity, than the doctrine of joint-tenancy. The task of extricating it requires so large a space, that I am compelled to make it the subject of a suppletory note, which will be found at the end of the text.

It is true, that from the nature of a joint estate, by the common law, these further consequences flow: that (although it is in the power of any one of the joint-tenants, at his pleasure, to destroy the joint estate as to himself, and as to a portion of the thing which is, till such destruction,
377 the subject of it; (54) *yet)—1. as long as the joint estate endures, each joint-tenant holds, in the same manner as at first he took, conjointly with the rest the entire estate, separately nothing; (55)—and 2, when some out of many joint-tenants die, each of the survivors continues to hold, in like manner, conjointly with the rest the entire estate, separately nothing; (56)—and 3, when the joint-tenancy is at length terminated by the deaths of all but one, the last survivor keeps the entire estate,—of which he is then become sole tenant, (57)—and no person but himself has any interest in it whatever. (58) And it is also true that the statute takes away totally the last of these consequences, and modifies
378 *the second in so far as the jus accrescendi is involved in it. (59)

But it does no more. (60) It does not annihilate the legal entity called a joint estate, so as to prevent any such estate from vesting; (61) nor does it destroy the joint estate forthwith after it has vested. (62) On the contrary, it permits the estate to subsist as joint, (63) with all its

(54) 2 Blackst. Comm. 184-186; Wms. Real Prop. 108.

(55) 2 Blackst. Comm. 182-183.

(56) Litt. sect. 280.

(57) 1 Prest. Est. 137, 2d edit.

(58) Litt. sect. 280; 2 Blackst. Comm. 183,—Mr. Williams (on Real Prop. 100-101,) says: "The lands intended to be given to joint-tenants in fee simple are limited to them and *their* heirs, although the heirs of *one* of them only will succeed to the inheritance, provided the joint-tenancy be allowed to continue; thus, if lands be given to A., B., and C., and their heirs; A., B., and C. will together be regarded as one person, and, when they are all dead, but not before, the lands will descend to the heirs of the artificial person (so to speak) named in the gift. The survivor of the three, who together compose the tenant, will, after the decease of his companions, become intitled to the whole lands.—While they all lived, each had the whole; when any die, the survivors or survivor can have no more [qu. less?] The heir of the survivor is, therefore, the person who alone will be entitled to inherit, to the entire exclusion of the heirs of those who may have previously died." And so the law was settled in the time of Littleton, and long before. But very many passages in Bracton and Fleta prove, what I have not seen noticed in any writer of a later date, that when they wrote respectively, that is, in the reigns of Henry the Third and Edward the First,—at least before the statute of *Quia Emptores Terrarum*, (Westm. 3, 18 Edw. I. c. 1:)—the law was different—Those passages cannot be understood, but upon the supposition, which is almost expressly declared in some of them,—that in such a case as Mr. Williams puts, although the *jus accrescendi* would carry the whole to the last surviving joint-tenant for his life, yet after his death the whole estate would belong to the heirs of all, if there were heirs of all then living, or to the heirs of two, if heirs of only two were then in being, and that among them again the *jus accrescendi* would operate in such a manner as that the land would revert to the donor upon the total failure of all the heirs of all the joint-tenants, and not before. Indeed there are several passages in Bracton, which would seem to indicate that in his time the law concerning joint-tenants was yet nearer to what is now the law in Virginia; for they strongly import, that if the joint-tenant who died first, left heirs, they were entitled to come at once into his place, and that the *jus accrescendi* took effect, as to his part, only when his heirs failed. But probably the law was not then clearly settled upon this point, for he does not appear to be consistent respecting it; and as those passages are either omitted or modified by Fleta, we may fairly presume that in the time of the latter the law was taken to be otherwise. See Bract. lib. 2, cap. 5, sect. 6, fol. 13, a, edit. 1569; Fleta, lib. 3, cap. 4, sect. 2, pag. 179, edit. 1685; Bract. lib. 2, cap. 5, sect. 6, fol. 13, a; lib. 4, tract. 3, cap. 9, sect. 3, fol. 262, b; Fleta, lib. 3, cap. 4, sect. 3, 5, pag. 179, 180; Bract. lib. 2, cap. 11, sect. 1, fol. 28, a; Bract. lib. 2, cap. 11, sect. 2, fol. 180; Fleta, lib. 3, cap. 4, sect. 7, pag. 28, a; and 28, b. To the passages in the two last cited pages I find nothing corresponding in Fleta. Since this note was written a remarkable confirmation of the construction therein put on the passages cited from Bracton and Fleta has been discovered in Craig's *Jus Feudale*, lib. 2, dieg. 3, sect. 19, 20; lib. 2, dieg. 5, sect. 14; lib. 2, dieg. 6, sect. 7; pp. 198, 199, 221, 225, 226, edit. tert., 1732.

(59) Where one out of three or more joint-tenants dies, as in the case of Rose's adm'x v. Burgess, 10 Leigh 186, there is no reason to suppose that the statute has abolished the joint-tenancy among the survivors; on the contrary they remain joint-tenants *inter sese*, and become tenants in common with the heirs, devisees, executors, or administrators, as the case may be, of their deceased companion in the manner described by Littleton, sect. 294. See 1 Tuck. Comm. edit. 1836, B. 2, p. 173, 1 Lom. Dig. 481. One consequence of which, that is important, may be gathered from Litt. sect. 312.

(60) All the provisions in detail, about the devolution of the property, and its liability for debts, &c might have been omitted, and still the result would have been the same, from the mere abolution of the *jus accrescendi*. See 4 Kent's Comm. 37, note d, 6th edit. 4 Ired. Eq. Rep. 276-277, Weir v. Humphreys. —Suppose a husband joint-tenant should alienate, and then die; whether or no would his wife be entitled to dower? See 15 Peters 21; Mayburry v. Brien.

(61) The importance of this position to the point mainly discussed, may be estimated by considering the case of Sawyer v. Trueblood's ex'rs, 1 Murph. 190. There a testator, living in North Carolina, bequeathed to his five daughters, by name, "all the remaining part of his moveable estate, to them and their disposal." Three of these daughters died in his lifetime: the other two claimed the whole residuum. The question, whether they were so entitled, or that a part of the residue had elapsed, was referred to the Supreme Court of that State. And their decision upon it was pronounced, as follows: "There being no words of severance in the devise to the daughters, it would at common law have been a joint-tenancy; but, by the act of 1784, it is converted into a tenancy in common. Each of the daughters, then, had a fifth of the residue bequeathed to her in common, and the shares of those who died in the lifetime of the testator must be considered as so much of the testator's property undisposed of by will. As to those the bequests have become void and cannot be claimed by the survivors."—Undoubtedly this is a direct authority for the opinion of Judge Lomax which is combatted in the text, if the statute of North Carolina be similar to that we are considering. See note 22. But it is an authority which seems to have been ever since overlooked in that State, if not positively disapproved as misinterpreting the statute in this point. Hence no allusion is made to it by Ruffin, C. J. in the case cited in the note just now mentioned; nor by Daniel, J. in delivering the opinion of the court in Nelson v. Moore, (1 Ired. Eq. Rep. 31:) but each of them takes pains to shew that the terms of the will *per se* created a tenancy in common: nor can I find it noticed in any other case; while in the very recent one of Weir v. Humphries, 4 Ired. Eq. Rep. 277, Ruffin, C. J. in delivering the opinion of the court, says expressly: "The act does not abolish joint-tenancy, nor turn it into a tenancy in common."—See also the next succeeding note.

(62) This position is important, for the reason mentioned in the last preceding note: But if both it and the position preceding it were mistaken, still the conclusion of the text upon the main point might be maintained. See note 102.

(63) 2 Rob. Va. Rep. 273; Robinett v. Preston's heirs; 3 Gratt. 212-218, Lowe v. Miller; 1 Tuck. Comm. edit. 1836, b. 2, p. 173; 1 Lom. Dig. 481. See note 61.

379 former incidents, during the *joint lives of all its owners: and if, in that time, partition be made, or a severance effected without partition, (64) it is quiescent as a dead letter. It begins to operate at all, only when one of the joint-tenants has died before partition or severance. And on the happening of that event, and from thenceforth it directs that the part (65) of the deceased shall be considered as if he had been a tenant in common, not from the beginning, but only when the event to which it refers happened. Where it applies, and to the extent of its application, it operates in articulo mortis a statutory severance; (66) and that is all. It does not extirpate the quality of a joint estate; which made it produce among other fruits the jus accrescendi, but only destroys in the moments of production, or blights by anticipation in the bloom, that particular fruit. (67) In this manner it modifies the nature of a joint-tenancy by the common law, so far as to take away one of the incidents which that law annexed to it, but leaves it in all other respects as it was. And whatever fate might have befallen an attempt of individuals, prior to its enactment, so to modify the law of estates, in any particular instance, by deed or will, (68) there can be neither doubt about the power of the legislature to make such a modification for every case, (69) nor insurmountable difficulty about comprehending the notion of a joint estate deprived of this particular incident. The idea was not even new; for, although the right of survivorship is said (70) to be the natural and regular consequence of the union and entirety of interest between the owners of such an estate, yet even the common law admitted, from the custom of merchants, in a large class of cases, (71) a modification either just *the same with, or exactly analogous to, that, which, by force of the statute where it prevails, is now universal.

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In short, since the statute joint-tenants seem to have an estate that is to all purposes joint, both in its inception; and also in its continuance, until a destruction or severance thereof takes place,—which latter, where an interest has become vested, is effectuated by the statute at (if the joint estate was not terminated before) the moment any of them dies, to the extent of his part; (72) and thenceforth that part is to be regarded as it would have been (though the statute never had been exacted), if the joint estate had been to the same extent dissevered by any of the means which therefore existed. And,—if this be the sum of its efficacy,—the consequence seems to be, that in regard to the lapsing of devises and legacies, and also in regard to the vesting of estates created or transferred by conveyances inter vivos, it has been productive of no change whatever.

381 *It may be objected, that the inten-

(64) This may happen without an alienation by any of the joint-tenants: and in such a case they are converted into tenants in common. 2 And. 232, Morgan's case; Cro. Eliz. (470,) 743, S. C. cited; (470.) 481. Childs v. Wescot; 2 Rep. 60. b. S. C. Cor. Eliz. 743, Portley v. Portley, cited; Co. Litt. 182, a. b; Com. Dig. tit. Estates, K. 5; Bac. Abr. tit. Joint-Tenants, I. 6; 2 Blackst. Comm. 186; 3 Prest. Convey. 474-484; 2 Crabb on Real Prop. § 2312.

(65) This expression, taken from the statute, is not quite accurate, though very common in our books; but its meaning (as here employed) is obvious. No sound argument can be drawn from it to impugn the position maintained in the suppletory note, *post*.

(66) 11 Serg. & R. 192-193. Bambaugh v. Bambaugh.

(67) See note 60, and the paragraph of the text corresponding to note 85.

(68) See Y. B. 8 Ass. pl. 33, Anon.; 1 Rep. 84. b, Corbet's case; 3 Green's Chanc. Rep. 16, Mullany v. Mallany; and notes 33 and 77.

(69) The decision in Bambaugh v. Bambaugh, 11 Serg. & R. 191, does not precisely indicate the imaginary difficulty here scouted.

(70) 2 Blackst. Comm. 183-184; 3 Rand. 182, Thornton v. Thornton. See 1 Tuck. Comm. edit. 1836, B. 2. pp. 172-173, and also the passages of Bracton and Fleta cited in note 58.—Judge Story (on partnership, sect. 89, note 6) quotes Blackstone as saying that it is "the natural and *necessary* consequence;" but in that he is not quite accurate.

(71) Noy 55, Anon.; 2 Brownl. 99, Anon. Co. Litt. 182, a; Bac. Abr. tit. Joint-Tenants, C.; Collyer on Partn. 1st edit. 64-65; Peak. edit. § 123, 124. In these and many other books merchant-partners are represented as joint-tenants of their stock, without survivorship; which, no doubt, was long, if it is not now, the common opinion,—agreeably to the phrase, "*jus accrescendi inter mercatores pro beneficio commercii locum non habet.*" And that serves my purpose equally, whether such opinion was or was not correct: since it proves that the *notice* of a joint-tenancy divested of the *jus accrescendi* was not new. Some maintain that in such cases the partners are not joint-tenants, (Com. Dig. tit. Estates, K. 2;) but tenants in common. 2 Blackst. Comm. 399; 1 Tuck. Comm. edit. 1836, B. 2. p. 313. One learned writer has said, that "where it is understood that the *jus accrescendi* never holds between partners, it seems altogether immaterial whether they are named joint-tenants or tenants in common, of *personal* property." Wats. Partn. 65-66. While another insists, that they are neither joint-tenants nor tenants, in common, but different from both, though more resembling the former than the latter. Stor. Partn. § 89-91.—from what appears in the Y. B. 38 Edw. 3. 7. a. Executors of Henry de L—— v. J——, especially at the end of the case, there is reason to believe that at that time they were joint-tenants, with survivorship as in other cases of joint-tenancy; and that the custom of merchants was at a later period allowed to work a change in the law. [Since this note was written, it has been contended, in Buckley v. Barber, 15 Jur. 63; (1 Engl. L. & E. Rep. 506, that *at law* the *jus accrescendi* still operates in favour of the surviving partners or partner in all cases; and that the representatives of the deceased partner have no remedy for his share but in a court of equity: but upon mature deliberation the contrary thereof was determined in regard to *chattels in possession*, against the opinion expressed in a note in the 5th London edition of Abbott on Shipping, (P. 1. ch. 3, § 1, note a;) which appears to have been written by Lord Tenterden, [Abb. shipp. 7th Lond. edit. 97. note by Shee:] though the fact was doubted, or rather denied, by Judge Story. Abb. Shipp. 4th am. edit. 68, n. Stor. Partn. § 417, p. 585, note 1; Coll. Partn. 2d am. edit. 666. note 2; 3d am. edit. 976, note 1.) It was admitted, however, that the law was as contended, in regard to *choses in action*, [2 Steph. Comm. 77;] notwithstanding some authorities to the contrary: [2 Lev. 188, Hall v. Huffam; 3 Keb. 737, 798, S. C.; 2 Lev. 228, Hall *et al.* v. Huffam; 1 Freem. 568, S. C.; 3 Lutw. 1493, Smyth *et al.* v. Milward; Nels. Lutw. 480, S. C.—See V. C. 1849, ch. 116, sect. 19;) and in regard to *real estate*. As to which see 1 Mount. Partn. 138; Wats. Partn. 72; Coll. Partn. 2d am. edit. 69 *et seq.* 3d am. edit. 116 *et seq.* Stor. Partn. § 92, 93; Biss. Partn. 47 *et seq.* 2 Rand. 183, Deloney v. Hutcheson; 10 Leigh 406, Pierce's adm'r. v. Trigg's heirs; 12 Leigh 272-273. Wheatley's heirs v. Calhourn; 1 Brock. 456, Anderson v. Thomkins; 1 Amer. Lead. Cas. 2d edit. 439, S. C.] 1 Americ. Lead. Cas. 2d edit. 492-507, Coles v. Coles, (15 Johns. Rep. 159, S. C.) Dyer v. Clark, [5 Metc. 562, S. C.] and the note to them.

(72) See note 65.

tion of the parties in a conveyance, and more especially of the testator in a will, is the polar star, (73) by which we must be guided in determining what rights are thereby conferred and upon whom; and that, with an actual or imputed knowledge of existing law, (74) they must be supposed, in conveying, devising, or bequeathing a joint estate, since the statute, to have intended that all the persons nominated should take such an estate as, although joint in its inception, must eventually become several, whereby each of the takers and their respective representatives would, in the end, have his proportion of the entire subject and no more; and therefore that, if some of them should fail to take, the rest should have an estate (of the same character) in only so much of the subject as would be tantamount to the aggregate of those portions thereof, which would have belonged eventually to them if the others also had taken. But, in answer to such an objection, it seems sufficient to say, that if an argument is to be drawn from the parties' or testators' knowledge of the law, that knowledge must be supposed complete; and then the fair inference will be, that, in such a case, both the former and the latter inquest, should,—as according to its nature it regularly would,—vest in some only of the persons nominated, if the rest either could not (from any cause) or would not take it. Indeed it seems no strain to say, that, subject to the modification which has been mentioned before, (75)—from the nature of a joint estate, as existing now as well as formerly,—every gift, though to individuals nominatum, must, if joint, be regarded as a gift to a class. And in most cases such a determination would probably best accord with the real intention, (76) not only for the reasons which have been stated, but also because, if the intention were different, it would be so easy to effectuate it, either by a provision adapted specially to
382 the contingency, (77)—or, *by making the grantees, devisees, or legatees, tenants in common.

In case of such a devise or bequest, if any one of those to whom it is made fail to take the part devised or bequeathed to him, it lapses in like manner as if he had been a sole devisee or legatee, not only where such failure happens from his death, whether succeeding the date of the will, as in the cases heretofore mentioned, or preceding it, (78) but also where it hap-

(73) 1 Wash. 102, Kennon v. McRoberts. See 2 Cain. 350, arg. in Newkerk v. Newkerk; 2 Rawle 32, Sloan v. Hanse. Not as much deference is paid to intention in construing deeds as in expounding wills: (Fonbl. Eq. B. 2. ch. 3, sect. 2, note d: Willes 180-182, Tapner v. Merlott; 3 Durnf. & E. 765, Doe v. Morgan: 2 Lawy. & Magist. Mag. 286. S. C.;) but the answer given in the text, to the objection here put, makes the distinction immaterial to the present purpose.

(74) See 2 Meriv. 22. Langham v. Sanford; 2 Bos. & P. 494-495, Seale v. Barter.

(75) See note 15.

(76) See note 102, and that part of the text which corresponds with it.

(77) I do not remember to have met with a case, in which such a provision has been made the subject of adjudication; and perhaps no testator ever gave to divers as joint-tenants, without intending that as many of them as could and would take, should have all that was given to them all. If so, the non-existence of an authority in point is well accounted for. But as the death of the devisees or legatees before the appointed period of vesting, or an incapacity or refusal at that time to take, is an event which must happen, if at all, within the allowed limits of executory devise, wherever the devise or bequest itself is not void on account of that period being deferred too long, there can be no doubt about the validity of any limitation predicated on such a contingency, whether of the whole subject or of any portion thereof. It has been held to be so, in the case of a gift to a class as tenants in common. 1 Collyer 320. Cort v. Winder. See also note 102.

(78) 6 Rawle 28, Sloane v. Hanse.—This case would be at war with the authority cited in note 34, if the marginal abstract of it were correct; for that is in these words: "Devise to A. and B. or to their heirs. B. at the time of making the will was dead, of which the testator was ignorant. Held, that the devise to B. had lapsed, and the testator's heir at law was entitled to recover." But in the report at large it appears, that the testator devised to A. and B. "all his estate both real and personal, *to be equally divided between them*, or to their heirs:" which if both had taken, would clearly have made them tenants in common: (3 Rep. 39, b, Ratcliff's case, and note O to it in Thomas's edition; Ambl. 656, Ettricke v. Ettricke, and note 1 to it in Blunt's edition; 3 Serg. & R. 135, Evans v. Brittain; 2 Leigh 642, Frazier v. Frazier's ex'rs, mentioned in note 20; and the cases cited in notes 1, 2, 4, 5, and 7:) and, in the argument of the case, this was asserted on the one side, and distinctly conceded on the other.—In an early case, (Anon. 30, Hen. 8. Bro. Abr. tit. Devise, pl. 29; Bro. N. C. 29, a, pl. 133;) Lord Chancellor Audley decided that a tenancy in common was created by a devise to two and their heirs, because the intention (as he conceived) was apparent, that the heirs of both should take: And, at a comparatively recent period, (1 Bro. C. C. 118, Perkins v. Baynton;) Lord Thurlow, (without having occasion to decide, yet) intimated very plainly his opinion, that a pecuniary legacy to more than one must, at least where there is not controuling evidence of a different intention, be deemed to be given to them as tenants in common and not as joint-tenants. But Lord Audley's decision, though commemorated with seeming approbation by Lord Chief Justice Brooke, was soon exploded, (Dyer 25, a, pl. 158, marg. Cro. Eliz. 444, Lewen v. Dodd; 695, Lewen v. Cox; Litt. Rep. 47, Jaques v. Collins; Hetl. 29, S. C.) and the contrary doctrine has ever since prevailed in England, and where English authority give the rule: (Benl. 100, Vaughan v. Buwicke; Cro. Eliz. 431, Anon. Gouldsb. 141; Owen 65, S. C. 3 Chanc. Rep. 214, Saunders v. Ballard; Curth. 15, S. C. 2 Vern. 46, S. C. incorrectly reported; 545, Cook v. Cook; 2 Stra. 1172, Oates v. Jackson; 7 Mod. 439, S. C. 3 East 534, Doe v. Ironmonger; 15 Ves. 365, Swaine v. Burton; 7 Dowl. & R. 535; Goodtitle v. Oxley; Cam. & Norw. 291; Campbell v. Heron; 1 Tayl. 199, S. C. and the cases cited in note 8:) In some of the United States a doctrine agreeable to Lord Audley's is established either by statute [see *ante* 363, note 10:] or by the decisions of the courts. See *ante* 374, note 46. And Lord Thurlow's opinion which was opposed to several antecedent decisions, (1 Dick. 392, Keys v. Luffkin; and some of the cases cited in notes 9 and 86:) although not without countenance from some printed reports of a few early cases, (1 Chanc. Cas. 238, Cox v. Quantock, 3 Chanc. Rep. 214, Saunders v. Ballard:) was afterwards discarded by himself, (3 Bro. C. C. 27, Jolliffe v. East;) and has been since decisively repudiated. 4 Bro. C. C. 15, Campbell v. Campbell; 3 Ves. 628, Morley v. Bird; 632, Stuart v. Bruce; 6 Ves. 139, Whitmore v. Trelawney; 7 Ves. 535, Jackson v. Jackson; 9 Ves. 591, S. C. 197, Crooke v. De Vandes; 11 Ves. 230, S. C. 11 Sim. 41, De Witte v. De Witte; 12 Sim. 645, Bridge v. Yates; 1 Hare 45, Crockett v. Crockett; 5 Hare 326, S. C. And therefore it may now be safely considered as settled, that a gift, whether by deed, (Com. Dig. tit. Estates, K. I; Bac. Abr. tit. Joint Tenants, F;—notwithstanding what is said in 5 Barr 367, Shirlock v. Shirlock, where since the right of survivorship is abolished in Pennsylvania, the point was not necessary to be determined: See 1 Call 458, Jones v. Jones; 5 Mass. Rep. 344, Higbee v. Rice; 5 Binn. 124—125, Caines v.

383 pens *from any other cause. (79) A similar failure in the like case is attended by similar consequences, in regard to the vesting of an estate under a conveyance inter vivos. (80) And, from the nature of a tenancy in common, it must unavoidably be so. (81) For, although tenants in common before partition hold an undivided occupation, and none of them knoweth his part in several, (82) in which respect they resemble joint-tenants, (83) yet, unlike the latter, each tenant in common has, in his undivided part, a distinct and separate estate. (84) To such part his right is individual and exclusive, not social and conjunctive,—entire, not partible; so that, of two having equal interests, each, in point of estate, as contradistinguished from occupation, has the whole of one, and nothing at all in the other, undivided moiety. And therefore, when one of them gets the whole of such an undivided part as the will or deed gives him, he gets all that in any manner it gives him; and, having gotten that, (no matter what may become of similar shares intended for others, nor whether they live or die, or take or fail to take,) he can be entitled to no more.

Hitherto the phrase jus accrescendi has been used, from the commencement of this discussion, in a single sense; being the same in which it is believed, writers on the common law have always employed it; (85) and in which alone, certainly, the statute can be said to have abolished the thing
384 signified: that is to *say, it has been used as denoting the advantage, which formerly one joint-tenant derived from the death of another, happening subsequently to the period when the estate became vested in them both.

It is remarkable that in the civil law, from which the term was borrowed, such an advantage did not exist, (86)—and moreover could not, on any grounds similar to those on which it rested by the common law; for, in the former, by whatever means, or in whatever terms, an estate was conferred on more persons than one, no sooner was the ownership vested in them, than it was severed by mere operation of law, (87) if it was not already several per formam doni, (88)—so that each became in that instant, and continued to be thenceforth,
385 the sole owner of *his undivided part or portion. (89) Hence,—without an exception from the time of Justinian, and with only one before his time, of a singular nature, and depending on a peculiar reason, (90)—the jus accrescendi of the civ-

Lessee of Grant:) or by will, (Com. Dig. tit. Devise, N. 8; 2 Jarm. Wills, 157—161; 2 Rop. Leg. 4th edit. 1360—1367;) of either real or personal estate, of any kind, or two or more persons, whether designated as individuals, by their names, or as a class, consisting of either a definite or indefinite number,—or to them and their heirs,—or to them and their executors or administrators,—simply, and without more saying,—constitutes a joint-tenancy.

(79) 2 Eden 123, Cresw v. Cheslyn; Ambler 136, note 1, Blunt's edit. 3 Bro. P. C. 2d edit. 246, S. C. 1 Swanst. 566, Shrymsher v. Northcote; 1 Wils. C. C. 248, S. C. 3 Mason 486, Brownell v. De Woolf; stated in note 39.

(80) Shepp. Touchst. 70, 71, 82, 212, 237, 285, Prest. edit. 5 Monr. 443, Currie v. Tibbs's heirs; *ante* notes 45, 46, and 47.

(81) That is, all the consequences in any combination of circumstances, must be the same as if the person so failing to take had been a sole devisee, legatee, feoffee, grantee, or donee, of that part, in severalty and divided, which is attempted to be given him in common and undivided.

(82) "*In communi absque hoc quod aliquis sciat suum separale.*" Westm. 2 cap. 22; Litt. sect. 282; Co. Litt. 189, a.

(83) See 7 Mann. & G. 172, note c.

(84) Com. Dig. tit. Estates, K. 8; Bac. Abr. tit. Joint-Tenants, A. 2; 2 Blackst. Comm. 191-194; 1 Prest. Est. 2d edit. 139; 2 Prest. Abstr. 75, 77; Wms. Real Prop. 103-104; Crabb on Real Prop. § 2321; 1 Lom. Dig. 498.

(85) 2 Blackst. Comm. 184; Co. Litt. 181, a; Cunn. Law Dict. & Bouv. Law Dict. v. Jus accrescendi.

(86) 1 Brown's Civ. Law, 211-212, and note 2. See also Swinb. Wills, P. 3, sect. 6, § 1, notes a and b, p. 250, edit. 1803.—In legatory matters within their jurisdiction, the english ecclesiastical courts followed the civil law; that is to say, they disallowed the *jus accrescendi* where a joint legatee died *after* the period of vesting. See 2 Lev. 209, Bastard v. Stukeley; 3 Keb. 440, 458, 490, 613, 676, 686, 755, 828; 1 Freem. 286, 289; T. Jones 130, S. C.; 161, Taylor v. Shore. And attempts were made which at first had some prospect of success, but in the end proved unavailing, to induce the Court of Chancery, when the same point came before it, to adopt the rule of the *forum* in which originally such matters were cognizable. See Finch 176, Cox v. Quantock; 2 Freem. 140; 1 Chanc. Cas. 238; 3 Keb. 382, pl. 65, S. C. 2 Chanc. Cas. 64, Draper's case; 2 Freem. 84, Thichnesse v. Vernon; 1 Vern. 482, Shore v. Billingsley; 2 Vern. 557, S. C. cited: 2 P. Wms. 347, Webster v. Webster; 529, Cray v. Willis; Mosel. 184, S. C. 3 P. Wms. 115, Willing v. Baine; 9 Ves. 598, Jackson v. Jackson. There is probably some mistake in the report of Evans v. King, 2 Roll. Abr. 301, pl. 14: at any rate the case is denied to be law, in 3 P. Wms. 115, Willing v. Baine. See also Swinb. Wills, P. 4, sect. 20, § 15; 3 Chanc. Rep. 214, Saunders v. Ballard; Carth. 15; 2 Vern. 46, S. C. 1 Bro. C. C. 118, Perkins v. Baynton, and the cases cited in connexion with it in note 78; 4 Bro. P. C. 2d edit. 577, Hall v. Digby; 2 Bro. C. C. 220, Frewen v. Rolfe; 3 Bro. C. C. 455, Balwyn v. Johnson; 2 Woodd. Lect. 132, S. C. 12 Ves. 298, Griffiths v. Hamilton.

(87) "*Si eadem res duobus legata sit, sive conjunctim, sive disjunctim,* SI AMBO PERVENIANT *ad legatum.* SCINDITUR *inter eos legatum.*" Just. Inst. lib. 2, tit. 20, sect. 8. "*Conjunction haeredes institui, aut conjunction legari, hoc est:* TOTAM *haereditatem et* TOTA *legata* SINGULIS *data esse,* PARTES *autem* CONCURSU FIERI." Dig. lib. 32, (*de legatis et fidei-commissis*, lib. 3,) leg. 80. See Vult. in Inst. lib. 2, tit. 7, sect. final. (4.) p. 220, edit. tert. Viun. in Inst. lib. 2, tit. 20, sect. 8, p. 428, edit. quart. Amstelodami, 1665; p. 399-400, edit. "ultima," (as its title page imports,) Lugduni Batavorum 1709; Dom. Civ. Law, P. 2, b. 3, tit. 1, sect. 9, vol. 2, p. 91, of Strahan's Translation, edit. 1722.

(88) "*Etsi singulis partes ejusdem rei legatas proponas hoc pacta,* Maevio fundi illius partem dimidiam, seio partem dimidiam, do lego, *non intelligitur* RESAEDEM *legata, sed* ALTERA ATQUE ALTERA, *et* DIVERSAE SINGULIS:—*non enim quia partes estae* INDIVISAE *sunt* ET INTER SE CONFUSAE, *eo minus sunt* DIVERSAE, [which appears to be the true reading, as it stands in the 4th edit. though in a later it is *divisae,*] *quarum una sit unius, altera alterius.*" Vinn. in Inst. lib. 2, tit. 20, sect. 8, p. 427, edit. quart. p. 399, edit. "ult." See also Huber, Praeect. in Inst. lib. 2, tit. 20, sect. 8, tom. 1, p. 259, edit. "in Germania altera," Lipsiae, 1725; where a detailed explanation is given of the cases in which "*separatim eadem res legari dicitur.*"

(89) See Dom. Civ. Law P. 1, b. 1, tit. 8, sect. 1, art. 2; sect. 2, art. 2, 7; b. 2, tit. 5; P. 2, b. 1, tit. 4; vol. 1, pp. 149, 151, 152, 302-308; 632-643, of Strahan's Translation, edit. 1722. In reading these passages occasional expressions may perplex, (possibly through the fault of the translator,) unless the important remark in 7 Mann. & G. 172, note c. concerning the similitude between joint-tenants and tenants in common, be constantly borne in mind.

(90) Inst. lib. 2, tit. 7, sect. 4. For a reason, that will appear in the sequel, it is proper to set this section before the reader. "*Erat olim et alius modus civilis acquisitionis per jus accrescendi quod est tale; si communem servum habens aliquis cum Titio, solus liberatem ei imposuit, vel vindicta vel testamento, eo casu pars*

ilians was conversant about cases alone, in which one or more persons failed to take, —as proprietors, (91)—an interest that otherwise would have belonged to them. (92) And it is a common, (93)—but perhaps erroneous, (94)—opinion, that a further restriction confined it to cases arising in the disposition of decedents' estates. (95) Yet even within these limits the subject was, among them, of large extent, if measured by the space it occupied in their books; (96) and moreover so full of embarrassment, as to have been generally classed by them among the most subtle, intricate, an difficult departments of their jurisprudence. (97) With some principal
386 *sources of the difficulty, which appear to have been dicta found in different parts of the Corpus Juris Civilis, we need not meddle, but a few observations upon one of its causes may shed light on important topics of the disquisition in which we are engaged.

That cause was an absolute disagreement between the technical term jus accrescendi and the thing it was employed to represent.

Where a testator bequeathed the same thing to several legatees, without any mention of portions, if any of them either could not, (98) or would not, (99) take what was given, the whole of it belonged, by the so-called jus accrescendi, to the rest; but where he bequeathed the same thing to several, by portions, whether equal or unequal, the share of any that failed to take lapse. (100) Yet in the former case, no less than in the latter, each of the legatees would have taken, in the instant of the estate's vesting, a distinct and separate right to a several, though not then visibly separated, part of it. In other words, they would have become, according to the phrase of the common law, tenants in common. Why then, it might be demanded, should the failure of some of them to take, make the shares of the rest larger in the one case, and not in the other? A solution has been offered, to this effect: (101) that where the
387 *will gave the thing by shares or portions the testator made the titles of the legatees, and so their interest in the subject, several, but in the other case he made the title of all joint, and though it would cease to be joint as soon as the state vested, yet such severance would be merely the consequence of the donees' taking it; that till then the title, originally conjoint, was not disjoined; and that, therefore, where any of them did not take, the title still conjoint carried the entire subject of it to such of them as did. And, supposing the common opinion before mentioned, which would exclude the jus accrescendi from conveyances inter vivos, to be mistaken, nothing can be more satisfactory than this solution: If, however, that opinion be correct, the only tenable ground left, for a civilian, would seem to be what Vinnius has stated, in language that cannot be improved, nor without difficulty translated

ejus amittebatur, et socio ACCRESCEBAT. *Sed, cum pessimum fuerat exemplo, et libertate servum defraudari, et ex eo humanioribus quidem dominis damnum inferri, severioribus autem dominis lucrum accedere, hoc, quasi invidia plenum, pio remedio per nostram constitutionem,* [Cod. lib. 7, tit. 7, leg. 1 ;] *mederi necessarium duximus ; et invenimus viam, per quam manumissor, et socius ejus, et qui libertatem accepit, nostro beneficio fruantur, libertate cum effectu procedente, (cujus favore antiquos legum lutores multa etiam contra communes regulas statuisse manifestum est,) et eo, qui eam libertatem imposuit, suae liberalitatis stabilitate gaudente, et socio indemni conservato, pretiumque servi secundum partem dominii, quod nos definivimus, accipiente.*" For cases in the American Courts somewhat resembling this, see 14 Johns Rep. 188, 192, Oatfield v. Waring ; 4 B. Monr. 502, 505, Thompson v. Thompson ; 1 Gratt. 327, Binford's adm'r v. Robin.

(91) See Huber. Praelect. in Inst. lib. 2, tit. 20, sect. 8, tom. 1, p. 260-261, edit. qu. sup.

(92) 1 Brown's Civ. Law, 212, note 2.

(93) 1 Brown's Civ. Law, 212.—"*Ita se habet jus accrescendi, quod in contractibus, aliis que negotiis inter vivos, locum non habet.*" Vult. in Inst. lib. 2, tit. 7, sect. final. (4) p. 222, edit. qu. sup. See also 2 Dom. Civ. Law, 92, note by the translator, edit. 1722. The opinion appears to be founded upon the texts in Dig. lib. 45, tit. 1, leg. 110; and inst. lib. 3, tit. 20, sect. 4: which do not seem sufficient to warrant it.

(94) See Vinn. in Inst. lib. 3, tit. 20, sect. 4, p. 623, edit. quart. p. 581, edit. "ult" 1709.

(95) See all the definitions cited post, notes 103-110.

(96) "*Argumentum, quod de jure accrescendi est, vix nisi* INTEGRIS LIBRIS *pertractari videtur posse, adeo prolixum est et obscurum praecipue si interpretum commentaria addas.* Bynkershoek, Observ. Jur. Rom. lib. 2, cap. 3 : Oper. omn. tom. 1, p. 38, edit. *Coloniae Allobrogum.* 1761.

(97) Vinnius (in Inst. lib. 2, tit. 20, sect. 8, p. 425, edit. quart. p. 398, edit. "ult." 1709;) speaks of it in the words which I have taken for a motto. Vulteins (in Inst. lib. 2, tit. 7, sect. final. (4,) p. 220, edit. qu. sup.) says :—"*Doctrina juris accrescendi unum est ex difficillimis et subtilissimis juris nostri capitibus ; quam* DUOBUS LIBRIS *Franciscus Duarenus illustravit.*" And others express themselves in words to the same effect. See Huber. Praelect. in Inst. lib. 2, tit. 20, sect. 8, tom. 1, p. 260, edit. qu. sup. Dom. Civ. Law, P. 2, b. 3, tit. 1, sect. 9, vol. 2, p. 88, edit. qu. sup. Stair's Inst. B. 3, tit. 8, sect. 27, vol. 2, p. 522, edit. 1759.

(98) Whether such inability proceeded from,—1. their dying after the date of the will; (Cod. lib. 6, tit. 51, leg. 1, sect. 4: see *ante* notes 8 and 9 :)—or 2. their being dead before it was made, (Cod. lib. 6, tit. 51, leg. 1, sect. 3: see *ante*, note 34:)—or 3. from their having never been born ; (Dig. lib. 30, (de legatis et fidei commissis, lib. 1.) leg. 16, sect. 2 : see *ante* note 35 :)—or 4. from any other cause. See *post*, note 100; and *ante*, note 36.

(99) Dom. Civ. Law, P. 2, b. 3, tit. 1, sect. 9, art. 11-14, vol. 2, pp. 95-97, edit. qu. sup. See *ante*, note 37.

(100) Dom. Civ. Law, P. 2, b. 3, tit. 1, sect. 9, art. 13, vol. 2, pp. 96—97, edit. qu. sup. See *ante* notes 1—7.—The doctrine of both our own and the civil law is stated so clearly and at the same time concisely, in the following extract, that I cannot refrain from quoting it. "*Porro sciendum, discrimen inter relicta* SEPARATIM *vel* CONJUNCTIM *nobile et eximium esse ; nam eorum, quibus* SEPARATIM *res relinquunter, partes deficientes apud eos, a quibus erant prae standæ, maneut.* (Cod. lib. 6, tit. 51, leg. 1, sect. 4, 8. *At quae* CONJUNCTIM *le gantur, ea, si deficiant, collegatario conjuncto acquiruntur.* (Cod. lib. 6, tit. 51, leg. 1, sect. 11.) *Deficere autem legatatribus modis sciendum est; primo, quae inde ab initio, non valent, dicunturque,* PRO NON SCRIPTIS *haberi:* [See *ante*, notes 38-40 :] *tum quae vivo testatore per mortem eorum quibus relicta erant, aut conditionis, aliumve defectum,* IN CAUSAM CADUCI *incidebant;* [See *ante*, notes 1—9, 34—35, 78, 79:] *tertio, quae post obitum testatoris, ex simili defectu, aut repudiando, intercidebant;* [See *ante* notes 36, 37:] *eaque sola veteres* CADUCA *appellabant.* (Cod. lib. 6, tit. 51; leg. 1, sect. 2.") Huber. Praelect. in Inst. lib. 2, tit. 20, sect. 8, tom. 1, pp. 259—260, edit. qu. sup.

(101) Dom. Civ. Law, P. 2, b. 3, tit. 1, sect. 9, art. 11, 13, vol. 2, pp. 95, 96, edit. qu. sup. See also Vinn. in Inst. lib. 2, tit. 20, sect. 8, p. 428, edit. quart. p. 399—400, edit. "ult." 1709.

so as to preserve the pointed precision of the original. "In legatis locum habet [jus accrescendi] ex sola praesumpta voluntate testatoris, eandem rem pluribus legantis; quippe quos singulos partem habere velle intelligitur, et legatum scindi, si concurrant,—si vero non concurrant, solidum, postposito haerede. (102) But neither of these solutions, nor any that has been (so far as I know) suggested, seems capable of being reconciled with the technical term itself, according to any definition which I have ever seen of it.

It has been defined (agreeably to the natural sense of the verb accrescere,) to be "jus,—quo pars vacans cadit et accrescit parti occupatae;" (103)—"quo deficientium haeredum ejusdem haereditatis, aut collegatariorum ejusdem rei, portiones adjiciuntur iis, qui suam portionem agnoverunt;" (104)—"quo pars deficientis conjuncto acquiritur legatario vel haeredi;" (105) and "the right, which each of two heirs of the same succession, or of two legatees of the same thing, has to take the share or portion of the other, who either cannot or will not take it himself." (106) And it is said
388 (107) to have been so *called, "because the vacant portion accrues to the portions of the others." (108) These are quotations from the writings of eminent jurists professedly upon the civil law: the following is taken from a celebrated work on the law of Scotland, which has for its basis the civil law of Rome. (109) "The right of accresence is that, whereby the portion of an heir, legatar, or fidei-commissar befalleth to another, not by a new and several succession, but by the first succession, and as a part thereof." (110) And the latter clause of this definition was materially added, so that it must be understood as tacitly annexed to, or implied in, all the rest; for, if the so-called vacant part, portion, or share, had ever belonged to the person whose failure to take was the cause of the so-called accretion, that accretion could never have taken place. (111) But the observation thus suggested leads to another, more important; namely, that if the term defined had been really accepted according to any of these definitions, it would have represented absolutely nothing.—There was, literally, not a conceivable case, in which, so understood, it did or could operate. In the case of a gift to many, severally, there might be one or more vacant, unrecognized, rejected, parts or shares, according to the number of the persons nominated and failing to take; but to them the jus accrescendi did not apply, because the gift was not conjoint. (112) On the other hand, in the case of a gift to many, conjointly, no severance,—consequently no parts or shares,—existed until the estate vested; (113) and though when it vested, a severance took place whereby parts or shares were created, yet that made no room for the jus accrescendi, (14)—since the severance was only among those in whom the thing had vested, the necessary consequence of which was, that every part or share so produced was occupied, and must thenceforth pass by a new and separate succession.

Thus the discrepancy between the technical term and the thing it was employed to denote, is manifest. The former was in truth a misnomer, incapable of being defined, according to the native force and meaning of the words composing it, so as to furnish any faithful representation
389 of the latter. (115) And *if further proof be desired of the justness of these animadversions, it may be found in the fact, that the so-called jus accrescendi took place, not only where there might have been, but also where, from the date of the will and before, it was impossible that there ever should be, shares of those who failed eventually to take; as, for example, where legatees so failing were dead before the making of the will. (116)

Yet we can understand how it came to pass, that such a misnomer was adopted in the civil law. There were, indeed, never in fact any shares of the persons that failed to take; and the shares, in event, of those who took the whole, were never any smaller,—therefore not in any case augmented by an actual accretion: but, in most of the cases that occurred, in which some of different conjoint legatees failed to take, there was, between the date of the will and the period of vesting, a possibility that the number of shares might be more, and so the

(102) Vinn. in. Inst. lib. 2, tit. 8, p. 426, edit. quart. p. 398, edit. "ult." 1709. He adds: "*Proinde et inter collegatarios ejusdem rei* PROHIBERI *accretio potest.*" See *ante* note 77.—See also Huber. Praelect. in Inst. lib. 2, tit. 20, sect. 8, tom. 1, p. 260, edit. qu. sup.—It is obvious how each of the explanations here stated supports the conclusions, which (in the text) I have endeavored to maintain, even upon the supposition that the statute, contrary to the interpretation of it which I have advocated, makes a severance of the joint estate in the instant of its vesting,—the former in regard to both deed and wills,—the latter in regard to wills at least.

(103) Vult. in Inst. lib. 2, tit. 7, sect. final, (4,) p. 220, edit. qu. sup.

(104) Vinn. in Inst. lib. 2, tit. 20, sect. 8, p. 425, edit. quart. p. 398, edit. "ult." 1709.

(105) Huber Praelect. in Inst. lib. 2, tit. 20, sect. 8, tom. 1, p. 260, edit. qu. sup.

(106) Dom. Civ. Law, P. 2, b. 3, tit. 1, sect. 9, vol. 2, p. 85, edit. qu. sup.

(107) Dom. Civ. Law, P. 2, b. 3, tit. 1, sect. 9, art. 2, vol. 2, p. 93, edit. qu. sup.

(108) See also the passages in Bracton and Fleta, cited in note 58; Co. Litt. 181, a; 2 Blackst. Comm. 184.

(109) Mackenz. Inst. B. 1, tit. 1, sect. 7, pp. 2—3, 6th edit.

(110) Stair's Inst. B. 3, tit. 8, sect. 27, vol. 2, p. 522, 2d edit.

(111) See note 86.

(112) See note 100.

(113) See note 87.

(114) See note 86.

(115) That which it was intended to represent, I take to have been,—the quality of the title conferred on several coheirs or colegatees of the same thing, which carried the whole right, in case some of them did not take, to such of them as did; whereby the latter alone became entitled *ab initio* to the *entire* thing, and not to *parts* or *portions* thereof,—though, in (but not before) the instant of its vesting, the general law of severance attached, so that then (but not sooner) the joint right was sundered, and each was thenceforth entitled to, and only to, a distinct, though not actually divided, part,—a several, though not actually separated, portion.

(116) See note 98.

magnitude of each share less, than in the results exhibited. And therefore there was, in that law, something that looked like accrescence, though not in reality the thing properly called so. (117) But in the common law,—till the establishment in very modern times, of the doctrine respecting gifts to classes as such—there was never anything that bore the most remote similitude to even this delusive semblance of an accretion. (118) And yet, whether from some fancied resemblance, or from a passionate admiration for the learning of the civil law, this phrase, inappropriate in that law, more manifestly so in ours, was nevertheless, about the time of Bracton, (119) borrowed from the former and ingrafted into the latter. The consequences have been such as were inevitable. What it did for the civilians, it has at least contributed to do for us: It has aided in propagating the notion of there being several and respective parts, where there was in fact nothing but what was integral, a chimaera (when applied to the doctrine of joint estates), which has been
390 *puzzling the wits of students through a long succession of ages, and which has (not seldom) set in direct and irreconcilable contradiction jurists of the best natural endowments and largest professional acquirements. (120)

In the civil law there were three modes, in which legatees might be conjoined; 1. verbis tantum; 2. re et verbis; 3. re tantum; (121) and in whichever of these ways a conjunction was formed, the jus accrescendi took place. But there was a difference of some practical importance, between a conjunction in either of the two modes first mentioned, on the one hand, and in the last mentioned mode, on the other; which occasioned it to be frequently said, that among legatees conjoined re tantum the jus accrescendi ought rather to be called the jus non decrescendi. (122) Yet, even among such a vesting and a severance of the estate were inseparably contemporaneous. (123) In our law the substitution of the latter term for the former would be still more in accordance with obvious propriety; and in each system it would have greatly diminished the occasions of perplexity, if the thing intended to be signified had been always called, among the civilians, simply jus conjunctionis, (124) and in the common law (different as it was therein) either by that name, or the right of survivour. (125)

The reader who has been attentive cannot have failed to observe, ere this, that, if the law of Virginia be such as it is here represented, there is, at least, in regard to devises and bequests, however it may be in regard to conveyances inter vivos, an exact agreement between it and the civil law, as it was left by Justinian, respecting the consequences of the so-called jus
391 accrescendi *of the latter. (126) And to such an one it may seem that the most perspicuous method of treating the subject would have been to begin with an exposition of the civil law. But the opposite course has been pursued by design, for two reasons: 1, that the argument might be rested solely upon the principles of the common law, since no reason has been discovered for supposing that during some centuries past, legislators or jurists have had any special regard to the civil law, while engaged in settling this branch of ours; and 2, that use might be made of an advantage towards facilitating the discussion which circumstances happened to furnish,—the advantage (namely) of an already received usage, which, among us, confined the term jus accrescendi to denoting precisely what was abolished by the statute.

Should it be thought, after all, as by some it may be, that the doctrine of the common law concerning joint devises and bequests to several, of whom some fail to take. does in truth depend upon a jus accrescendi; the objection, which may seem to arise thence against my conclusions, admits of this answer: The jus accrescendi, thus largely contemplated, produced effects, some prior, others subsequent, to the vesting of estates; and the statute which has abolished it (127) a parte post, does not

(117) There was also another circumstance, that may have contributed to the general adoption of the term. Until the time of Justinian there was one case in the civil law, the only case that perhaps ever existed of a *genuine* accretion. See note 90.

(118) This is true concerning the common law from the time of Littleton, and even before. But perhaps there was a time when, in this respect, it was more like the civil law. See note 58.

(119) See the passages in Bracton, cited in note 58. As to the passion for the civil law, that prevailed among English lawyers, from about the time of Stephen to the reign of Edward the Second, inclusive, or somewhat later,—See Selden's Dissertatio ad Fletam, cap. 7 & 8, pp. 504—534, edit. 1685; pp. 139—227, of Kelham's translation, edit. 1771; 1 Blackst. Comm. 17—20; 1 Spence's Eq. Jurisd. 108—109, 122—124, 346—347.

(120) See *post*, Suppletory Note, and notes to it.

(121) Vult in Inst. lib. 2, tit. 7, sect. final. (4,) p. 220—221, edit. qu. sup. Vinn. in Inst. lib. 2, tit. 20, sect. 8, p. 426—427, edit. quart. p. 398—399, edit. "ult." 1709; Huber. Praelect. in Inst. lib. 2, tit. 20, sect. 8, tom. 1, p. 259, edit, qu. sup. Dom. Civ. Law, P. 2, b. 3, tit. 1, sect. 9. vol. 2. pp. 89-91, edit. qu. sup. Stair's Inst. B. 3, tit. 8, sect. 27, vol. 2, pp. 522—523, 3d edit.

(122) Vult. ubi supra, p. 221; Vinn. ubi supra, p. 426, edit. quart. p. 398, edit. "ult." 1709; Huber. ubi supra, p. 260; Dom. ubi supra, art. 12, pp. 95—96; Stair, ubi supra, p. 523.

(123) See note 87. Those who were conjoined *re tantum* were said to be *disjunctum conjuncti;* which will serve to explain the passage of Justinian there quoted.

(124) "*Ubi* JUS CONJUNCTIONIS *est, ibi* JUS *est* ACCRESCENDI, *et contra.*" Vinn. in Inst. lib. 2, tit. 20, sect. 8, p. 427, edit. quart. p. 399, edit. "ult." 1709.—This remark, however, applies only to the law after the time of Justinian. Before his time there was a case of accretion, where there was no conjunction, and which was a case of *genuine accretion* BECAUSE there was no conjunction. See note 90.

(125) Any person familiar with the books of our law, from about the time of Richard the Second to the termination of the Year-Books and somewhat later, is aware that this is the term most commonly employed in them, to denote what we now call, most frequently, by the name which I have censured with so much freedom, and (as I think) with not less truth.

(126) This agreement has been, to some extent, disturbed, since the text was written, by V. C. 1849, ch. 116, sect. 19; stated in note 22 *ante*.

(127) Perhaps it would be more accurate to say, that the statute has abolished certain EFFECTS of the *jus accrescendi* (taking it in the enlarged sense.)—

touch it a parte ante, nor interfere with that quality of a joint estate from which it sprung; the consequence whereof is, that up to the period of vesting, it operates still with undiminished vigour.

SUPPLETORY ARTICLE (TO THE PRECEDING:) ON THE TRUE NATURE OF A JOINT-TENANCY.

Bracton says: "Quilibet cohaeredum tantundem juris habet tenendi haereditatem, quantum et alii; sed tamen non per se ante divisionem, sed pro se in communi cum aliis; et sic totum tenet et nihil tenet, scilicet, totum in communi et nihil separatim per se." (128) The words of
392 this quotation extend *only to coparceners; but in exact accordance with the author's meaning, as that is apparent from the context, the concluding expression has been quoted by Sir Edward Coke, (129) and after him repeatedly by others, (130) as descriptive of joint-tenants; —of whom, as they existed by the common law, the wit of man cannot devise a more accurate, nor perhaps a more felicitous, representation: And Bracton elsewhere, in speaking of them, (131) uses an expression, in words almost, in effect altogether, identical. The same thing is declared also, not indeed so obviously, nor near so strikingly, but yet with equal certainty, by the phrase (long ago become, from continual use, a decantatum,) that every joint-tenant is seised per my et per tout. (132) To make this manifest, let us suppose that A.
393 and B. are *thus seised of an estate in land, and let us designate the moieties (133) of their estate, (as contra-

to wit, all that arise *after* a joint estate has vested; leaving the thing *itself* in other respects untouched.

(128) Lib. 5, tract. 5, cap. 26, sect. 1, fol. 430, a. See 1 Reev. Engl. Law, 474. The context shews that this passage was not intended to describe merely the *modus occupandi* between coparceners,—in respect of which there is no difference between them and either joint-tenants or tenants in common, (see note 134;) but to set forth the nature and character of their title. For the author is speaking of the plea in abatement, which in a real action the defendant (therein called tenant) might have on account of his being sued without others who ought to be joined with him; and which plea lay for either coparceners, (Thel. Dig. lib. 5, cap. 1, Com. Dig. tit. Abatement, F. 4;) or joint-tenants, (Thel. dig. lib. 5, cap. 2; lib. 11, cap. 28; Comm. Dig. tit. Abatement, F. 5;) sued without their companions; but not for tenants in common,—on the contrary *their* being sued together in such actions was objectionable as a misjoinder: (Thel. Dig. lib. 5, cap. 3; Comm. Dig. tit. Abatement, F. 12:) And the reason of this diversity was, that all the coparceners *quoad hoc* (Co. Litt. 164, a;) and all the joint-tenants had one joint title, whereas the title of each tenant in common was separate and distinct. And the same considerations enable us to determine, that the context,—("*adhoc quod exceptionem habeat quoad actionem differendam et breve prosternendum, secundum quod* PARTICIPES *nominandi sunt in brevi vel non nominandi, videndum erit an partita sit inter cohaeredes vel* NON-COHAEREDES PARTICIPES *haereditas vel res communis, vel non;*") which expressly refers to joint-tenants as well as to coparceners, comprehends only them; although the phrase *non-cohaeredes participes*, as used in both Bracton and Fleta, seems sometimes to have embraced not only joint-tenants, (Co. Litt. 180, b; 1 Reev. Engl. Law, 473;) but also tenants in common, (if that description of tenancy then existed, as it is probable that it did, though no distinct proof of the fact is now recollected,) and even commoners. See Bract. lib. 5, tract. 5, cap. 25, *per totum*, especially sect. 9, fol. 428, a—429, b; Fleta, lib. 6, cap. 48, *per totum*, especially sect. 7, pp. 439-440.

(129) With a slight change, which in point of phraseology is perhaps an improvment: "*Et sic totum tenet et nihil tenet scil. totum conjunctim et nihil per se separatim.*" Co. Litt. 186, a; 1 Steph. Comm. 314, n.

(130) 2 Blackst. Comm. 182, n. Stor. Partn. sect. 89.

(131) Lib. 4, tract. 3, cap. 9, sect. 3, fol. 262, b,—*de "pluribus feoffatis simul ex una donatione."* The passage, as far as it is material to the present purpose, is quoted, almost *verbatim*, in Co. Litt. 181, a.

(132) Litt. sect. 288; Bac. Abr. tit. Joint-tenants and Tenants in Common, A; H. 2; 1. 3. 1; 1. 3. 2; 1. 3. 3; K; L.—in 2 Roll. Abr. 403, (I,) pl. 3; Bac. Abr. tit. Release, C. I; 2 Prest. Abstr. 70; and 4 Kent's Comm. 366, it is said that coparceners likewise are,—but in Bac. Abr. tit. Coparceners, B, it is as distinctly said that *they* are *not*,—seized *per my et per tout*. The latter assertion coincides with the doctrine of some most respectable modern writers, that among coparceners there is no entirety of interest but each before partition is entitled separately and only to the whole of a distinct aliquot share. 2 Blackst. Comm. 188; 1 Steph. Comm. 320; Crabb on Real Prop. sect. 2297. See 1 Long. Dig. 488-489. While, on the other hand, the former is not only supported by the direct authorities in its favor already mentioned, but also countenanced strongly by Bracton, in the passages cited *ante* note 128, and in other passages, (lib. 2, cap. 30, sect. 3; cap. 33, sect. 1, 2; fol. 66, b; 71, b;) some of which may be seen (quoted) in Co. Litt. 163, b, 164, a. Nor is it a conclusive objection against this view, that among coparceners the right of survivorship does not hold; (see notes 58, 70, 71, and the portion of the text which corresponds to the two latter:) though formerly this even was otherwise, where any of the coparceners, before obtaining actual seisin by completion of the feudal investiture, died without issue, but leaving nearer heirs than the surviving coparceners,—as might be the case when the latter were only cousins. Bract. lib. 2, cap. 35, sect. 1, fol. 78, a; Fleta, lib. 3, cap. 16, sect. 5, pp. 204-205. The truth (told undisguisedly,) seems to be, that for ages past, though perhaps not in the times of Henry 3. and Edward 1. when Bracton and the author of Fleta wrote, nor even as late as the reign of Edward 3. (See Y. B. 17 Edw. 3. 46, b,—v. Vaghan; Fitzh. Abr. tit. Counterple de Vouche, pl. 41; Mich. 20 Edw. 3. Anon. Fitzh. Abr. tit. Monstrans de Faits, Fynes, et Records, pl. 72;) there has been an established confusion of ideas respecting coparceners; according to which, while they are always considered in regard to strangers as having one freehold. (2 Wood. Lect. 117-118;) as between themselves they are considered, not merely to different intents, but even to one and the same, as being *both* seised and not seised *per my et per tout*. Thus a coparcener may divest himself of his interest in the common subject in favour of his companions; by either (Perk. sect. 193; Co. Litt. 200, b; Watk. Convey. 82, Prest. edit. 2 Prest. Abstr. 69;) (a release, Y. B. 21 Edw. 3. 27, a, pl. 22, Anon. Fitzh. Abr. tit. Counterple de Vouche, pl. 90, tit. Reless, pl. 85; Bro. Abr. tit. Counterplee de Voucher &c. pl. 29; tit. Releases, pl. 16; Co. Litt. 273, b; Shepp. Touchst. 326;) or a feoffment; (Y. B. 10 Edw. 4, 3, b, pl. 6, Anon. Fitzh. Abr. tit. Feffements et Faites, pl. 26; Bro. Abr. tit. Feoffments de Terres, pl. 45, 75; Co. Litt. 164, a; Shepp. Touchst. 205; Crabb on Real Prop. sect. 2297;) whereas a tenant in common cannot by the former, (see note 151;) nor a joint-tenant by the latter (see notes 154, 162, 163, 164, 165;) and *that* for the sole reason that tenants in common are not, (see note 135;) and joint-tenants are, so seized. An attempt, indeed, has been made at explaining away this inconsistency; (Gilb. Ten. 73;) but the reasons for rejecting it as unsatisfactory seem too obvious to require (or even excuse here) a detailed exposition of them.

(133) As to the proper translation of the word in this connexion, which is generally written "my," but sometimes "mie," (Bac. Abr. tit. Joint-Tenants and Tenants in Common, passim; 1 Thom. Co. Litt. 733, Note E; Shepp. Touchst. 205, note 11, (by Hillard,) Prest. edit. Alln. Part. 128; Rose. Act. Real Prop. 6; Wms. Real Prop. 103; 1 Swift's Syst. 271, n.) and sometimes also "moi," (Shepp. Touchst. 327, notes 1 and n, Ath. edit.) there is a remarkable difference of opinion; some taking it to mean "one half, or moiety;" others, "any undivided aliquot part;" and others again, "every parcel." Litt. sect. 288; 3 Reev. Engl. Law, 350; 2 Blackst. Comm. 182; Stor. Partn. sect. 89; 1 Steph. Comm. 314, n. 4 Kent's Comm. 360, n. 7 Mann. & Grang. 172, note c; Whart. Convey. 127,

distinguished from both the land which is the subject of it, and the mere possession or occupation (134) thereof,) by numbers 1 and 2. Now A. is seised of moiety 1, and B. is seised of moiety 2, because each is seised per my; were this all, each would have
394 the whole of an undivided *moiety, and neither would have more, of the estate; (135) but that result, in both its aspects, is prevented by the remainder of the description, according to which each is also seised per tout, the consequence whereof is, that A. is seised of moiety 2 as much as he is of moiety 1, and B. is seised of moiety 1 not less than he is of moiety 2; each is seised of both moieties (per tout), and both are seised of each moiety (per my), at one and the same time;—which cannot be, otherwise than by each being seised, of the whole conjointly with the other, and of nothing whatever separately. Hence Blackstone is right in saying, that of two joint-tenants neither [that is neither separately] has the whole of an undivided moiety; but when he says, (136) that "each has an undivided moiety of the whole," he uses language that can hardly fail to mislead. In a certain sense each has an undivided moiety, because what he has in a moiety is conjoint; but he has not (what the expression easily may be, and perhaps generally is understood to mean) either separately or only such moiety; for in the same manner, that is to say conjointly with his companion, he has both it and the residue of the estate. (137) And from these premises, and from them alone, may be logically deduced, as "a natural
395 and regular *consequence," (138) the jus accrescendi. (139) For if each joint-tenant owned separately an undivided moiety or other part naturally and regularly such moiety or other part should be, like any other interest owned separately by him, transmissible on his death to his heirs, devisees, executors or administrators. But because there cannot be a separate ownership of, or in respect to, a joint estate;—for this reason,—and for no other,—by the common law, the whole of such estate "remained" (140) upon his death, in his companions without him, as, during his life, it had subsisted entire in them with him.

I have bestowed such minute pains in an endeavour (perhaps after all not successful) to make this matter clear, because a just conception of the nature of a joint estate is on many occasions important, and yet (as there is good reason, from what appears in our books, to believe) by no means common. Unfortunately Littleton himself has used expressions, (141) not sufficiently guarded against misrepresentation, whereby others have been led to maintain, of purpose and by design, a doctrine that is neither true, nor reconcilable with the genuine simplicity (142) of a joint estate. This

note 130. That which I have adopted is most (if not alone) congruous to the uses made of the word, in the several forms of expression mentioned in notes 135 and 136. Any of the others, however, would equally favour the view which I take of the law.

(134) See Litt. sect. 323; 3 Reev. Engl. Law, 353; Com. Dig. tit. Estates, K. 8; 7 Mann. & Grang. 172, note c. In the words of the last mentioned book, "with respect to occupation and the right to occupy, there is no difference between tenants in common and joint-tenants; [see ante, note 128; Co. Litt. 189, a;] in either case each of the two or more tenants is said to hold the whole and nothing, nihil habet et totum habet, or, in the legal phrase, he is seised, per my et per tout." The notes in the several series of reports of which Serjeant Manning has been a co-reporter, are so distinguished for learning and accuracy, that it is of moment to point out a mistake in them when one occurs. In the present instance, the word "seised," is improperly used for "possessed;" (see the next succeeding note;) the difference between them being strongly marked, (see 1 Burr. 107, 114, Taylor v. Horde; 2 Ld. Keny 219-229, S. C. Co. Litt. 330, b, note 1 by Butler; 3 Thom. Co. Litt. 5, note E;) and in this discussion of the utmost importance.—"Nota, between joint-tenants there is a twofold privity, viz. in estate and in possession: between tenants in common there is privity only in possession, and not in estate: but parceners have a three-fold privity, viz. in estate, in person, and in possession." Co. Litt. 169, a.

(135) Thus constituting them tenants in common; who are seised (in contradistinction to possessed,—see the last preceding note;) per my et NON per tout. 4 Kent's Comm. 368; Wart. Convey. 134; Watk. Convey. 94, Prest. edit.; Shepp. Touchst. 327, note n. Ath. edit.; 1 Rep. Leg. 483, 4th edit.

(136) 2 Blackst. Comm. 182.—The passage is retained by Tucker, (1 Comm. B. 2, p. 170, edit. 1836;) and transcribed by Thomas, (1 Co. Litt. 733, note E;) Crabb, (on Real Prop. sect. 2305;) and Lomax; (1 Dig. 476;)—but Stephen, in his Commentaries, avowedly founded upon Blackstone's, has rejected it, and substituted therefor what follows:—"There is [in cases of joint-tenancy] an entirety and equality of interest among the tenants; for while they continue to hold together, they are not considered as holding in distinct shares, but each is equally entitled to the whole. And, on the other hand, though the entirety ceases for the purpose of alienation, every co-tenant being entitled (if he thinks proper) separately to transfer his own share, yet the equality remains; for each is capable of conveying an equal share. This combination of ENTIRETY OF INTEREST with the POWER OF TRANSFERRING IN EQUAL SHARES is expressed by the ancient law maxim, that every joint-tenant is seised per my et per tout." 1 Steph. Comm. 314.—By means of this power, whenever he chooses, any joint-tenant may, to the extent of an equal aliquot share, destroy the joint-estate, and as between such share and the residue, substitute a tenancy in common for the joint-tenancy. Litt. sect. 292, 294, 301, 302, 304; Crabb on Real Prop. sect. 2320. But while it remains dormant, there is, to practical purposes, no difference between joint-tenants on the one hand, and, on the other, husband and wife holding by entireties, [under the old law, prior to V. C. 1849, ch. 116, sect. 18:] who, for want of this power, are said to be seised per tout et NON per my. 2 Blackst. Comm. 182; Bell on Husb. & Wife, 396; Whart. Convey. 121; 4 Kent's Comm. 363, n. 1 Lom. Dig. 479; 2 W. Blackst. 1214, Green v. King; 3 Rand. 180, 181, Thorton v. Thorton; 1 Barr. 181, Fairchild v. Chastelleux.—See 3 B Monr. 442, Trustees of Augusta v. Purkins; wherein this doctrine of entireties (heretofore universally, and still generally, supposed to be peculiar to the case of husband and wife,) was extended to the trustees of a town.

(137) "In every parcel, and by every parcel and by all the lands and tenements he is JOINTLY SEISED with his companion." Litt. sect. 288. This is according to the version in both Co. Litt. and the Commentary on Littleton edited by Cary; but the words of the original, "enchescum parcel, et per chescum parcel, et per touts les terres et tenements," would equally bear to be translated "in every parcel, and through every parcel, and through all the lands and tenements;" and this version seems to me better as more expressively pointing out the pervadingness of the JOINT SEISIN.

(138) 2 Blackst. Comm. 183. See ante note 70; 4 Reev. Engl. Law, 235.

(139) The sense, in which this phrase is here used, is that indicated in the paragraph of the text corresponding to note 85.

(140) Blackst. Comm. 183. See ante note 30, and the quotation at the foot of it from Strahan's Domat.

(141) Sect. 291.

(142) Reeves (4 Hist. Engl. Law, 235,) says: "The

doctrine is perhaps the most broadly stated by Lord Chief Baron Comyns, who says: "Joint-tenants are seised per my et per tout; but [where there are two, each of them hath] a right only to a moiety." (143) And Judge Story, less positive in assertion, but not therefore less influential upon the minds of his readers,—after quoting some expressions of Sir Edward Coke, which will be noticed in the sequel,—demands: "Now what is this but admit-
396 ting, that joint-tenants *have in reality distinct and independent interests, capable of a distinct alienation; and that each has but a moiety concurrent and undivided, with the other, in the property, with a right of survivorship in case no severance takes place." (144)

To me it seems, that with proper explanations every difficulty springing from the nature of the subject, and not merely created by the mistakes and contradictions (sometimes self-contradictions) of the writers upon it, may be removed. When it is affirmed, that each joint-tenant owns conjointly with the rest the entire estate, and separately nothing, no more is asserted than that this is so while the joint estate endures. Whenever it is destroyed, in that instant it is transmuted into the estates which succeed it. And what is necessary to a perfect comprehension of the subject, in all its aspects, is (as it seems to me) to keep in view steadily the nature of this transmutation, with a reference to the distinctive principles of the estates, which simultaneously it annihilates, on the one hand, and brings into existence, on the other. Until then, to all intents and purposes, whether as among the joint-tenants themselves, (145) or as between all or any of them, on the one hand, and the rest of mankind, collectively or individually, on the other each joint-tenant, both in point of seisin and in point of right, has, in the

idea of property possessed by two or more persons, where each has in him the entire whole and every parcel of that whole, as joint-tenants are said to have, is a subtility in jurisprudence which savours much of the age in which it was conceived."—But if four words, necessary to render it correct, be interpolated in this extract, so as to make it read "each has in him conjointly with his companions the entire whole every parcel of that whole," the subtility disappears. See further in note 145.

(143) Com. Dig. tit. Estate, K. 6.

(144) Stor. Partn. sect. 89, note 6. Contrast with this what is said in note 32 ante; particularly the dictum of Bayley, J. there mentioned.

(145) It has been said: "A gift of lands to two or more persons in joint tenancy, is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. As between themselves, they must, of course, have separate rights." Wms. Real Prop. 99. On which I make (besides what is said in the text) two remarks—1. Whether compatible or not with the notion of all the joint-tenants being inter sese "one single owner;" the separate rights, which every such tenant has, are perfectly consistent with the species of ownership insisted upon in the text. According to that, all being intitled conjointly to the whole, and each separately to no part of it; if without the consent of all, any one of them wastes or destroys the common subject, or appropriates to himself its exclusive enjoyment, he thereby manifestly usurps more than his own right, and to the same extent deprives the other joint owners of theirs. And from this wrong,—which is not (like the right it effects) conjoint,—arises a new right distinct from any before existing; to wit, a claim to redress on the one part, having for its correlative, on the other, an obligation ex maleficio: (Just. Inst. lib. 3, tit. 14, sect. 2; Halliff. Civ. Law, 60:) which new right corresponding in character with the wrong from which it originated, is therefore necessarily separate. In this manner, all these separate rights are offshoots and excrescences from, and not any portion of the original joint right; to which, as primary, they bear the relation of secondary. Or, to speak after a fashion first introduced (it is believed) by Bentham, and since adopted to some extent by more popular writers, they may be regarded as so many phases of an adjective individual right in each of the joint-tenants, by means of which is secured to him his fair and equal enjoyment of the substantive joint right.—2. By whatever appellation they may be distinguished, or in whatever light regarded, and however at this day their existence may be deemed a matter "of course;" there is about them a subtilizing refinement, (see note 142:) which appears to have been not well (if at all) understood in the early ages of the common law. Hence, if one of several joint-tenants committed waste, or, without an agreement that he would account, took all the profits, of the common subject; his companions were wholly destitute of legal redress,—in the former case, (Co. Litt. 58, b; 200, b; 247, b; Rosc. Act. Real Prop. 9, 108-109;) until the statute of Westm. 2, (13 Edw. 1, st. 1.) c. 22, which was enacted A. D. 1285; and even afterwards as to some descriptions of waste; (Y. B. 50 Edw. 3. 3, b, Thomas B—— v. Heymonde H——; Fitz. Abr. tit. Wast. pl. 96; Bro. Abr. tit. Entre Congeeable, pl. 113, tit. Waste, pl. 56; 2 Roll. Abr. 825, pl. 7;) indeed there is reason for thinking that joint tenants were not comprehended within the statute, as it was construed, until it was held, in 1535, by Fitzherbert and Baldwin, (Y. B. 27 Hen. 8, 13, b. pl. 37, Anon. 2 Inst. 403; 2 Blackst. Comm. 183.) to the dissatisfaction of Brooke, (Bro. Abr. tit. Waste, pl. 4,) that its equity reached to their case,—and in the latter, (Dr. & Stud. dial. 1, chap. 19, pp. 54-55, edit. Dubl. 1792; Plowd. 247, Willion v. Berkley; 2 Rep. 68, a, Tooker's case; Cro. Eliz. 803, S. C. Co. Litt. 200, b. Comyns 272, Walker v. Holyday; V. Willes 208, Wheeler v. Horne; 14 Viner 513, 514, S. C. 12 Ad. & Ell. N. S. 986, Eason v. Henderson; 3 Hawks 232, Chambers v. Chambers) until the statute of 4 & 5 Ann. c. 16, s. 27, which was enacted A. D. 1705.—Beyond what redress may be had under the last mentioned statute, and others which (on this side of the Atlantic) have been made upon the model of it,—if one joint-tenant holds exclusive possession of the common subject being a chattel personal, there is even now no legal remedy for the rest. Litt. sect. 323; Co. Litt. 200, a; Bac. Abr. tit. Joint-tenants and Tenants in Common, L; Browne on Actions, 132; Broome on Parties, sect. 262, 2d edit. 2 Murph. 65, Campbell v. Campbell; 1 Ired. 271, Bonner v. Latham; 1 Monr. 25, Chinn v. Respass; 2 Harring. 129, Ellis v. Culver. If he puts an end to the joint estate, by the destruction of its subject matter, it is probable that the courts in England would now decide,) 8 Ad. & Ell. N. S. 908, Higgins v. Thomas; 2 Saund. Rep. 47 h, note 1, by Serjeant Williams;) as some of the American courts have decided, (3 Dev. 398, Lucas v. Wasson; 3 Gratt. 205, Lowe v. Miller; see also 1 Monr. 40, Bell v. Layman;) that an action will then lie against him: But I have not been able to find any case there, in which it has yet been so determined; on the contrary, in the report of the case mentioned in Co. Litt. 200, a—200, b, of an action by one tenant in common against another, for his destruction of the whole flight of doves belonging to them in common,—which was held to be well maintainable,—it is expressly stated to have been said, at the same time, that, if they were joint-tenants, it would be otherwise. Y. B. 47 Edw. 3, 22, b, pl. 54, Anon. And though, from a period indefinitely remote, the common law has furnished remedies for restoring the possession of a joint-tenant ousted from a freehold estate or chattel real by his companions; yet, as late as the twenty-third year of Edward 3, (A. D. 1348-9,) where there were four joint-tenants, and two of them turned the others out of possession, the latter brought their assise in the names of all the four against the two that were the wrong-doers; and those two having been summoned and severed,—in like manner as they might have been, if they had not been defendants as well as plaintiffs, (see the portion of the text corresponding to notes 168 and 169;)—the writ was, on solemn debate, decided to be good: Thorpe C. J. saying, that, as the precedents were, it might be sued either

words and meaning of Bracton, totum et nihil: or, to vary the phrase, and adopt the words, less elegant but quite as significant, of Fleta, (146) on the like occasion, joint-tenants are proprietors, "quorum nullus jus habet separatim, cum jus commune sit in personis omnium simul."

397 *Of this the proofs abound in our books; but, to avoid an intolerable prolixity, some few specimens of them only will be here exhibited.

1. Inter sese, (besides the jus accrescendi, from which an argument has been already drawn to this point,) one joint-tenant may release, and by that means effectually 398 relinquish and renounce *(147) the estate, in favour of all, (148) or of such one, (149) or more, (150) as he may designate, of his companions; whereas one tenant in common cannot, with any effect, release to another, (151) but, if he would divest himself of his interest in the undivided subject held by him and the others, so as to vest in all or any of them, he (not only may, (152) but) must (153) convey it by the like means and in the like manner, as if he were transferring it to a stranger, —for, in point of estate, tenants in common are strangers to one another, but a joint-tenant cannot make either a feoffment, 399 (154) or a surrender, *(155) or a grant, (156) or an assignment, (157) or a bargain and sale, (158) to one or more or all of his companions, nor covenant to stand seised to his or their use, (159) with any degree of effect in the way those several assurances usually operate. And though (to save the intention from being defeated, and ut res magis valeat quam pereat,) the courts will, whenever they can, construe any form of assurance between joint-tenants, designed for putting with an interest in the joint estate, to be a release, (160) because in no other way can any such assurance (161) operate between them; yet the

in the names of the four or of the two. Lib. Assis, anno 23, fol. 109, b; pl. 9, Anon. Fitzh. Abr. tit. Briefe, pl. 762; Bro. Abr. tit. Assise, pl. 251; tit. Joinder in Accion et in Plee, pl. 55; tit. Sommons et Seuerance, pl. 17. In whichever form the suit was brought, it merely vindicated the joint right, and restored a possession pro indiviso, 6 Rep. 13, a, Morrice's case; Co. Litt. 187, a. 14 Viner 478, pl. 13, & Marg. 513, lett. Q. a. The writ de reparatione facienda stood upon grounds which were distinct and peculiar. See Co. Litt. 54, b; 200, b; 11 Rep. 82, b, Bowle's case; 1 Salk. 360, arg. Tenant v. Goldwin; 2 Ld. Raym. 1091; 6 Mod. 312, S. C.

(146) Lib. 6, cap. 48, sect. 1, p. 439.

(147) Shepp. Touchst. 314, Prest. Edit. See Dyer 263, a, Estost's case; 1 Anders 45; Benl. 195, S. C. Winch 3 Wase v. Pretty; Hetl. 150, Mortimore's case; T. Raym. 413, Harrison v. Belsey; T. Jon. 136; 1 Ventr. 345; Pollexf. 573; 3 Salk. 299, pl. 4, S. C.

(148) Shepp. Touchst. 326-327.

(149) Litt. sect. 304, 305; Perk. sect. 84; Bro. Abr. tit. Alienation, pl. 4, 31; Bro. N. C. 65, b, pl. 296, Anon. Co. Litt. 193, a—193, b.

(150) 2 Prest. Abstr. 61.

(151) Co. Litt. 200, b; Shepp. Touchst. 327, Prest. edit. Bac. Abr. tit. Joint-Tenants and Tenants in Common, A: 1, 3, 2.—In the original and all subsequent editions of the last mentioned book, the same proposition is stated tit. Release, C. 1; but in the seventh edition (1832) there is introduced in immediate justaposition, a statement of the case of Doe v. Prestwidge, 4 Maul. & S. 178, so expressed as to give it a flat contradiction. And the reporters' abstract of the case is couched in the same terms, but upon looking into the report at large it will be seen that the conveyance was by lease and release, as in ordinary cases between mere strangers; and in the deed of release, moreover, were the words "grant, bargain and sell, alien and confirm," as well as "release."—So that the case did not require an expression of opinion upon this point: nor was any given.

(152) 2 Woodd. Lect. 135-136.

(153) 2 Prest. Abstr. 77; Alln. Part. 129.

(154) Y. B. 22 Hen. 6. 42, b—43, a, Rose W——'s case; 18 Edw. 27, pl. 22, Anon; Fitzh. Abr. tit. Feffements et Faits, pl. 11; Bro. Abr. tit. Feoffments de Terres, pl. 15, 45, 48; 2 Roll. Abr. 86. (A.) pl. 2; Perk. sect. 193, 197; 2 Inst. 244; Shepp. Touchst. 205; Alln. Part. 128-129.

(155) Y. B. 22 Hen. 6. 51, a. pl. 14, Anon. Fitzh. Abr. tit. Surrendre, pl. 2; Bro. Abr. tit. Surrender, pl. 13; 2 Roll. Abr. 86 (A.) pl. 3; Perk. sect. 586; Shepp. Touchst. 303; Watk. Convey, Prest. edit.

(156) 1 Leon. 283, Jenner and Hardie's case; 1 Ventr. 78, Chester v. Wilson; 2 Saund. 96; 3 Salk. 205, pl. 9, S. C. See also, the case of Eustace v. Scawen, stated in note 166.

(157) 2 Saund. 96, Chester v. Willan.

(158) Cro. Jac. 696, Eustace v. Scawen; Wath. Convey. 89, Prest. edit; 1 Thom. Co., Litt. 733, note E; Crabb on Real Prop. sect. 2315.

(159) In Godb. 146, Whitlock and Hartwell's case, it is so laid down, and said to have been "adjudged in Barton and Harvey's case, 37 Eliz." And doubtless the law is so. But the report in Godbolt, though followed without objection in 14 Viner 471, pl. 8, marg. gives a grossly false idea of both Whitlock and Hartwell's case, (S. C. Moore 776; Noy 14; Cro. Jac. 91; 2 Roll. Abr. 89, pl. 5; cited 1 Roll Rep. 403;) and Barton and Harvey's case, (S. C. Moore 395; Noy 157; Poph. 96; Gouldsb. 187; 2 And. 16; Dyer 187, a, pl. 5, marg. 2 Roll. Abr. 89, pl. 4; cited Moore 776; Noy 14; Cro. Jac. 91; 1 Roll. Rep. 309, 402; 3 Bulstr. 131, 132, 133, 273;) as appears from all the other (numerous) accounts of each.

(160) Glayt. 32, Ballard v. Sitwell; 2 Saund. 96, Chester v. Willan; T. Raym. 187; 1 Ventr. 78; 1 Sid. 45 e; 2 Keb. 641; 3 Salk. 205, pl. 9, S. C.; Shepp. Touchst. 205, 304, 314, Prest. edit.

(161) Cro. Jac. 696, Eustace v. Scawen; 2 Keb. 642, Chester v. Willand; Gilb. Ten. 73; Bac. Abr. tit. Release, C. 1; Com. Dig. tit. Release, D. 1; 4 Wood's Convey. 541, note b. edit. Dubl. 1792; Wms. Real Prop. 102.—In Y. B. 22 Hen. 6, 43, a, Rose W—'s case, Newton, C. J., having delivered his opinion, that a joint-tenant cannot enfeoff his companion, subjoins: "But if the feoffment be made, then peradventure it will enure by way of confirmation;"—"if it be by deed," adds Fitzherbert, in his Abr. tit. Feffements et Faits, pl. 11. On the sole foundation of this dictum, or (which is more probable) the mis-statement of it in Bro. Adr. tit. Confirmation, pl. 11; where the qualifying "peradventure" is omitted; it is stated in several later books, that a feoffment, (Owen 102, James v. Portman; 5 Viner 386, pl. 8; 14 Viner 470, pl. 2, marg. 1 Wood's Convey. 218, note b; 328, note a, edit. Dubl. 1792;) or a grant, (Hardr. 49, Jones v. Clarke;) of one joint-tenant to another, shall operate, and (Plowd. 156, Throckmorton v. Tracy; 4 Mod. 150, arg. Barker v. Lade;) he pleaded, as a confirmation. Concerning the effect of a direct confirmation between joint-tenants, I have found but one case in the books, and that is thus given from MSS. in Fitch. Abr. tit. Confirmation pl. 15: Confirmation by one joint-tenant to his companion availeth not, per Thorp and Grene, in assise, Trin. 34 Edw. 3, and his part [moiety] doth not pass thereby; but it extinguisheth his part in the moiety of his companion, and breaks the survivorship." the better opinion, however, is opposed to the last of these propositions; (Litt. Sect. 523; Shepp. Touchst. 314; Gilb. Ten. 73;) and Sir Edward Coke gives it a direct contradiction. —Co. Litt. 298, b. And therefore, upon the whole, the truth seems to be that a mere confirmation, or any other assurance operating as such, between parties who are joint-tenants, can do no more than give validity to the joint estate, against any other title which may be in the confirmer, (Shepp. Touchst. 314, Prest. edit.) without in any degree disturbing the mutual relation between them arising out of their joint-tenancy. Nor is it an objection, that if the deed of confirmation contain the words, "to have and to hold to him and to his heirs all the tenements whereof mention is made therein," then the confirmee hath a sole estate in the tenements; (Litt. sect. 523; Plowd. 158, Throckmorton v. Tracy;) because in such a case the deed operates in that respect as a release, and not as a confirmation.—Shepp.

400 distinction *is not therefore idle or merely nominal; not only, nor principally, because in such cases the assurance, whatever may be its form, must, in pleading, be stated as a release; (162) but also for other and far weightier reasons. Thus, it can never be construed in that way, unless it be by deed; and therefore a feoffment between such parties, though livery be made according to a written charter, if that be not also sealed, will avail nothing: (163) nor can it be so construed quoad one of several persons to whom it is made, when quoad the rest of them it can have full effect, in its own proper mode of operating; and therefore in the case of a feoffment made by a joint-tenant to his companion and a stranger, (164) whether it be with or without deed—the stranger takes (165) the whole. And where such a construction is adopted, the effect it produces is only that which is proper to a release, and not the full effect that would ensue, if the assurance could operate in its accustomed, and what may be called its natural, manner; as is proved, and illustrated very strikingly, by the case of Eustace v. Seawen (166) Upon all
401 *which this observation, pertinent to the matter in hand, may be made; that, though the fact of each joint-tenant's having the entire seisin may sufficiently account for some of these phenomena, yet of others no satisfactory solution can be given, but upon the ground that each has also, from the beginning, the entire right.

2. As between them and the rest of mankind, if joint-tenants be disseised of real estate, all of them must unite in any action to recover it, founded on the right, (167)—which is thus also proved to be joint in them; and though such of them as disapprove and refuse to maintain the action, may be summoned and served, after which it will proceed in the name of the others only, (168) yet, if it be successful, all will participate in the benefit: (169) whereas tenants in common, disseised, cannot (170) join in an action founded upon the title, (171) because their rights are distinct. And for the like reasons, on the other hand, a third person cannot, in such an action, sue a joint-tenant without, (172) nor a tenant in common with, (173) his companions. I lay no stress upon the rule, which requires joint-tenants to unite as plaintiffs, and be united as defendants in merely personal actions; because in them, for special reasons, it is equally the rule that tenants in common shall join (174) and be joined. (175)

Sir Edward Coke does say, that "albeit joint tenants are seised" in the manner which has been described, "(as, for examples, where there be two joint-tenants
402 in fee,) yet to divers purposes *each of them hath but a right to a moiety," (176) of which he proceeds to state what he considers to be examples: and the same instances are adduced by Lord Chief Baron Comyns, as roof of his broad and unqualified assertion already quoted.—But, as it seems to me, there is not one of them, which does not admit of an explanation, on undeniably sound principles of law, that will make it harmonise perfectly with the theory here maintained. For brevity's sake I shall notice only that which, of them all, appears to be the most pregnant,—namely, that "where all the joint-tenants join in a feoffment, every of them, in judgment of law, doth give but his part,"—thereby meaning an undivided moiety where there are two, or third part where there are

Touchst. 314, Prest edit. Gilb. Ten. 78. note c. Watk edit.—And if, as has been suggested, (Shepp. Touchst. 293. note i, Ath. edit.) contrary to the received opinion, (Wath. Convey. 89. Prest. edit. 1 Madd. 223. Att. Gen. v. Hamilton:) joint-tenants can exchange with one another, so as to convert the joint seisin of both in the whole into a sole seisin of each in the respective parts; the transaction must operate by way of mutual release, as the author of the suggestion himself admits.

(162) 2 Saund. 97, Chester v. Willan; and Serjeant Williams' note 2 to that case.

(163) 1 Leon. 283, Jennor and Hardie's case; 4 Leon. 187, Anon. Shepp. Touchst. 203, note c. Ath. edit; 1 Prest. Abstr. 61.

(164) Simpliciter, so as to constitute them [if it could have the proposed effect] joint-tenants inter sese of the undivided share intended to be conveyed; secus, if the terms of it be such as would make them tenants in common thereof with one another. See Shepp. Touchst. 83, 220. Prest. edit.

(165) See ante note 48.—By the common law a feoffment might be made without writing. 2 Sand. Us. & Tr. 3: 2 Lom. Dig. 4-5. The statute of Frauds and Perjuries (29 Car. 2. c. 3.) made a writing, but not a deed necessary.—Shepp. Touchst. 203, Prest. edit. ibid. note c. Ath. edit. But in Virginia, by statutes, a deed has long been indispensable for the conveyance of an estate of inheritance or freehold. (3 Hen. Stat. 318-319, act of Oct. 1705, ch. 21, 516: act of Oct. 1710, ch. 13, sect. 1: 5 Hen. Stat. 408, act of Oct. 1748, ch. 1. sect. 1; or for a term of more than five years, 12 Hen. Stat. 154, act of Oct. 1785, ch. 62, sect. 1: R. C. 1819, ch. 99, sect. 1. [V. C. 1849, ch. 116, sect. 1.]

(166) Cro. Jac. 696; W. Jon. 55; A. Benl. 147, (mispaged 151:) 2 Roll. Rep. 398, 444, 472, 485; 2 Roll. Abr. 86. (A.) pl. 1; 408, [L.] pl. 3; 409, [Z.] pl. 2. In this case, as appears by comparing the different reports of it, a man and a feme sole were joint-tenants for life; the latter married, and she and her husband, by fine, granted to the former the tenements which were the subject of the joint-estate, and all and whatsoever they had therein, for the term of the life of the feme, habendum to him and his assigns during her life, and warranted the same to him and his heirs, as long as she should live; he, to whom the fine was levied, died during the life of the feme: and, in a contest between one who entered as occupant and the reversioner, it was decided,—that the fine, operating only by way of release, had the effect to make the releasee sole tenant of the whole estate for the term of his own life and no longer, so that there could not be an occupant of either the whole or a moiety; whereas, if it could have operated to the same extent as it would have done, if levied to a stranger, the life estate in one moiety would have continued to subsist as long as the feme should live.

(167) Co. Litt. 180 b; 195, b; Com. Dig. tit. Abatement. E. 9, Rosc. Act. Real Prop. 9.—Secus in a proceeding not depending upon the title, as a warrant of detainer. 10 Smed. & M. 440, Rabe v. Tyler. See 4 Rand 477, Allen v. Gibson.

(168) Rosc. Act. Real Prop. 172.

(169) Co. Litt. 188, a; 364, a, b.

(170) This was altered in Virginia, by act of 11 Febr'y. 1824, Sess. Acts. ch. 24, sect. 1; 1 Lom. Dig. 502. [V. C. 1849, ch. 168, sect. 2.] That, however, does not effect the argument in the text, which (throughout) is founded upon the common law.

(171) Litt. sect. 311, 312; Com. Dig. tit. Abatement, E. 10.

(172) Com. Dig. tit. Abatement, F. 5.

(173) Com. Dig. tit. Abatement, F. 12.—This likewise is altered in Virginia, by the act mentioned in note 170.

(174) Com. Dig. tit. Abatement, E. 10.

(175) Com. Dig. tit. Abatement, F. 6.

(176) Co. Litt. 186, a.

three, et sic de caeteris. Now I have laboriously sought out all the cases I could find, (even from the commencement of the Year-Books,) of such joint conveyances, whether by feoffment or by any other mode of assurance; and in not one of them have I been able to discover any point decided, that requires them necessarily to be so considered. (177) And, on the contrary, there are points, long and perfectly settled, in relation to such conveyances, that cannot be reconciled to any such view of their effect. Thus, "if two joint-tenants be within age, and they join in a feoffment, in such a case a joint right remains in them, and, therefore, if one dies, the right shall survive, and the survivor shall have the right of the land as from the first feoffer;" (178) from whom the joint-tenants originally derived their estate. Or, as Littleton puts it, (179) "if two joint-tenants being within age make a feoffment in fee, and one of the infants die, and the other surviveth, inasmuch as both the joint-tenants might enter jointly in their lives, this Right accrueth all to him which surviveth, and therefore he that surviveth may enter into the whole." And yet, if each had separately made a distinctly feoffment, the survivor could have
403 *reinstated himself, by entry or suit, in no more than one moiety, (180) and the other moiety would have descended to the heir of his deceased companion. (181) In one case of this class, (182) Herle, C. J. said,—and Fitzherbert in his Abridgement (183) preserved the saying, "si deux lesseront, certum est que chescun de eux lessa l'entier." And so, if "two joint-tenants make a feoffment in fee, by this word dedi," (184) says Sir Edward Coke, (185) and "the one dies, the survivor shall be vouched and render in value for the whole, (186) for though the state [estate] passed from both, and the statute (187) saith ratione doni proprii, yet each of them did warrant the whole by this word dedi; otherwise the survivor ought not to have yielded the whole in value, as it hath been adjudged" that he shall. Does it not equally follow, that each also, conjointly with the other, gave the whole? (188)

404 *No. 2.

FORECLOSURE OF MORTGAGES—ACCOUNT OF RENTS AND PROFITS.

In England, upon a successful bill of mortgagee against mortgagor to foreclose, the decree directs a reference to one of the masters "to compute what is due to the plaintiff for principal and interest on his mortgage, and to tax him his costs of the suit;" after which in ordinary cases, (1) it proceeds in this form or to this effect: "And upon the defendants paying unto the plaintiff what shall be reported due to him for principal, interest and costs as aforesaid, within six months (2) after the

(177) Certainly the decision in Doe v. Chaplin, 3 Taunt. 120, (which is mentioned in 2 Blackst. Comm. 182, note 7, edit. New York, 1830; and in Crabb on Real Prop. sect. 2308 a,) does not,—as is shewn by the remarks of Lord Tenderden, C. J. in delivering the judgment of the court, in Doe v. Summersett, 1 Barn. & Adolph. 135. See also 7 Mees. & W. 139, Doe v. Hughes, Carr. & M. 280, Alford v. Vickery; 2 Mann. & Ry. 433, Doe v. Hulme, & note 6 to it; 17 Engl. Comm. Law Rep. 316, S. C. 5 East 491, Right v. Cuthell; 3 B. & Ald. 689, Goodlittle v. Woodward; 10 B. & Cressw. 626, Doe v. Walters.

(178) 8 Rep. 43, a, Whittingham's case.

(179) Sect. 634. See Y. B. 18 Edw. 2. 565-567, Anon. Fitzh. Abr. tit. Briefe, pl. 831, S. C. Y. B. 21 Edw. 3. 50 a, 50, b, Kemp's case; Fitzh. Abr. tit. Dum fuit infra aetatem, pl. 1, 2; Bro. Abr. tit. Dum fuit infra aetatem, &c. pl. 2; tit. Jointenants, Jointour, & Survivour, & Joynt Actes, pl. 13; 2 Roll. Abr. 87, (D.) pl. 2; 1 Roll. Rep. 401, 442, Smalman v. Agburrough; 3 Bulstr. 274, S. C. Palm. 254, Darcy v. Jackson.

(180) 2 Prest Abstr. 59.

(181) 8 Rep. 43, a, Whittingham's case; Co. Litt. 337, a, b.

(182) Y. B. 6 Edw. 3, 4, 6, pl. 12, Anon.

(183) Tit. Dum fuit infra aetatem, pl. 4.

(184) As to which see Co. Litt. 384, a.

(185) 2 Inst. 276-277.

(186) Y. B. 39 Edw. 3. 26, a—26, b, Brinkel's case; Bro. Abr. tit. Recoverie in Value, pl. 39. To prevent the possible misconception, that in this case something may have turned upon the word dedi, in the singular number; it seems proper to state that, according to the report in the Year Book, J. Brinkel, in a praecipe quod reddat against him, vouched to warranty John London and Robert de T——, and, to bind them to the warrantry, "set forth a deed by which J. L. and the ancestor of R. gave [donerent, in the plural, or [more exactly] doneret with a circumflux over the last syllable.] the same land to him, without clause of warrantry." This, it was agreed, did not bind the vouchee Robert: (see Co. Litt 384, a; 2 Inst. 276-277;) and upon debate it was held, that it did bind the other vouchee for the whole.

(187) 4 Edw. 1. st. 3, called from some of its provisions De Bigamis, cap. 6.

(188) See also 2 Prest. Abstr. 63-65.

(1) That is to say, wherever a sale is not decreed: —Which, upon a bill that only prays to foreclose, (1 Hovend. Supp. 538; 2 Hovend. Fraud. 202;) cannot be done against the mortgagee's wish, (13 Ves. 370, Kenebel v. Serafton; 2 Swanst. 257, Postlethwaite v. Blythe; see 2 Bland 666, Andrews v. Scotton;) in any case whatever; not even where an infant entitled to redeem is defendant, (3 Pow. Mortg. 6th edit. 986, note Z, Atkins v. Graves; see 2 Ventr. 351, Sale v. Freeland; 2 Vern. 518, Draper v. Clarendon; Set. Decr. 273-274; 275, Wakeham v. Lome; ibid. Hamond v. Bradley; 3 Ves. 317, Bishop of Winchester v. Beavor; 4 Ves. 370, Spencer v. Boyes, 3 Myl. & Cr. 159, S. C. cited; 19 Ves. 114, Williamson v. Gordon; 3 Pow. Mortg. 6th edit. 983, note u;) or the mortgage is of an interest in stock (2 Fonbl. Eq. 5th edit. 261, Tancred v. Potts;) in reversion; (3 Hare 35, Slade v. Rigg; 4 Engl. L. & E. Rep. 147, Wayne v. Hanham; see 1 Madd. Chanc. 2d edit. 529, Ponten v. Page: 1 Hare 422, Dyson v. Morris;) as to both which cases, on this point, there has been some difference of opinion. Nor upon such a bill, (Mosel. 196, Dashwood v. Bithazey; 3 Pow. Mort. 6th edit. 1016; see 12 Ves. 48, Palk v. Clinton; 7 Sim. 317, Kerrick v. Saffery;) can the plaintiff obtain a decree for a sale, unless by consent; or where it would promote the interest of an infant owner of the right of redemption; (Set. Decr. 274, Pace v. Marsden; 1 Madd. Chance. 2d edit. 532, —— v. Mansell; 1 Ves. & B. 223, Mondey v. Mondey; even in that case, however, Sir William Grant refused such a decree, 18 Ves. 83, Goodier v. Ashton; see 3 Pow. Mortg. 6th edit. 985, note z; Macph. Inf. 422-423; 1 Dan. Chanc. 211-212, Perk. edit. 3 Bland 193-194, Williams's case;) or, perhaps, where the defendant makes default at the hearing, (Set. Decr. 173-174, Hall v. Baker; see ibid. 367; 2 Sch. & Lefr. 300, Carew v. Johnston; 10 Ves. 30, Stubbs v. ——; 2 Ves. & B. 186, Knight v. Young; 1 Smith's Chanc. 2d edit. 416; 2 Dan. Chanc. 1st edit. 621-622, Perk. edit. 1183-1184;) or suffers the cause to be heard on bill taken pro confesso. Mosel. 196, Dashwood v. Bethazey; Coote on Mortg. 3d edit. 494, see 2 Bligh 170, 186, Hamilton v. Houghton; 2 Madd Chanc. 2d edit. 459; 1 Hovend. Supp. 364; Set. Decr. 372; 1 Dan. Chanc. 1st edit. 695-696, Perk. edit. 570, 577-578. Probably the decree made by Lord Harcourt in Mason v. Lake, 2 Bro. P. C. 2d edit. 497, was by consent; as, it is certain, the like decree was in Ransden v. Hylton. Belt's Supp. 1st edit. 350-351.

(2) Calendar, not lunar, Barn. C. C. 324, Anon. Bac. Abr. tit. Mortgage, E. 7; 3 Pow. Mortg. 6th edit. 972 a; Coote on Mortg. 3d edit. 492, 508. The contrary

405 *said master shall have made his report, at such time and place as the said master shall appoint, it is ordered that the said plaintiff do reconvey the mortgaged premises free and clear of all incumbrances done by him or any claiming by, from, or under him, (3) and do deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said defendant, or to whom he shall appoint; but in default of the said defendants paying unto the said plaintiff such principal, interest and costs as aforesaid, by the time aforesaid, it is ordered and decreed that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises." (4) On a bill of mortgagor against mortgagee to redeem, (5) after 406 directing a similar reference to *compute what is due for debt, interest and costs, (6) the decree, mutatis mutandis, proceeds in almost the same words,—as follows: "And upon the plaintiff's paying unto the defendant what shall be reported due to him for principal, interest and costs as aforesaid, within six months after the said master shall have made his report, at such time and place as the said master shall appoint, it is ordered that the said defendant (7) do reconvey the mortgaged premises free and clear of all incumbrances done by him or any claiming by, from, or under him, and do deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said plain-
407 tiff, or to whom he *shall appoint; (8)

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statement in 2 Dan. Chanc. 1st edit. 643, Perk. edit. 1204, is erroneous, and in conflict with Set. Decr. 140, the sole authority there vouched. In some cases, (3 Bro. P. C. 2d edit. 558, Wickalse v. Short; 5 Bro. P. C. 2d edit. 247, Jones v. Kenrick; 9 Sim. 304, Jones v. Creswicke; 308, Nanfan v. Perkins, cited;) the master using the discretionary power which the decree seems clearly to give him, has appointed a day for the payment considerably within six months, even reckoned as lunar: But in most of the reported cases, wherein the fact is capable of being traced, he has allowed the full term of six calendar months; (1 Madd. Rep. 287, Edwards v. Cunliffe; 4 Madd. Rep. 439, Thompson v. Grant; 3 Myl. & Cr. 191, King v. Bryant; 9 Sim. 312, Crompton v. Effingham, cited; 315, Joachim v. McDonall, cited; 2 Beav. 479, Eyre v. Hanson: see also 2 Harr. Chanc. 132, 133, edit. Philad. 1807; 1 Smith's Chanc. 2d edit. 538;) and from the language generally used in the cases, this is what the court seems to expect of him. See 2 Myl. & K. 419, Parker v. Housefield; 1 Keen 16, Mellor v. Woods; 1 C. P. Coop. 8, Lewis v. John; 2 Young, & Coll. E. C. 730, Thorpe v. Gartside.—For a reason which will appear in note 14, it is of little moment in suits to foreclose, but may be of great moment in suits to redeem, how the master exercises his discretion in this particular.—As to the time allowed for successive redemptions, see Set. Decr. 162, note 2.

(3) See 6 Dow 22, Ruscombe v. Hare.

(4) Set. Decr. 139, Thornbury v. Dutton; 153, Hill v. Price; 155, Smyth v. Collier; 165, Dalton v. Wilson; 175, Becket v. Micklethwaite; 6 Madd. 202, S. C. 8 Sim. 498, Ball v. Harris; 3 Myl. & Cr. 163, Price v. Carver; 191, King v. Bryant; Vanheyth. Eq. Draftsm. 1st edit. 647; 2 Newl. Chanc. 2d edit. 345; Mill. Eq. Mortg. 259-262. Substantially this form of decree was in use at (5 Bro. P. C. 2d edit. 247, Jones v. Kenrick:) and before (2 Freem. Hovend. edit. 21, Rightston v. Overinge,) the beginning of the eighteenth century; and one very similar, it is said, (1 Spence's Eq. Jurisd. 608, note d, Coll v. Wood:) at the beginning of the seventeenth, which seems to have been about the time the practice of foreclosing began. See 1 Spence's Eq. Jurisd. 601-608; Toth. trans. 132-135, edit. 1649; A Benl. 176, (mispaged 160.) Edwards v. Wolfe; 1 Salk. 404. Anon. Serjeant Hutchins there mentioned was a Commissioner of the Great Seal from 1690 to 1693.—For the form of a decree to foreclose on the equity side of the Exchequer, in 1709, see 5 Bro. P. C. 2d edit. 201, Lant v. Crispe; and for similar forms in the Chancery Court of Maryland, see 2 Bland 372, n. Atkinson v. Hall; 666, n. Wardrop v. Hall; 667, n. Hunter v. Gaunt; 668, n. Buchanan v. Shannon.

(5) This—to redeem—is the only decree for the plaintiff that can be made, without the mortgagee's consent, upon a bill filed against him; (1 Atk. 520, Smithson v. Thompson; 6 Ves. 573, Troughton v. Binkes; 3 Myl. & Cr. 69, Tasker v. Small; 7 Sim. 479, Pearce v. Hewett; 7 Beav. 316, 319, Dalton v. Gayter;) unless, perhaps, where he makes default at the hearing or suffers the bill to be taken pro confesso, concerning which see the references in note 1. And this doctrine is held even in Ireland, (2 Ball & B. 555, McDonough v. Shewbridge; 562, n. Drew v. O'Hara: 2 Dru. & W. 486, Balfe v. Lord:) and Jamaica, (11 Jur. 573 n. Gordon v. Horsfall; 2 Spence's Eq. Jurisd. 671;) and North Carolina, (2 Dev. Eq. Rep. 477, Gillis v. Martin; (though in all of them, upon a bill of the mortgagee to foreclose, the ordinary course is to decree a sale, whether he consents or not.

(6) In cases of this description the plaintiff, though successful, must pay costs to the defendant, unless the latter has forfeited them by his misconduct. See Beam. Costs, 1st edit. 39-48; 3 Pow. Mortg. 6th edit. 991-997, note D; Coote on Mortg. 3d edit. 347, 385-388; 3 Dan. Chanc. 1525-1532, Perk. edit. in which books most of the very numerous authorities or this subject are collected.

(7) In one precedent, this part of the decree runs thus: "And what upon the balance of the said account shall be certified due to the said defendant for his principal, interest and costs, it is ordered and decreed that the said plaintiff do pay the same unto the said defendant within six months after the said master shall have made his report, at such time and place as the said master shall appoint; and that thereupon the said defendant" &c. Set. Decr. 144, Oneley v. Moor; 2 Newl. Chanc. 2d edit. 338, (Anon.) S. C. And to the same effect is the decree in Proctor v. Oates, if we may trust the report thereof in 2 Atk. 140; not, however, that in Glover v. Portington, 1 Chanc. Cas. 51; Nels. 96; though seemingly so from the short report in 2 Freem. 182. See Set. Dec. 168. Kenner v. Goulston. On the strength of the first mentioned precedent alone, it is stated in 2 Dan. Chanc. 1st edit. 643, Perk. edit. 1205, that decrees for redemption "usually" so direct: but the contrary would seem to be true, from the precedents cited in note 9, except that above mentioned of Oneley v. Moor, and from the following; all of which, except as just excepted, accord on this point with the form in the text: 2 Freem. (Hovend. edit.) 15, Sherman v. Cox; 69, Newcombe v. Bonham; 89, Clarke v. Jevon; 250, Cleveland v. Dashwood; 129, Cocker v. Bevis; 1 Chanc. Cas. 61, S. C. (in which the first decree was made by consent;) 5 Bro. P. C. 2d edit. 191, Conway v. Shrimpton; 195, Wilson v. Tooker; 198, 199, Birne v. Hartpole; 210, Stone v. Byrne; 258, 259, Amherst v. Lytton; 287, Palmer v. Jackson; 6 Dow 5, Ruscombe v. Hare; 1 Bligh. 113, Jackson v. Jones. And therefore a proposition, which has been with great confidence advanced, (18 Johns Rep. 544, 555, 560, 570, Beekman v. Frost; 3 Pow. Mortg. 968, note 1, Rand's edit.)—that in a bill to redeem it is essential, and indispensable, the plaintiff should, in express terms, offer to pay what is due for debt and interest with costs,—would seem to be mistaken. See 1 Hoffm. 41, Brown v. Frost; (in which case the Assistant Vice Chancellor's decree was reversed, but upon a ground wholly distinct from this, 10 Paige 243, S. C.) Willis' Eq. Plead. 160-166, 381-386; Whitw. Eq. Prec. 92-93, 419-426. As to the case of a subsequent incumbrancer filing (a bill against a prior mortgagee see ibid. 420, note c. 11 Jur. 569, 573 a, Gordon v. Horsfall; 2 Dru. & W. 486, Balfe v. Lord; 2 Spence's Eq. Jurisd. 671; Set. Decr. 157, Denny v. Blowers; 167, Kenner v. Goulston; 2 Newl. Chanc. 2d edit. 339-345.

(8) "And that the said defendant do deliver the possession of the said mortgaged premises to the planitiff,"—is here added, if the defendant be in possession. Set. Decr. 147, Miller v. Beaty; ibid. Yates v. Hambly; 2 Atk. 360, 364, S. C.; 3 Atk. 272, Ashenhurst v. James. Upon bill to foreclose, where the mortgagor is in possession, a like direction is inserted in the decree, if the mortgage be equitable; (Set. Decr. 179, Hiern v. Mill; 3 Myl. & Cr. 164, Price v. Carver; 8 Jur. 93, Stevens v. Lord; Mill. Eq. Mortg. 259, 261; 2 Spence's Eq. Jurisd. 793; see 3 Atk.

but in default of the said plaintiff's paying unto the said defendant what shall be so reported due to him for principal, interest and costs as aforesaid, at such time and place as aforesaid, it is ordered that the said plaintiff's bill do from thenceforth stand dismissed out of this court, with costs to be taxed by the said master." (9) In either case, the report (10) being made and eventually (11) confirmed, (12)—formerly, (13) if the money was not paid by the
408 time appointed therein, *or by such further time, as the court, upon application to it, allowed, (14) the mortgagor was de facto absolutely foreclosed;

5, Lacon v. Mertins;) but not, if it be legal, the court in the latter case leaving the mortgagee to recover the possession at law, 2 Chanc. Cas. 244, Anon. 2 Atk. 101, Sutton v. Stone; 3 Pow. Mortg. 6th edit. 965-966; 988, note B; Set. Decr. 140, 146, 179; 2 Spence's, Eq. Jurisd. 679, 793. The same distinction seems also to prevail in such suits, in regard to directing by the decree, that the mortgagor shall deliver title deeds of the estate to the mortgagee. See Set. Decr. 178-179, Hiern v. Mill; Mill. Eq. Mortg. 261; 1 Younge & J. 117, Wiseman v. Westland; 17 Law Journ. Chanc. N. S. 353, Frazer v. Jones; Coote on Mortg. 3d edit. 493; 2 Spence's Eq. Jurisd. 785, note c.

(9) Set. Decr. 144, Oneley v. Moor; 147, Yates v. Hambly; 149, Knowles v. Chapman; 163, Samborke v. Hanbury; 170, Aynsley v. Reed; 181, Kempe v. Westbrooke; 2 Newl. Chanc. 3d edit. 347; Belt's Supp. 1st edit. 141, S. C. Vanheyth, Eq. Draftsm. 1st edit. 648; 3 Atk. 90, Weltshire v. Smith; 555, Forward v. Duffield; 2 Russ. 208, Martinez v. Cooper; 3 Ves. & B. 54, n. Smith v. Bicknell. In this last mentioned case the decree was, that "in default of the plaintiff's paying," &c., he was "to stand absolutely foreclosed;"—in Slingsby v. Hale, 1 Chanc. Cas. 122, it was that "if the plaintiff failed to pay the money at a day to be set by the master, the defendant should hold discharged of all equity of redemption;"—and in Titley v. Davie's, 2 Younge & Coll, C. C. 405, it was, that "in default of the plaintiff's paying," &c. his bill was "to be dismissed with costs, and he to be foreclosed;"—these three differing herein from all the other precedents I have seen. But the difference is in form only; for, in effect, the dismission of a bill to redeem, on account of nonpayment at the day appointed by the master, is an absolute foreclosure. 2 Atk. 267, Cholmley v. Oxford; 11 Ves. 199, Bishop of Winchester v. Paine; 12 Ves. 62, Palk v. Clinton; 3 Hare 37, Slade v. Rigg; 4 Johns. Chanc. Rep. 142, Perine v. Dunn; 1 Bland 405, Colegate D. Owing's case; 537, Etchison v. Dorsey; 2 Spence's Eq. Jurisd. 671. See 7 Paige 173, Waller v. Harris. In a case where the right of redemption belonged to several, of whom one was plaintiff and the others defendants, the decree was that, upon such default of them all, the latter should stand foreclosed, and the bill of the former stand dismissed. Set. Decr. 170, Aynsley v. Reed; 1 Dick. 249, S. C. See also 1 West's Hardw. 452, Hill v. Mawle,

(10) For a form of this report, see 2 Harr. Chanc. 182, edit. Philad. 1807; and for the method of proceeding upon the reference, see 1 Smith's Chanc. 2d edit. 538.

(11) 5 Bro. P. C. 2d edit. 247-249, Jones v. Kenrick; 1 Sim. & Stu. 364, Renvoine v. Cooper; 3 Pow. Mortg. 6th edit. 998, a, note F; 2 Dan. Chanc. 1206, Perk. edit.

(12) 1 Smith's Chanc. 2d edit. 539; Coote on Mortg. 3d edit. 493, 496.

(13) So it is stated, Set. Decr. 140; and reported to have been said by Lord Hardwicke, 1 West's Hard. 130, Sheriff v. Sparks. The printed reports of early cases leave the matter in some obscurity. See 2 Freem. (Hovend. edit.) 129, Cocher v. Bevis; 1 Chanc. Rep. 253; 1 Chanc. Cas. 61, S. C. 122, Slingsby v. Hale; 217, Roscarrick v. Barton; and note 16 post.

(14) Set. Decr. 142, Edwards v. Cunliffe; 1 Madd. Rep. 287, S. C. 1 Chanc. Rep. 262, Ismoord v. Claypool; 9 Sim. 316, n. S. C. 304-319, Jones v. Creswicke, and many cases cited from MSS. in it and a note to it; Mosel. 246, Anon. Barn. C. C. 221, Anon. 2 Atk. 467, Fleetwood v. Jansen; 3 Pow. Mortg. 6th edit. 997-999, notes E and F; 1 Smith's Chanc. 2d edit. 540-541. This extension of the time for payment is an indulgence, which (if opposed, 8 Price 630, Quarles v. Knight;) will not be granted, even the first time, unless some reason for it be shewn. 4 Russ. 124, Nanny v. Edwards; 2 Beav. 478, Eyre v. Hanson. An abuse of it was, in one case, corrected by the House of Lords; (5 Bro. P. C. 2d edit. 200, Lant v. Crispe;) and Lord Eldon often gave utterance to his regret that the practice respecting it had been established as it is. 2 Madd. Chanc. 2d edit. 492, note s, Anon. 17 Ves. 418, Novosielski v. Wakefield; see also 19 Ves. 140, Reynolds v. Pitt. But in suits to foreclose, if the property mortgaged is ample security for the debt, (1 Hare 252, Geldard v. Hornby;) it is almost of course, (2 Ball & B. 97, Jesop v. King;) to grant a first enlargement for six, and a second for three months, upon the terms which will be presently mentioned. 17 Ves. 382, Monkhouse v. Corporation of Bedford; 2 Dan. Chanc. 1206, Perk. edit. In the first mentioned of the cases above, (Edwards v. Conliffe,) the time allowed by the master was six months; this was enlarged six months, then five months, then again three months, "but that was to be peremptory;" nevertheless another enlargement for three months was asked. The Vice-Chancellor said: "It requires a strong case to induce the court to make a fourth order, enlarging the time for the payment of mortgage money, decreed to be paid. If the defendant has done all he can to obtain the money, and has been baffled in his purpose by unexpected delays, and there appears a strong probability of the money being raisable within three months, the court would feel disposed to enlarge the time." And upon an affidavit, of the defendant's solicitor, making out such a case, it was done. The same indulgence, however, is not granted in suits to redeem, notwithstanding the absolute foreclosure which ensues when such a bill is dismissed on the ground of default of payment; (see note 9;) it being now considered as settled, that the court cannot in such cases extend the time even once. (17 Ves. 417, Novosielski v. Wakefield; 7 Sim. 319, Faulkner v. Bolton; 2 Ball & B. 563, McDonough v. Shewbridge; 4 Johns. Chanc. Rep. 76, Brinckerhoff v. Lansing; 141, Perine v. Dunn; 1 Woodb. 8 Min. 61, Jenkins v. Eldridge; 2 Madd. Chanc. 2d edit. 493; 2 Dan. Chanc. 1206-1207, Perk. edit. 1 Pow. Mortg. 6th edit. 403, note K; Coote on Mortg. 3d edit. 496; Set. Decr. 146;) unless upon circumstances raising an equity that would, in a distinct and independent suit, entitle the mortgagor to relief. See 2 Freem. (Hovend edit.) 129, Cocher v. Bevis; 1 Chanc. Rep. 253; 1 Chanc. Cas. 61, S. C. 17 Ves. 417, Tipping v. Hause, cited. Originally no terms seem to have been imposed as a condition of granting it; but afterwards it became the practice to require, that subsequent interest should be computed upon the whole aggregate amount reported, of principal, interest, and costs. 1 P. Wms. 453, Butler v. Duncomb; 653, Brown v. Barkham; Mosel. 246, Neal v. Att. Gen. 3 Atk. 722, Harris v. Harris; 2 Ves. Sen. 471, Bickham v. Cross; 1 Bro. C. C. 574, Perkyns v. Baynton; 2 Ves. Jr. 158-159, Cruize v. Hunter; 1 Jac. & Walk. 47, Turner v. Turner; 7 Sim. 483, Breure v. Wharton; see 2 Vern. 392, Bennet v. Edwards; 2 Eden. 201, Greenly v. Howe, cited. This, however,—only raising the price of redemption,—produced no beneficial effect to the mortgagee, wherever that was ultimately relinquished: For which reason, (as it would seem,) about the commencement of this century, (1 Moll. 151, Maghee v. Mahon; see 5 Bro. P. C. 2d edit. 201, 202, Lant v. Crispe; 9 Sim. 309, Nanfan v. Perkins, cited; the practice now prevalent was introduced, of requiring payment, either immediately or, under circumstances, at a short day, (2 Beav. 478, Eyre v. Hanson; 1 Hare 251, Geldard v. Hornby;) of the interests and costs already reported; (Coop. 28, Wakerell v. Delight; 9 Ves. 37, S. C. 17 Ves. 382, Monkhouse v. Corporation of Bedford; 1 Madd. Rep. 287, Edwards v. Cunliffe; Set. Decr. 142, S. C. 9 Sim. 304, Jones v. Creswicke;) which being paid, of course only the original principal is left to bear interest in any subsequent computation. 1 Keen 267, Wharton v. Cradock; 2 Keen 211, Brewin v. Austin; Coote on Mortg. 3d edit. 434-435; 2 Spence's Eq. Jurisd. 688.—It is said, in 2 Bland 371, Hammond v. Hammond: "It may be regarded as a general rule, here as in England, that where a debt is liquidated by an auditor's statement [master's report] confirmed, the whole carries interest from the date to which such confirmation relates; and so toties quoties as any new statement may be made;" the context shewing, that by "the whole" is meant the aggregate of principal and interest reported, and also costs in England though not in Maryland. See ibid. 367-384. But the authorities above cited shew, that the general rule in England has long differed from this representation of it, (see also Set. Decr. 60; 180-181, Smith v. Nelson; 2 Smith's Chanc. 2d edit. 346-348; 2 Dan. Chanc. 1442,

409 *(15)—but now, (16) upon default, a further order is necessary. This (which is called the final order) is 410 made "upon reading *the decree, the master's report, the order for confirming the same," and an affidavit shewing that the default has happened; (17) and it thereupon directs, in the former case, (18) "that the said defendant now be and stand absolutely debarred and foreclosed of and from all right, title, interest, equity, and benefit of redemption of, in, and to the said mortgaged premises;" in the latter, (19) "that the said plaintiff's bill stand dismissed out of this court, with costs to be taken by the said master pursuant to the said decree." Whereupon, if (20) no party necessary to be made has been omitted, the mortgagee becomes in equity, as before he was (21) at law, complete owner of 411 the estate; *(22) and thenceforth as

Perk. edit.) however much it does seem, during a considerable period of time to have accorded therewith. 4 Bro. C. P. 2d edit. 495, Kelly v. Bellew; 505, Bradshaw v. Astly; 8 Bro. P. C. 2d edit. 395, Stroud v. Moor; 14 Viner. 457, pl. 4, marg. S. C. 1 P. Wms. 480, Bacon v. Clerk; 1 Dick. 182, Bedford v. Coke; 1 Ves. Sen. 496, Astley v. Powis; 2 Eq. Abr. 529-530, pl. 1. 4, 9; 2 Fonbl. Eq. 5th edit. 439-440; 3 Pow. Mortg. 6th edit. 911-912; Coote on Mortg. 1st edit. 442-443, 2 Crabb on Real Prop. § 2222. See also 1 Moll. 151-152, Maghee v. Mahon; 2 Moll. 435, Bachelor v. Blake, and cases cited from MSS. in a note to it; 1 Johns. Chanc. Rep. 14, Connecticut v. Jackson; Hopk. 346, Hunn v. Norton; 5 Paige 546, Ryckman v. Parkyns; 1 Amer. Lead. Cas. 2d edit. 536. The modern English is the same with the Virginia rule, as that was expounded on the second appeal in Snickers v. Dorsey, (S. C. on the first appeal, 2 Munf. 505:)—argued by Tucker for the appellant, and Nicholas for the appellee, before Judges Brooke, Coalter and Green;—who "decided that where a commissioner reports an account shewing a balance composed of principal and interest, the decree should not give continuing interest on the aggregate, but on the principal sum only." Judge Green's MSS. See Franc. Max. (Hen. edit. 92. n, 1 Tuck. Comm. B. 2, p. 113, 379, edit. 1836; 1 Lom. Dig. 375; 4 Gratt. 43, Cunningham v. Cunningham; 343, Morris's adm'r. v. Morris's adm'r. The cases of Chamberlayne v. Temple, 2 Rand 384; Beall v. Silver, 2 Rand. 401; and Laidley v. Merrifield, 7 Leigh 346, stand upon ground which is clearly distinguishable. Where the balance consisted of interest entirely, which was found due at a day long anterior to the commissioner's report, and the circuit court decreed payment of it with interest from that anterior day; the decree was (by a special court of appeals) reversed, and the cause remanded with instructions to allow interest upon the sum so due (not from that day, nor from the date of the commission's report, nor even from that of the reversed decree which confirmed the report, but) from the date of the final decree, whenever it should be made. 10 Leigh 628, Dunbar's exr's v. Woodcock's ex'r; see 9 Leigh 488-490, Handley v. Snodgrass. And the rule has been at least intimated to be the same, respecting estimated rents, hires and profits: (9 Leigh 729, Shields v. Anderson;) which, in their own nature, are not interest bearing subjects, 5 Leigh 561, Payne v. Graves; 6 Leigh 38, Roper v. Wren; see 1 Manf. 183, Dilliard v. Tomlinson; 557, Whiteborn v. Hines; 5 Munf. 240, Carter's exr's v. Cutting; 492, Baird v. Bland; 1 Rob. Va. Rep. 206-207. Garrett v. Carr; 2 Rob. Va. Rep. 639, 654, Hickerson's adm'r v. Helm.

(15) That this was so, as much in the one case as in the other, see note 9. It is erroneously said, 1 Tuck. Comm. B. 2, p. 122, edit. 1836, that "the old idea," upon this point, "seems justly reprobated by late adjudications." The case there cited from 18 Ves. 460, (Hansard v. Hardy,) was one of a bill to redeem dismissed for want of prosecution, not for default of payment at the time set for it by the master; and Sir Wm. Grant, in delivering his opinion in it, adverts expressly to the distinction.

(16) 1 West's Hardw. 130, Sheriff v. Sparks; 2 Ves. sen. 450, Senhouse v. Earl; 1 Madd. Rep. 269, Quarrell v. Beckford; 2 Phill. 593, Ford v. Wastell; 2 Dan. Chanc. 1203-1205, Perk. edit. 1 Rob. Va. Rep. 39-41, Cocke's adm'r v. Gilpin. See Mosel. 364, Garrett v. Evers; which is unaccurately represented both in the reporter's marginal abstract, and in 2 Pow. Mortg. 6th edit. 423 a. 668, as if the decree had been nisi or by default.—This, as an existing practice, (whether or not then regarded as necessary,) may be distinctly traced from a period at least as early as the time of Lord Clarendon. 2 Freem. (Hovend. edit.) 15, Sherman v. Cox; Finch 408, S. C. (which is also, but as to this matter less perfectly, reported in Nels. 71, and 3 Chanc. Rep. 88;) 5 Bro. P. C. 2d edit. 182, Tooke (Bishop) v. Ely.

(17) 1 Newl. Chanc. 2d edit. 343-344; 1 Smith's Chanc. 2d edit. 539-540, Sudell v. Lewis; 1 Coll 273, Anon.

(18) Set. Decr. 143, Wyndham v. Skylling; 4 Madd. Rep. 449, Thompson v. Grant; Hand's Pract. 193, 195.

(19) Set. Decr. 147, Steward v. Worrall; 1 Bro. C. C. 581, S. C. 7 Sim. 319, Faulkner v. Bolton; McClel. & Younge 567, Jones v. Roberts; Hand's Pract. 197. See 2 Munf. 352, Davison v. Waite; 1 Tuck. Comm. B. 2, p. 121, edit. 1836.

(20) 5 Conn. Rep. 531, Swift v. Edson; 3 Pow. Mortg. 979 a, note 1, Rand's edit.

(21) From the time of the mortgage deed being executed, the legal estate is in the mortgagee, (Coote on Mortg. 3d edit. 6; 2 Crabb on Real Prop. § 2211:) subject to be defeated by performance, or what is, for this purpose, tantamount to performance, (Co. Litt. 209 a—209 b;) in due time, (5 Rep. 114, a, Wade's case; 14 Sim. 427, Brown v. Cole:) of the condition; failing which, it forthwith becomes absolute in him. 2 Blackst. Comm. 158; Wms. Real Prop. 331-333; 2 Spence's Eq. Jurisd. 614-615. And after that neither payment of the debt and interest, (6 Ad. & Ell. 479, Dunn v. Massey;) nor even cancellation of the mortgage deed, (1 Atk. 520, Harrison v. Owen; 1 West's Hardw. 528, S. C. See 10 Leigh 57, Graysons v. Richards 6 Hill 460, Raynor v. Wilson;) will be sufficient to restore it (the legal estate) to the mortgager; but a conveyance, either actual, (1 Scho. & Lefr. 176-177, Schoole v. Salle; 4 Madd. Rep. 186, Wood v. Williams; 3 Russ. 476, Scott v. Nicoll; 3 Pow. Mortg. 6th edit. 970 a, note N; 2 Spence's Eq. Jurisd. 707;) or presumed, (2 Sim. & Stu. 154, Cooke v. Soltair; 3 Sim. 603, Noel v. Bewley. See Buller 110, Wilson v. Witherby; Barn C. C. 93, Richards v. Syms; 5 Taunt 170, Doe v. Calvert;) of the mortgagee's title is necessary. See Paige 347-348, Merritt v. Lambert.—This doctrine, founded (as it would seem,) in the clearest manner, upon the plainest principles, has yet been received, on this side of the Atlantic, with various decrees of acceptance. See 1 Pow. Mortg. 109, notes 1 and 2; 109 a, note 1, Rand's edit. 4 Kent's Comm. 140, 154-157, 164-166, 193-196; 2 White & Tud. Eq. Cas. (Americ. edition.) part 447; and, besides the cases collected in those books, 1 Peters 441, Conard v. Atlantic Ins. Comp. 17 Peters 48, Brownson v. Kinzie; 2 Chipm. 100, Briggs v. Fish; 6 Hill 65, Arnot v. Post; 2 Denio 344, S. C. In Virginia, subject only to some slight (if indeed any) modification by the legislature, (Sess. Acts 1830-1831, ch. 11, (Supp. R. C. 1819, ch. 109.) Sect. 65; V. C. 1849, ch. 135, sect. 21; see 3 Gratt. 283, Davis v. Teays;) it obtains in its whole extent; (1 Tuck. Comm. B. 2, pp. 100, 109, edit. 1836; 4 Rand. 245, Faulkner's adm'x v. Brockenbrough;)—the marginal abstract of Towler v. Buchanans, Hastie & Co. 1 Call 187, which seems contra, being in this respect altogether mistaken. In the case of Faulkner's adm'x v. Brockenborough, the property mortgaged was personal, to wit, a slave, which was said (4 Rand. 249.) not to make any difference: but its being of that description, seems to render the remark important, that the payment, which in the case was held not to destroy the mortgagee's legal title, was made by a surety for the debt, and not by the mortgagor. See 5 N. Hampsh. Rep. 252, Willard v. Harvey. Had it been made by the latter, and with a design to revest the legal title in him; then, it seems, though made after the day appointed in the condition, it would have had that effect, inasmuch as the title to such property is capable of being transferred by parol. 2 Pick. 207-208, 210-211, Parks v. Hall; 4 Bibb 453, Blanchard v. Kenton; 1 Port. 423, Harrison v. Hicks; 5 Ired. 475, Alexander v. Springs; 2 Rob. Va. Rep. 280, Tavenner v. Robinson.

(22) 3 Ves. & B. 45, Silberschildt v. Schiott; 4 Madd. Rep. 438, Thompson v. Grant; 5 Sim. 384, Le Gros v. Cockerel; 2 Pow. Mortg. 6th edit. 423 a—426, note P; 1 Rob. Va. Rep. 40-41, Cocke's adm'r v. Gilpin.

against (but only (23) as against) the parties to the suit and all persons claiming under them by title originating pendente lite, (24) it is irredeemable; (25) unless the court shall, as it may, for good cause, still permit a redemption, (26) or unless the mortgagee
412 shall, by some act of *his own, reopen the foreclosure. (27) This, as a matter of course, he does by taking ulterior proceedings to recover the debt, (28) if at that time the estate is in his possession or power. (29) And in such case he is allowed to recover, in like manner as if he had not foreclosed; (30) but, at least where the mortgaged subject is real estate, if he has sold it or otherwise put it beyond his power to reconvey, the court of chancery will not permit payment to be coerced, of even so much as would remain of the debt, after deducting either the proceeds of actual sale, or a fair valuation of the property mortgaged. (31) Subject only to this restriction, he may put in force, either at the same time, (32) or in succession, (33)
413 all his remedies for his *debt; (34) and in some cases (35) he may compel, if he chooses, a decree for a sale instead of a foreclosure, but ordinarily the mortgagor, (36) and in all cases the mortgagee, (37) can his pleasure insist, with

(23) Nels. 71. Sherman v. Cox; Finch 406; 2 Freem. 13; 3 Chanc. Rep. 83, S. C. 1 Chanc. Cas. 299, Needler v. Deeble; Chanc. Cas. 170, Greswold v. Marsham; Lew. Trusts, 530, note q. S. C. 2 Vern. 185, Lomax v. Hide; 601, Godfrey v. Chadwell; 863, Morret v. Westerne; 9 mod. 153, Soley v. Salisbury; 1 Jac. & W. 197, Harvey v. Tebbutt; 1 Scho. & Lefr. 386, Giffard v. Hort; Dow 18, Gore v. Stacpoole; 1 Moll. 42, Dick v. Butler; 2 Moll. 503, Ormsby v. Thorpe; 3 Johns. Chanc. Rep. 459, Haines v. Beach; 1 Dana 25, Cooper v. Martin.

(24) 2 Atk. 175, Garet v. Ward; 11 Ves. 194, Bishop of Winchester v. Paine; 3 Ves. & B. 206-207, Metcalf v. Pulvertoft; 2 Ball & B. 170, Gashell v. Durdin; 2 Spence's Eq. Jurisd. 705-707; see 5 Johns. Chanc. Rep. 89, Cooke v. Mancius; 2 Rand. 93, Newman v. Chapman; 5 Gratt. 259, Philips v. Williams; 8 Paige 83, Van Hook v. Throckmorton.—The case of Crisp v. Heath, 7 Viner 52, is (in effect) overruled; see 3 Pow. Mortg. 6th edit. 991, note C.

(25) 3 Bro. P. C. 2d edit. 558, Wichaise v. Short; 7 Viner 398, pl. 15, S. C. 1 Dick. 65, Mallock v. Galton; see 1 Chanc. Cas. 217, Roscarrick v. Barton; 2 Vern. 518, Draper v. Clarendon; Ambl. 564, Reynoldson v. Perkins; 3 Pow. Mort. 6th edit. 972-975, 1008 a 1010.

(26) This has been done, after the "final order" made and enrolled, not only where a new bill has been exhibited, for relief against the foreclosure upon some distinct ground of equity, (5 Bro. P. C. 2d edit. 213, Burgh v. Langton; 2 P. Wms. 73, Loyd v. Mansall; 1 How. Exch. Eq. 423, Coote v. Reilly, see Gilb. Eq. Rep. 185, Floyd v. Mansell; 7 Viner 399, pl. 20, & marg. 3 Pow. Mortg. 6th edit. 996 a, 1007 a, but even upon motion in the (seemingly terminated) foreclosure suit; and that, not only where a flaw has existed in the proceedings, (9 Sim. 311, Crompton v. Effingham, cited,) but even (in a recent instance, admitted to be the first of the kind on record,) where the sole ground of the application was the great hardship of the case. 2 Phill. 591, Ford v. Westell; 6 Hare 229, S. C. See Coote on Mortg. 3d edit. 496, 497; 2 Spence's Eq. Jurisd. 687.

(27) The next sentence of the text comprehends all the cases I have been able to find, wherein this consequence has, in England, ensued from anything done by the mortgagee after the foreclosure was completed. Writers have used language importing that there might exist other cases; (3 Pow. Mortg. 6th edit. 1007 a; Coote on Mort. 3d edit. 497; 2 Spence's Eq. Jurisd. 683;) and attempts have been made at setting up such, but uniformily (so far as my researches have reached) without success there. 7 Viner 398, Wishall v. Short; 3 Bro. P. C. 2d edit. 558, S. C. 5 Bro. P. C. 2d edit. 181, Tooke v. Bishop of Ely; 183, Stuteville v. Dolbers, stated; Sel. Cas. Ch. temp. King 10, S. C. cited. The case of Cook v. Sadler, 2 Vern. 235, does not seem to be an exception. See 3 Pow. Mortg. 6th edit. 1000-1001. In New England, see 8 Verm. Rep. 164, Converse v. Cook; 11 N. Hampsh. Rep. 474, Deming v. Comings; 10 Metc. 344, Lawrence v. Fletcher.

(28) 1 Eq. Abr. 317, Dashwood v. Blythway; Mosel. 196, S. C. 1 Ves. junr. 433-434, Lyster v. Dolland; 1 Pow. Mortg. 6th edit. 15, note L; 2 Foubl. Eq. 5th edit. 277; 1 Tuck. Comm. B. 2 p. 114, edit. 1836; see Gilb. Eq. Rep. 186, Birch's case; 16 Viner 362, pl. 5; 3 Pow. Mortg. 6th edit. 1086 a; Pract. Reg. Chanc. 158, Wyatt's edit. 2 Dev. Eq. Rep. 166, Bissell v. Bozman; Mass. Rev. Stat. ch. 107, sect. 33.

(29) 3 Pow. Mortg. 6th edit. 1006 a, note I; see 11 Ves. 194, Bishop of Winchester v. Paine.

(30) 2 Dick 551, Aylet v. Hill; 3 Pow. Mortg. 6th edit. 1005, note I; 2 White & Tud. Eq. Cat. (Americ. edit. 2 part, 424; see Gilb. Eq. Rep. 186,) Birch's case. n Con necticut it was formerly held, that when the mortgagee had completed his foreclosure, he had made his final election; after which the debt, with all its securities, was extinct both at law and in equity; so that thenceforth he must have been satisfied with the mortgaged subject, however inadequate to the debt; (2 Swift's Syst. 440; Kirb. 255, Colt v. Fitch; 1 Root 181, Stores v. Snow; 202, McEwen v. Welles; 3 Conn. Rep. 62, Derby Bank v. Langdon; 5 Conn. Rep. 531, Swift v. Edson;) but, in 1833, the law there was altered, in this respect, by statute, 4 Kent's Comm. 6th edit. 181, note d; see 18 Conn. Rep. 181, Bassett v. Mason. See also 1 Wash. 198, arg. Payne v. Dudley; 2 Blackf. 243, Grouse v. McCreary; 268, Markle v. Rapp; 10 New Hampsh. Rep. 466, Hunt v. Styles; 1 Alab. Rep. 1708, Doe v. McLosky.

(31) 8 Ves. 527, Perry v. Barker; 13 Ves. 197, S. C. 9 Beav. 349, Lockhart v. Hardy; 2 Spence's Eq. Jurisd. 347, 682-683; see 2 Freem. 87, Thexton v. Betts; 2 Bro. C. C. 125, Tooke v. Hartley; 2 Dick. 785, S. C. Eden on Inj. 59-62, edit. N. Y. 1839, Drewr. Inj. 68-70; 3 Pow. Mortg. 1001-1006 a, Rand's edit. Coote on Mortg. 3d edit. 496; 4 Kent's Comm. 182-183.

(32) 2 Dougl. 417, Burnell v. Martin; 2 Anstr. 497, Rees v. Parkinson; 3 Smith 516, Colby v. Gibson; see 1 Scho. & Lefr. 176, Schorle v. Salle; 1 Pow. Mortg. 6th edit. 16, note L; 204, & note I; Coote on Mortg. 3d edit. 342, 497-498; 2 Spence's Eq. Jurisd. 646; 4 Kent's Comm. 183; 1 Tuck Comm. B. 2, p. 118, edit. 1836.

(33) 2 Russ. & M. 76, Davis v. Battine; 1 Hare 423, Dyson v. Morris; see Kirb. 254, Colt v. Fitch; 1 Root. 201, McEwen v. Weller, 2 Conn. Rep. 358; Findlay v. Hosmer.

(34) Of course he is not allowed more than one satisfaction of his debt and interest. 2 Spence's Eq. Jurisd. 682-683; 2 Swift's Syst. 440.

(35) Of these cases an enumeration has been attempted, with differing results by different writers: Ambl. 17, note 7 by Blunt; 2 White & Tud. Eq. Cas. (Americ. edit.) 2 part 422; 3 Pow. Mortg. 6th edit. 1016, note T; Coote on Mortg. 3d edit. 493-495; 2 Crabb on Real Prop. § 2286; 1 Lom. Dig. 401; Set. Decr. 173-174; Whitw. Eq. Prac. 394; note Z; 2 Spence's Eq. Jurisd. 676-678, 791-793; 2 Stor. Eq. Jurisp. § 1026.—In point of fact (so far as the books inform us) a decree for a sale has almost never been made, in England, unless to wind up the affairs of a bankrupt, (in which case more commonly the proceeding is under Lord Ruslyn's order, 4 Bro. C. C. 550-551;) or a decedent whose personal estate is insufficient for the payment of all his debts, or in the case of an infant, or of an equitable mortgage by the deposit of the title papers; and it is in these cases only, that anything can be learned, from what is in print, concerning the method of proceeding there, when a sale is decreed. In the last of them alone, as it would seem, (see Set. Decr. 173, Geary v. Geary; 274, Pace v. Marsden;) is time for redemption given; (Set. Decr. 180, Smith v. Nelson; 1 Keen 16; Meller v. Woods; 2 Spence's Eq. Jurisd. 793;) and in that case, upon default, a "final order" (to sell) is made, in like manner as "final orders" (to foreclose or dismiss) in the ordinary course of proceeding. Set. Decr. 181, Smith v. Nelson. No case has been found of this discription, in which an enlargement was asked of the time appointed by the master for payment.

(36) 3 Pow. Mort. 6th edit. 1016, note T; Coote on Mortg. 3d. edit. 498; 1 Dan. Chanc. 332, Perk. edit. Adams on Eq. 120; 2 Stor. Eq. Jurisp. § 1026; see 2 Blackst. Comm. 159; 1 Steph. Comm. 284; Whitw. Eq. Prec. note Z.

(37) See notes 1 and 5; 1 Madd. Chanc. 2d edit. 532, Anon 2 Spence's Eq. Jurisd. 679.

effect, on a strict foreclosure as the sole alternative to redemption. (38)

In Virginia, the settled and long established practice is widely different. (39)

Here in every case of this kind, un-
414 less the *parties by their agreement render such a reference needless, an interlocutory decree directs that an account be taken by a commissioner, of what is due for principal and interest upon the mortgage; which being reported, and the report (after it has undergone all necessary corrections) being confirmed, then follows (40) another decree. By this latter the court appoints a day, (41)—which ought to be a reasonable time, (42) and is usually six months, (43) but may be less, (44) or
415 (perhaps in *some cases) more, (45) from the date of the decree,—on or before which the party wishing it may redeem, by paying the amount thus ascertained to be due, with costs, (46) which

(38) In Dashwood v. Bathazey, as reported in Mosel. 196, the "solicitor general, for the plaintiff, prayed a decree for a sale, instead of a foreclosure because the security was defective; and if they should afterwards sue the defendant on his bond for performance of covenants, that would open the decree of foreclosure; [see note 28;] and he insisted that such decrees were usual. But the Master of the Rolls said, he had never known any; but where the security was defective, it was often indeed referred to a master to set a valuation on the estate, and the plaintiff was to take it pro tanto; as in the case of Homden versus Tilby, on a bill of foreclosure of the shops in Westminster Hall." See 3 Pow. Mortg. 6th edit. 10166; Coote on Mortg. 3d edit. 494; 1 Tuck. Comm. B. 2, pp. 114, 122, edit. 1836. "It is presumed," says a learned writer, "this was only meant to be admissible if both parties consented" 2 Hovend. Fraud. 202. No report of the case cited by the Master of the Rolls, nor other account of it than that which he gives, at least on this point, (see 1 Dick. 20, Holmden v. Tilly, which may be the same case on a different point;) nor any further trace of the practice he mentions, ie (I believe) to be found in the books. If it ever existed as a compulsory mode of proceeding, it seems to have become as such long since obsolete, in England. See most of the authorities before cited, and particularly those in notes 28-31.

(39) Concerning the other states of the Union, from the reports of some of which there are authorities cited in these notes, it may be said, in general, that a procedure, similar in its character and effects to that which we have been considering, prevails in New England; and out of it another, resembling, but with some variability, that of which a delineation is about to be attempted in the text. See 4 Kent's Comm. 180-181; 2 Kinne's Law Comp. 198; and references thence. In both of these books it is said, that the practice of a strict foreclosure has been followed in North Carolina; one instance of which occurs in 1 Hayw. 482, Anon. But more recently the course there has been, upon bills for foreclosure, (not upon bills for redemption, see ante note 5;) to decree a sale, if either party desires it, (2 Dev. Eq. Rep. 66, Blackledge v. Nelson;) otherwise, a strict foreclosure. 2 Dev. & Batt. Eq. Rep. 393, Green v. Crockett. As to the practice in this respect, which may have obtained at one time in Virginia, see 1 Wash. 198, arg. Payne v. Dudley.

(40) See Hopk. 306, Gardiner v. Garniss; 5 Monr. 249, Chaney v. Cook. In general, it is error to decree a sale of real estate, before ascertaining the amount of the debt for which it is to be sold; (6 Gratt. 42-43, Smith v. Flint; see 5 Leigh 370, Gibson's heirs v. Jones; 11 Leigh 547, Wilkins v. Gordon; 583, Clarke v. Curtis;) or of each incumbrance made known to the court, where there are several (see 1 Tuck. Comm. B. 2, pp. 119, 120, edit. 1836; 6 Monr. 267, Smith v. Payton; 7 B. Monr. 104, 105, Chaplin v. Foster;) at least if it is a junior incumbrancer that asks the decree. See 6 Rand. 644, Cole's admr v. McGrae.—In the Chancery Court of New York it was held formerly that the amounts of all incumbrances on mortgaged premises must be reported by the master, before a sale would be ordered, even where the first incumbrancer was complainant and desired it; and this, though the amount due to a junior incumbrancer defendant was litigated by another defendant, and there was no question as to the amount due to the complainant. Hopk. 277, Renwick v. Macomb; 4 Paige 85, 87, Union Ins. Comp. v. Van Rensselaer. But the practice there was afterwards changed in this particular, by certain orders of that court. 9 Paige 545 and-546, Farmers Loan & Trust Comp. v. Seymour; 10 Paige 397, Tower v. White. As to personal, and especially perishable, property, see 6 Rand. 644, Cole's adm'r v. McRae; 11 Leigh 582, Clarke v. Curtis.

(41) It is error to decree an immediate sale, at least of real estate; (see 2 Rob. Va. Rep. 474, 484, Wade's heirs v. Greenwood; 6 Gratt. 44, 49, Kyles v. Tait's adm'r; 7 Monr. 548, Durrett v. Whiting; 7 J. J. Marsh. 247, Ferril v. Combs; 1 B. Monr. 197, Christopher v. Blackford; 2 B. Monr. 61, Woodard v. Fitzpatrick;) or to give an indefinite time for redemption. 3 Munf. 66, 68, Turner v. Turner; 7 Paige 168, Waller v. Harris.

(42) See 3 Leigh 240, Mut. Ass. Soc. v. Stone; 6 Gratt. 331, Hudgin v. Hudgin's ex'r; 5 Litt. 88, Skinner v. Miller; 6 Monr. 129, Jones v. Froman.

(43) 1 Lom. Dig. 403. Months, in these cases, are computed as calendar, not lunar. 1 Tuck. Comm. B. 2, p. 123, edit. 1836; see ante note 2; 5 Gratt. 285, Brewer v. Harris; 3 Johns. Chanc. Rep. 74, Stachkouse v. Halsey.

(44) 11 Leigh 294, Harkins v. Forsyth; see 4 Johns. Chanc. Rep. 140, Perine v. Dunn; 1 Bibb 528-529, Barnes v. Lee. Giving one dey will not be sufficient. 7 B. Monr. 386, Richardson v. Parrott's heirs. In Harkins v. Forsyth, and several subsequent cases, (2 Gratt. 50, Taylor's admr. v. Spindle; 359, Bentley v. Harris's adm'r, 6 Gratt. 452, Shackelford v. Apperson;) which, though not upon mortgages, yet seem analogous in this respect, the time allowed was thirty days; see also 3 Gratt. 270, Kniseley v. Williams. In other cases it has been sixty days, (2 Gratt. 359, Bentley v. Harris's adm'r, as to some of the parties; 3 Gratt. 246, Hanna v. Wilson; see also 1 Rob. Va. Rep. 159, Breckenridge v. Auld;) ninety days, (6 Gratt. 49, Kyles v. Tait's adm'r;) three months, (3 Leigh 302, Kelso v. Blackburn; 10 Leigh 98, Manns v. Flinn's admr.; 3 Gratt. 156, Vanmeter's ex'rs v. Vanmeters;) four months; (3 Leigh 171, Jackson v. Ligon; 4 Gratt. 286, Henkle's ex'r v. Allstate;) or till a particular day named, (10 Leigh 398, McClung v. Beirne; 11 Leigh 143, Huston's adm'r v. Cantril;) or the first day of the succeeding term. 1 Rob. Va. Rep. 243) Campbell v. Bowen's adm'rs. This last mentioned is the ordinary course in Kentucky; see note 47.

(45) See 3 Bland 194, n. Jones v. Betsworth; 196, n. Carroll v. Belt; 2 Harr. & G. 94, David v. Grahame; 17 Peters 48, Bronson v. Kinzie.—Concerning subsequent enlargement of the time there is (it is believed) no Virginia decision in print. It has been said, (1 Tuck. Comm. B. 2, p. 123, edit. 1836; see also 1 Lom. Dig. 403:) that "it is never afterwards enlarged;" for which reference is made to 4 Johns. Chanc. Rep. 140, Perine v. Dunn. Undoubtedly the remark of Chancellor Kent in that case is correct, that the very lax english "rule" in cases of foreclosure "does not apply to cases of decrees for the sale of the mortgaged premises, according to our usual practice." See ante notes 14 and 35. But under special circumstances causing some degree of stagnation in the money market, Chancellor Kent himself, in one case, (1 Johns. Chanc. Rep. 310, Astor v. Romayne;) and his immediate predecessor, in another, (1 Johns. Chanc. Rep. 311, Corp. v. Macomb, cited;) postponed sales under such decrees, the former eight weeks, and the latter about four months, beyond the time advertised for them; which, in effect and in principle, seems to be the same as extending the time for redemption. And it has been asserted by the Kentucky Court of Appeals, in one case, (1 Monr. 66, Downing v. Palmateer;) that this time "is sometimes, under extraordinary circumstances, lengthened;" and in another, (5 Monr. 80, Martin v. Wade's ex'rs;) that it "may, on good cause shewn in special cases be enlarged."

(46) 3 Munf. 66, Turner v. Turner; 1 Tuck. Comm. B. 2, p. 125, edit. 1836, Davidson v. Waite; see ante note 6.—These costs, (Kirb. 231, Bradley v. Hitchcock;)—which are those of the pending suits,—and also the costs of any proceedings at law, that are proper, (see 9 Sim. 366, Lewis v. John;) to recover or secure the debt, (3 Russ. 458, Ellison v. Wright; 1 Monr. 222, Hunt v. McConnell; Coote on Mortg. 3d

the clerk is to tax; and, at the same time, (47) whether the suit is for foreclosure or for redemption, (48) it is further de-
416 creed prospectively, *that, in the event of the mortgaged premises not being so redeemed, they shall be sold at public auction, in the manner and upon the terms therein particularly mentioned. These terms may, (49) and at least as to part of the proceeds, (50) especially where it is real estate that is to be sold, (51) unless under special circumstances, must, (52) be on a credit. In default of redemption, the sale, without any further order of the court, is made, after due advertisement (53) of the time and place and terms of it, by commissioners or a single commissioner appointed in the decree for
417 the purpose, (54) or *when no such commissioner is appointed, by the sheriff or serjeant that attends the court, unless the place of sale be out of his county or corporation, and in that case it is made by the sheriff of the county wherein the place of sale is, or, if the place be in a corporation, by the serjeant thereof, or the sheriff of the county which includes such corporation, as the court may direct; (55) whose proceedings being reported,—either the sale is upon the debtor's, (56) the creditor's, (57) or the purchaser's, (58) application, and for good cause shewn, set aside, in which case, unless the creditor be satisfied otherwise, a resale is ordered as a matter of course, and so toties quoties, (59)—or it is confirmed. (60) When that is the

edit. 385-386;) are as much a lien on the mortgaged subject, as the principal and interest are; but the costs last mentioned are not, like the former, to be taxed by the clerk, but must be reported by the commissioner; and for that purpose, wherever an allowance of them is proper, the decree for accounts should contain a direction, either special or general, to that effect. Set. Decr. 140, note 1. See 2 Spence's Eq. Jurisd. 813.

(47) In this respect the Kentucky practice differs from ours, and approaches more nearly the model of that which prevails in England. See 1 Monr. 66, Downing v. Palmateer; 5 Monr. 79-80, Martin v. Wade's ex'rs; 6 Monr. 129, Jones v. Froman; 7 Monr. 548, January v. January; 548, Durrett v. Whiting; 2 J. J. Marsh. 117, Oldham v. Halley; 4 J. J. Marsh. 557, Halsteads v. Bank of Kentucky; 5 J. J. Marsh. 250, Hanks v. Greenwade; 398, Thompson v. Taylor; in all which cases decrees of the courts below have been either reversed or censured for following, in this particular, the practice established here,—too firmly now to be shaken. See (inter alia) the references in the next note.

(48) 1 Tuck. Comm. B. 2, p. 123, edit. 1836; 1 Lom. Dig. 400-401. See, for forms of decrees, more or less perfectly reported,—in suits to foreclose 1 Wash. 4, Graves v. Groves; 2 Hen. & M. 589, Ellzey v. Lane's ex'x; 596, Allen v. Belches; 4 Munf. 125, Fairfax v. Muse's ex'rs; 353, Taylor v. Cole; 5 Munf. 423, Wood's ex'r v. Hudson; 6 Munf. 442, Bumgardner v. Allen; 485, Anderson's adm'r v. Davies's adm'r; 524, Mays v. Tompkins; 1 Leigh 298, Crews v. Pendleton; 3 Leigh 368, Doswell v. Buchanan's ex'rs; 7 Leigh 350, Laidley v. Merrifield; 11 Leigh 298, Harkins v. Forsyth;—in suits to redeem, 2 Call 432, Robertson v. Campbell; 2 Munf. 532, Davison v. Waite, 5 Munf. 422, Southgate v. Taylor; 1 Rob. Va. Rep. 159, Breckenridge v. Auld; 5 Gratt. 350, Woodson v. Perkins. In all these and in all other decrees of the kind which I have ever seen in Virginia, there is (besides the deviation from english practice hinted in the last preceding note,) an uniform omission of one thing which such decrees in England uniformly contain, namely, provision for a re-conveyance in case the terms of redemption be complied with. See 1 Rob. Va. Rep. 23, Cock's adm'r v. Gilpin—which was not a case of mortgage, though the decree closely resemble that which is usually entered in such cases. (ibid. 49-50:) 1 Wash. 128, Thompson v. Davenport. This defect, however, if it be one, would probably be supplied by making a further decree on motion whenever occasion arose for it.

(49) R. C. 1819, ch. 66, sect. 41; V. C. 1849, ch. 178, sect. 1. This power of decreeing a sale on credit was first given by Act of 12 February 1814, Sess. Acts, ch. 17, sect. 2. That without such an enactment the courts were destitute of such power, see 3 Bland 194-195, n. Jones v. Betsworth; Hopk. 594, Sedgwick v. Fish; 3 Smed. & M. 516, Tooley v. Gridley; See further 4 Munf. 125, Fairfax v. Muse's ex'rs; 7 Monr. 544, January v. January; 2 J. J. Marsh. 117, Oldham v. Halley.

(50) The charges of sale may be properly required to be paid in cash; (11 Leigh 143, Huston's Adm'r v. Cantril; 2 Rob. Va. Rep. 718, Shirley v. Mut. Ass. Soc.) and are, I believe, ordinarily.

(51) As to personal property, see 6 Rand. 644, Cole's adm'r v. McRae, 5 Gratt. 86, 87, McNew v. Smith; 350, Woodson v. Perkins.

(52) 6 Leigh 196, Tennent's heirs v. Pattons; 11 Leigh 83, Hagey's heirs v. Birchetts; 579, 583, Clarke v. Curtis; 6 Gratt. 92, Alford v. Helms; 188, Reynolds v. Bank of Virginia.—Under special circumstances the sale may be decreed to be made for cash (2 Gratt. 50, 72, Taylor's adm'r v. Spindle;) but then, to justify the decree, the circumstances must appear in the record. 12 Leigh 382, Brien v. Pittman & Co.; 2 Rob. Va. Rep. 484, Wade's heirs v. Greenwood; 6 Gratt. 49, Kyles v. Taite's adm'r. However, if credit be given, it seems that it shall be presumed to be not unreasonably short, unless the party complaining introduces (if it does not already find) upon the record facts to shew that it is. 10 Leigh 401, McClung v. Beirne; see also 3 Gratt. 149, 164-165, Vanmeter's ex'rs v. Vanmeters. As to the time of credit, which under various circumstances has been allowed, in judicial sales of real estates, see (besides the cases cited above) 11 Leigh 143, Huston's adm'r v. Cantril; 1 Rob. Va. Rep. 159, Breckenridge v. Auld; 2 Rob. Va. Rep. 301, Buceles v. Lafferty's legatees; 718, Shirley v. Mut. Ass. Soc. 1 Gratt. 9, Bailey's adm'x v. Robinsons; 3 Gratt. 246, Hanno v. Wilson; 270, Kniseley v. Williams; 5 Gratt. 87, McNew v. Smith; 6 Gratt. 452, Shackelford v. Apperson.

(53) This should pursue the decree,—which with us, I believe, always directs the manner of making it; (see 1 Bibb 529, Barnes v. Lee; 6 Monr. 129, Jones v. Froman; 1 Green's Chanc. Rep. 182, Merwin v. Smith; 311, Coxe v. Halsted:) and should in its turn be pursued, 6 Gratt. 339, Talley v. Starke's adm'x. For the practice in England, see 2 Dan. Chanc. 1449-1450, Perk. edit.

(54) V. C. 1849, ch. 178, sect. 1.

(55) V. C. 1849, ch. 178, sect. 2.

(56) See 4 Munf. 124, Fairfax v. Muse's ex'rs; 1 Rob. Va. Rep. 42, Cocke's adm'r v. Gilpin; 3 Johns. Chanc. Rep. 290, Williamson v. Dale, (in the marginal abstract of which "mortgagee" is misprinted for "mortgagor:") 10 Paige 487, Billington v. Forbes; 2 Bland 42-43, n. The State v. Brookes. It may be done on the application of others having a common interest with the debtor, as (for example) a subsequent incumbrancer under him, (1 Green's Chanc. Rep. 214, Seaman v. Riggins; 26 Wend. 143, Tripp v. Cooke;) or a creditor by judgment against him; (9 Paige 259, Americ. Ins. Comp. v. Oakley; 11 Paige 201, May v. May; see 4 Munf. 251, Quarles v. Lacy;) or even of friends acting for his benefit. 2 Paige 99, Duncan v. Dodd; see 3 Bland 644, Andrews v. Scotton.

(57) 2 Paige 339, Requa v. Red. See also 4 Sanf. Chanc. Rep. 582, Hoppock v. Conklin.

(58) 6 Gratt. 340, Talley v. Starke's adm'x. For various grounds on which, at the instance of a purchaser, the sale may be set aside, see 1 Paige 120, McGown v. Wilkins; 2 Paige 586, Morris v. Mowatt; 7 Paige 387, Jackson v. Edwards; 22 Wend. 498, S. C. 8 Paige 656, Seaman v. Hicks; 1 Edw. Chanc. Rep. 577, Laight v. Pell; 2 Harr. & G. 390, Weems v. Brewer; 2 McCord's Chanc. Rep. 159, Gordon v. Sims; 6 B. Monr. 274, Shiveley's adm'r v. Jones; 2 Moll. 561, Magennis v. Fallon.

(59) See 2 Smith's Chanc. 2d edit. 215-216; 2 Dan. Chanc. 1472, Perk. edit. 5 Munf. 423, Wood's ex'r v. Hudson; 6 Munf. 526, Mayo v. Tomkies.

(60) Till then the sale is only inchoate. (1 Rob. Va. Rep. 39, Cocke's adm'r v. Gilpin; 10 Smed. & M. 164, Gowan v. Jones; see 4 Leigh 373, Heywood v. Covington's heirs; 3 Smed. & M. 498, Tooley v. Gridley, & al. 1 Smed. & M. Chanc. Rep. 518 S. C. nom. Tooley v. Kane; though when it is perfected, the rights of the parties under it relate to the close of the biddings, and are the same as if it had been at that moment consummated; see 1 Leigh 297, Crews v. Pendleton;

case, the terms of the sale being
418 *complied with, the court gives the
purchaser possession, (61) and eventually (62) causes a conveyance to be made him; (63) which, like a final foreclosure in England, is conclusive as against (but only (64) as against) the parties to the suit,

(65) and claimants under them by title
419 of lite pendente origin. (66) *It also
compels him (if there be need of compulsion) to pay the proceeds of sale; (67) out of which, first, all the expenses of making it are defrayed, (68) then (if they are sufficient) the debt, interest, and costs are satisfied, (69) and finally whatever may remain is directed to be paid over to the party having title to redeem. (70) If the clear proceeds be not sufficient to pay the debt and interest and costs, they are applied to extinguish first, the costs, (71) then, the interest, (72) and lastly, so much as they will of the principal: And whatever of the whole aggregate is unpaid continues a debt, for which, with subsequent interest upon so much thereof as is principal, (73) the mortgagee (without any condition of setting aside the sale, (74) even where he himself (75) has been the purchaser at it,) undoubtedly has his remedy against the mortgagor. (76)

It is said, however, in one book, (77) and repeated in another, (78)—both of established reputation,—that the mortgagee cannot in the same suit have first a foreclosure, and then a personal decree for such balance against the mortgagor; and in support of
that position some authorities, all
420 cisatlantic, (79) are cited. *But,

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10 Leigh 317, Taylor v. Cooper; 11 Alab. Rep. 1009, Brown v. Isbell;) and therefore, till then, it is premature to dispose of the proceeds: (11 Leigh 579, Clarke v. Curtis; 12 Leigh 379, Brien v. Pittman & Co. See 6 Munf. 486, Anderson's adm'r v. Davies's adm'r; 1 Rob. Va. Rep. 29, Cocke's adm'r v. Gilpin; 2 Moll. 511, Farrell v. Irwin; ibid. Massy v. Massy; 548, Scott v. Rothe;)—if, however, the purchaser has, pursuant to a decree, parted with his money, and the sale is afterwards set aside, he will have (as against the parties to the suit, see 6 Gratt. 320, Hudgin v. Hudgin's ex'r;) a lien for his indemnity upon the subject sold. 2 Paige 593, Morris v. Mowatt; 9 Paige 264, Americ. Ins. Comp. v. Oakley; see 1 Rob. Va. Rep. 19, Bryan v. Loftus's adm'rs; 3 A. K. Marsh. 177, Griffith v. Depew. By confirmation the proceedings of the commissioners, so far as they are previously made known upon the record, are adopted and rendered valid; (6 Gratt. 107, Evans v. Spurgin; see 2 Munf. 167, Lovell v. Arnold; 4 Hill 171, Fuller v. Van Geesen;) and afterwards, in general, the sale will not be set aside for objections which might have been sufficient, if they had been urged before. 2 Gratt. 198, Threlhelds v. Campbell; 5 Gratt. 60, Worsham v. Hardaway's adm'r; 10 Paige 243, Brown v. Frost, (reversing the decision of the court below in S. C. 1 Hoffm. Chanc. Rep. 41:) see 4 Munf. 251, Quarles v. Lacy; 2 Harr. & G. 346, Anderson v. Foulke.

(61) 1 Tuck. Comm. B. 2, p. 125, edit. 1836, and books there cited; also 2 Rand. 105-106, Newman v. Chapman; 2 Bland 464, 468-469, Murdock's case; Hopk. 231, Ludlow v. Lansing; 422, Valentine v. Teller; 6 B. Monr. 84, Trabue v. Ingles; 3 Scamm. 261, Aldrich v. Sharp; 4 Gilman 354, Lawrence v. Lane. This, however, (as it seems, notwithstanding the case of Comm. v. Ragsdale, 2 Hen. & M. 8;) cannot be done against one not a party to the suit, but holding adversely to those that are. (4 Hill 171. Fuller v. Van Geesen;) even though he went into possession pendente lite, unless it was under, or by permission of, some of the parties. 8 Paige 33, Van Hook v. Throckmorton; see 6 Harr. & J. 21, Tongue v. Morton: 6 B. Monr. 446, Clarkson v. Morgan's devisees.

(62) See 4 Munf. 128, Fairfax v. Muse's ex'rs; 11 Leigh 584, Clarke v. Curtis; 3 Gratt. 246, Hanna v. Wilson. 270, Kniseley v. Williams; 6 Gratt. 452, Shackelford v. Apperson.

(63) 1 Lom. Dig. 404; 1 Rob. Va. Rep. 28, 29, 39, Cocke's adm'r v. Gilpin: 2 Rob. Va. Rep. 301, Buckles v. Lafferty's legatees; 1 Gratt. 10, Bailey's adm'x v. Robinsons. For this purpose the court may, and most commonly does, appoint a commissioner or commissioners, usually the same by whom the property was sold; whose deed passes the title as effectually as and in some cases more effectually than, that of the parties themselves would; (V. C. 1849, ch. 178, sect. 4:) unless the property be land lying beyond the jurisdiction of this state; (1 McLean 200, Watts v. Waddle; 6 Peters 389, 396, 400-401, S. C.) in which case it should decree the conveyance to be made by the party or parties to the suit having title. 1 Rob. Va. Rep. 45, Cocke's adm'r v. Gilpin; 3 McLean 358, Tardy v. Morgan; see 3 Gratt. 148, 167, Vanmeters's ex'rs v. Vanmeters; 1 Hen. & M. 5, Guerrant v. Fowler; Wythe 135, (new edit. 254.) Farley v. Shippen. In such case, if any of them be an infant, the conveyance must as to him be respited till he attains his full age; (Macphers. Inf. 423-426: Set. Decr. 270-273;) besides giving him a day then to shew cause. 1 Tuck. Comm. B. 2, p. 123-124, edit. 1836: 1 Lom. Dig. 399. As to the purchaser's being compellable, under such circumstances, to part with his money before his title is perfected, see 3 Swanst. 558, Morris v. Clarkson, and cases cited in that.

(64) 20 Werd 260, Watson v. Spence; 10 Paige 399, Curtis v. Hitchcock; 8 Yerg. 452, Miller v. Estell; see 4 B. Monr. 48-53, Bank U. S. v. Carroll; 6 B. Monr. 274-275, Shiveley's adm'r v. Jones; 6 Gratt. 320, Hudgin v. Hudgin's ex'r; ante note 23. Even as against a party to the suit it has been held, (4 Sandf. Chanc. Rep. 312, Wells v. Chapman;) that a sale under a decree transfers only the rights and interests which belonged to the parties at the time of making the decree, together with such others as are (if there be any others that are) specifically directed to be sold; and therefore that if, between the entry of the decree and the making of the sale, a party buys a lien which is unaffected by the decree, the sale under it will not impair his rights in respect of such lien.

(65) 3 Bland 329-330, Coombs v. Jordan.

(66) 2 Dann 480, Thorns v. Southard; see ante note 24.

(67) See 1 Lom. Dig. 405; 1 Bland 538, Mullikin v. Mullikin; 2 Bland 629, Andrews v. Scotton; 3 Bland 284, Coombs v. Jordan; 341, Simmons v. Tongue; 7 Gill & J. 494, Boteler v. Beale.

(68) 6 Munf. 443, Bumgardner v. Allen; 2 Rob. Va. Rep. 301, Buckles v. Lafferty's legatees; 1 Gratt. 10, Bailey's adm'x v. Robinsons.

(69) 1 Tuck. Comm. B. 2, p. 123, edit. 1836; 6 Munf. 485-486, Anderson's adm'r v. Davie's adm'r.

(70) 6 Munf. 526, Mayo v. Tomkies; 1 Leigh 305, Crews v. Pendleton; 1 Monr. 66, Downing v. Palmateer.

(71) 2 Bland 468, Murdock's case; 3 Bland 195, n. Jones v. Betsworth: 197, n. Ridgely v. Belt. The learned reporter suggests, in the page last referred to, that the rule in England is different: for which he cites Upperton v. Harrison, 7 Sim. 444, and Ellison v. Wright, 3 Russ. 458. But nothing in either of those cases countenances the suggestion: while other authorities there seem opposed to it. See 5 Beav. 188, Aldridge v. Westbrook; 1 Younge & Coll. C. C. 401, Barnes v. Raester; 1 Hare 410, Tipping v. Power; 3 Hare 485, Hepworth v. Heslop; Coote on Mortg. 3d edit. 347.

(72) See 12 Leigh 573, Kent v. Matthews in the report at large; Wythe 147, (new edit. 10.) Ross v. Pleasants, Shore & Co.

(73) See ante note 14, versus finem.

(74) See 3 Johns. Chanc. Rep. 330, Dunkley v. Van Buren; and other references in notes to the next paragraph.

(75) See 3 Edw. Chanc. Rep. 590, Mott v. Walkley; 4 Hen. & M. 101, Dabney v. Green.

(76) 1 Tuck. Comm. B. 2, pp. 113-114, edit. 1836.

(77) 2 Rob. Pract. 59.

(78) 1 Lom. Dig. 407.—It is doubtful whether Judge Lomax fully concurred in the proposition; for having stated it, as if he did, in p. 397, he gives a direction in his list of corrigenda, to strike out that paragraph: and in p. 407 he says, "it is laid down in 2 Rob. Pract. 59," &c.

(79) 3 Johns. Chanc. Rep. 330, Dunkley v. Van Buren; 6 Johns. Chanc. Rep. 77, Jones v. Conde; 9 Wheat. 489, Hughes v. Edwards: To which add 2 Bland 666-668, Andrews v. Scotton; 683, Worthington

without pausing to make upon them other observations that occur, it may be sufficient to remark, that none of them are Virginian authorities; that our practice on this subject has grown up without reference to any other practice than that of England, from which (in the manner and to the extent that we have seen) it has departed; (80) that here it has been the uniform course (certainly so far as my own observation and experience extend) to give such a decree; and that this course is strongly countenanced (at the least) by what of authority, bearing upon the point, there is extant in our own reports. In one case, (81) such a decree came before the Court of Ap-
421 peals, and, *though set aside for previous faults in the proceedings, it was not in this respect impugned. In another case, (82) one of the most distinguished judges who have sat in that court, being of opinion of the deed then in question was on its face a mortgage, in the course of his argument to prove it so, said: "It seems to me there could be no doubt, that if Harrison [the creditor in that case] had applied to a court of equity to foreclose the deed as a mortgage, and upon a sale of the property the amount had not been realized, [which was covenanted to be paid him,] he would have been entitled to a personal decree for the residue; the deed itself reciting and imbodying an express agreement to refund," (83) and, in a third case, (84) intermediate in date between these two, the whole court of Appeals was of opinion, and decided, that the court below erred "in omitting to decree against [the deceased mortgager's] representatives, (including eventually his heirs), the balance which was due" to the mortgagee,—after crediting what had been raised by the foreclosure and sale. (85) In the last mentioned case it does not appear from the report, distinctly, whether the mortgage contained an express stipulation to pay; but, from the reference made in the foregoing extract to the mortgagor's heirs, (86) it is almost certain that it did. These citations are not conclusive, (for though the last was an adjudication, it was upon a point not controverted, (87) and consequently not debated;) but yet they are authorities of very considerable weight, that it is proper to give a personal decree for the debt, wherever an undertaking in terms to pay it is contained in the mortgage. And why should not the practice be so where, in that manner, or in any other, the personal obligation is made out? Economy, certainty, and dispatch, in the administration of justice all seem
422 *to be promoted by it. (88) and the

v. Lee; 1 Dev. & Batt. Eq. Rep. 623-624, Fleming v. Sitton; 1 Monr. 67, Downing v. Palmateer; 5 Monr. 78, Martin v. Wade's ex'rs; 7 Monr. 548, Durrett v. Whiting; 590, Pool v. Young; 4 J. J. Marsh. 70, McGee v. Davie; 6 J. J. Marsh 28, Morgan v. Wilson; 90, Crutchfield v. Coke; 641, Madison v. Grant; see also 5 Barr 260, Wickersham v. Fetrow. In some of these cases it is said, that if, independently of the application to foreclose, equity would have either exclusive or concurrent jurisdiction of the demand; then, and only then, it may both foreclose and afterwards decree personally for the balance; a position which lies open to the full force of the considerations subsequently mentioned in the text: While in others of them it is laid down broadly, that a foreclosure suit is a proceeding in rem, and that therefore there cannot in it be a decree in personam.—Upon this last position it may be remarked, 1. that, for any purpose material to the present argument, it is not true; (see 9 Sim. 570, Dearman v. Wyche; 2 Hare 326, Du Vigier v. Lee;) and 2, that where it obtains, the consequence has been in fact, and (as it would seem) not illogically, deduced from it, that in such a suit a set-off is not allowable, (Hopk. 270, Troup v. Haight; 2 Green's Chanc. Rep. 376, White's adm'r v. Williams; see Hopk. 579, Rosevelt v. Bank of Niagara; 6 Paige 627, Chapman v. Robertson; 7 Paige 208, Holden v. Gilbert;) a conclusion, which in Virginia would probably meet with dissent.

(80) In England as to this point, there is in the printed reports a great dearth of authority; the causes of which are obvious. But even there some light has recently been shed on this subject: (see post, note 89;) and in one of the most learned and accurate English law publications, (Adams on Eq. 228) we are told, that what has been commonly known as the vendor's lien "is treated as a security in the nature of a mortgage, and the remedy under it is by suing in equity to have the estate resold, and the deficiency, if any, made good by the defendant; see also 3 Beav. 64, Barker v. Smark. The same practice in those cases has also prevailed in Virginia; (4 Call 266, King v. Hanson; 4 Rand. 272, Hays v. Wood; 6 Gratt. 451, Shackelford v. Apperson; see 2 Rob. Va. Rep. 475, Wade's heirs v. Greenwood; 483, n. Tibbs v. Matthews;) and in Kentucky, 3 Litt. 192, McGee v. Beal; 7 Monr. 544, January v. January. The court, in the last mentioned case, distinguishable between it and the case of a mortgage; but it is submitted, that, especially with reference to our practice of foreclosing by a judicial sale, the analogy between them is perfect. In the case (above cited) of Hays v. Wood, the point respecting jurisdiction appears in the following extract from an opinion not reported, more distinctly perhaps than in that which is: "Upon the facts disclosed, the plaintiff had a lien upon a moiety at least of the land for securing the payment of any balance due to him upon his advances towards the payment of the purchase money. If he had amended his bill, and claimed this lien, the court would have had unquestionable jurisdiction, to ascertain this balance, and charge it on the land and upon the defendant personally. That has been done by consent without amending the bill, which would have been done by the court upon an amended bill. The court has not charged the land; the omission to do so is advantageous to the defendant, and the plaintiff does not appear here or complain of it. I think the decree should be affirmed." Judge Green's MSS.

(81) 4 Munf. 304-305, Bull v. Douglass.

(82) 2 Rob. Va. Rep. 181, Floyd v. Harrison. See also 2 Munf. 370, Coalter, J. in Coutts v. Greenhow.

(83) Either covenant. (Hardr. 178, Norrice's case:) or debt, (3 Gratt. 308, Newby v. Forsyth; would have lain upon such an instrument; the case being distinguishable from 2 Munf. 337, Drummond's adm'rs v. Richards; 2 Gill 171, Barrell v. Glover; 7 Watts 360, Scott v. Field; 6 Blackf. 162, Smith v. Stewart And therefore, but for the application to foreclose, a court of equity would not have had, in such a case, jurisdiction of the demand. See ante note 79.

(84) 6 Munf. 439, 445, Bumgardner v. Allen.

(85) In this case the suit was not brought for administration of the deceased debtor's assets;—had it been so, the deficiency might have been decreed to be made good out of them, under a distinct head of equitable jurisdiction, as in 1 Russ. & M. 185, Greenwood v. Taylor; 2 Myl. & Cr. 443, Mason v. Bogg; and other cases of that class;—but it was a suit of the mortgagee alone, on behalf of herself simply.—The case, therefore, is as much in point as if it had been brought against the mortgagor in his lifetime.

(86) See Shepp. Touchst. 178; Dyer 14, a, pl. 69, Anon. 11 Leigh 136, Huston's adm'r v. Cantril; 3 Gratt. 371, Piper v. Douglas's ex'r.

(87) On the contrary Leigh, for the appellants, and Wickham, for the appellee, both agreed that in this respect the decree was wrong. Neither of them, however, was counsel for the mortgagor's representatives; who seem to have had no counsel in the Court of Appeals.

(88) Upon these considerations, in New York, from which first emanated the doctrine that is here controverted, it has been repudiated long ago by legislative enactment. See Grah. Jurisd. 388-391; 6 Paige

case appears to be (89) fully within the influence of that principle, on which rests the well known rule: That when once a court of equity has obtained
423 *legitimate possession of a cause for any purpose of relief, (90) it will not afterwards turn the parties round to a court of law, nor stop at administering merely partial relief, but will itself proceed to do complete justice between them.

345, Bigelow v. Bush; 8 Paige 480, McCarthy v. Graham; 9 Paige 90, Leonard v. Morris; 294, Suydam v. Bartle.

(89) See 3 Seaman. 261, Aldrich v. Sharp.—In England, under certain recent statutes of limitations, interest cannot be recovered for more than six years where the creditor has a mortgage only, but it may be for twenty years where he has a bond. In a suit to foreclose the creditor had both a bond and a mortgage, and, interest being in arrear for more than six years, the question was whether all or only part of it should enter into the price of redemption. Sir James Wigram, V. C. decided that all of it should, and in the course of his judgment made these observations: "Let it be supposed that the words of the two statutes strongly favour the defendant's construction,—in that case the contract between the parties will be varied; the mortgagee will have a security upon the land for part of his debt, and a claim against his debtor by specialty for the rest.—Now I certainly find nothing in either act to preclude a court of equity from applying to such a case the ordinary rules by which justice is administered in that court. Suppose then a bill by a mortgagee against a mortgagor in his life time to enforce payment of his whole debt [in such a case] by foreclosure or otherwise: That such a bill would lie I cannot doubt; and the ordinary rule of equity is, that where a plaintiff is properly drawn into equity to enforce part of his demand, he may assert his full rights in that court, although his demand in part be purely legal; and the mortgagor contending, as he does and must contend, that the suit (though to foreclose) is a suit to recover money, cannot deny the right of the mortgagee under some form of decree to obtain satisfaction of his whole demand. I admit that a mortgagee cannot in general tack a bond debt to his mortgage in a suit against the mortgagor himself, although the rule of the court seems to have been formerly otherwise. But the case of tacking supposes the bond and the mortgage debt to be several and not the same debt; whereas, in the case I have suggested, the mortgagee is suing for one and the same, debt, in respect of different parts of which he holds different securities. Now if the mortgagor in such a suit should submit to a foreclosure in respect of so much of the debt as the mortgage was admitted to cover, it would be obviously more for his benefit that the balance of interest should be covered by the foreclosure also; and if he should elect to redeem the estate, [—and should be permitted to do so,—by paying only so much of the debt and interest as the mortgage was admitted to cover,] the mortgagee might, by means of a sequestration, recover the balance of his interest out of the very estate which the mortgagor had so redeemed." 2 Hare 338-339, Du Vigier v. Lee. Of course, before he could have such a sequestration, he must have obtained a decree against the defendant personally. See 2 Dan. Chanc. 1253 et seq. 1266, Perk. edit. Upon the strength of the preceding authority, Mr. Spence says: "Where the mortgagee holds a security for part of the debt, and another security for other part of the same debt, but which the mortgagee cannot tack,—for instance, a bond,—a bill may be filed by the mortgagee to enforce payment of his whole debt by foreclosure can otherwise in the same suit, though, as regards the part secured by bond, his remedy is at law; the ordinary rule being that, where a person is drawn into a court of equity to enforce part of his demand, he may assert his full rights in that court." 2 Spence's Eq. Jurisd. 724.

(90) See the preceding note. For the present purpose the rule need not be stated more largely; but in truth it is more comprehensive, (see 1 Stor. Eq. Jurisp. § 64 h-74; 2 Hare 286, Pearce v. Creswick;) especially in Virginia. See 1 Munf. 98, Chichester's ex'x v. Vass's adm'r, and cases cited in that; Wythe 59, (new edit. 144,) Love v. Braxton; 144 (new edit. 254,) Farley v. Shippen; 6 Gratt. 438-439, Lyons v. Miller.

424 *Owing to the difference of procedure in the two countries, a point which in England is of some practical importance,—namely, whether a mortgagor is accountable for rents and profits which he has received, is here of none whatever: For as, by our practice, the mortgagee's decree or judgment (whichever it is) against the mortgagor after foreclosure is, in all cases, for the precise balance of the mortgage debt left unpaid by the proceeds of sale; it necessarily matters nothing (as between them, and also between others who merely represent them,) whether an account of such rents and profits can be required or no. This, if the mortgagor be solvent, is clear: and it seems in no degree less certain, though he be not; whether alive or dead. But in the latter contingency, should another as his heir, devisee, or donee inter vivos, have received the rents or taken the profits, it is of obvious moment to the mortgagee, where the mortgaged subject is inadequate security for the debt, that they should be respectively liable to his demand, for as much as, in aid of its proceeds, may be requisite of what they have so received or taken. In ordinary cases where there is no specific lien upon the land, (91) it

(91) This was decided, (2 Gratt. 419, Leake v. Ferguson:) in the case of a bona fide purchaser, for valuable consideration, of land that was bound by judgment; a kind of lien, (Lew. Trusts, 545-546; 3 Myl. & Cr. 417, Neate v. Duke of Marlborough; 2 Gratt. 44, Taylor's adm'r v. Spindle; 4 Gratt. 81, Rogers v. McCluer's adm'rs;) we may observe, which is general, not specific. 2 Spence's Eq. Jurisd. 813, 798. And it seems difficult to discern, how the reasoning on which that decision was grounded is less applicable to the case of voluntary (or even fraudulent) donees, devisees, or heirs, of the judgment debtor. In one case, indeed, (Crompton v. Crompton, cited Ambl. 15-16; and stated from the Reg. Lib. in Lew. Trusts, 539;) it was decreed at the suit of a single judgment creditor, and without any general administration of the deceased debtor's assets real as well as personal, that his heirs should account for the rents and profits which had come to his hands. But in the same case it was also decreed, that "if the personal estate and the rents and profits [aforesaid] of the real estate should fall short of paying what should be certified to be due [on the judgment,] the deficiency should be made good by sale of the whole real estate and lands of [the debtor] liable to the said judgment:" And, as in all subsequent cases wherein the circumstances were similar, that part of the decree, which subjected to sale more than a moiety of the real estate descended, has been clearly overruled: (Ambl. 13, Stileman v. Ashdown; 2 Atk. 477, 608, S. C. 2 Scho. & Lefr. 150, O'Gorman v. Comyn; 2 Moll. 483, Anon. 484. Armstrong v. Walker; see also 3 Ridgew. P C, 33-34, Barnewall v. Barnewall; 13 Peters 465, Burton v. Smith:) so the direction in it respecting bygone rents and profits seems to have fallen pari passu, in the scale of authority. Some two years before his decision in Stileman v. Ashdown (cited above,) and upon precisely the same principle, Lord Hardwicke, being asked to decree an account of rents and profits from the time of filing the bill,—he was not asked to carry it further back,—against alienees of the judgment debtor whose conveyances he sat aside as fraudulent in respect of the plaintiff, refused. 2 Atk. 107, Higgins v. York Buildings Company. And though the reporter represents him as having on that occasion said: "The most usual case in this court is a judgment creditor's coming here against an heir at law for an account of rents and profits received by him, being considered as assets of the ancestor;" yet the representation seems wholly unreliable, for reasons even stronger than that reporter's notorious general inaccuracy (see Wallace's Reporters, art. Atkyns; respecting the dicta (see Sander's Preface to his edition of Atkyns;) which he professes to record. Upon the face of the report, his account of

has been decided, and is perhaps
425 *settled too firmly now to be shaken, here, that an heir, (92) devisee,

this particular dictum is unquestionably somehow wrong, (see 2 Leigh 61, Blow v. Maynard;) since he makes Lord Hardwicke immediately subjoin to the words quoted above: "for, if he brought an action of debt, he would have judgment for the full value of the estate,] which is true concerning a bond creditor, but not true concerning a judgment creditor, of the ancestor,] and therefore the courts of equity make their decrees conformable to the judgments at law." See the next note. And, upon a diligent search no trace has been discovered of what Lord Hardwicke is here made to call "the most usual case" in courts of equity,—but in this (worse than suspicious) dictum, and the discredited case (above cited) of Compton v. Compton. It is true, that Stileman v. Ashdown, the case which overruled it, has been itself made, by Lord Chancellor Hart, the subject of some very free strictures; (1 Moll. 319, 322, 323, Leahy v. Dancer; mentioned in the third edition,—which is not by Greenleaf,—of Greenl. Overruled Cases, 375;) but it is certain they leave it unshaken, (see Lew. Trusts, 539-543, particularly notes q and u;) while numerous other determinations have powerfully confirmed it. See, besides the cases mentioned before, and W. Kel. 3, Harvey v. Woodhouse; Fitzg. 144, S. C. which was prior to Stileman v. Ashdown; 1 Dic. 150, Rowe v. Bant; Lew. Trusts, 542, note r, S. C. (in which note is also cited the case of O'Dowda v. O'Dowda, 2 Moll. 483, which is not to be found in the american edition of that reporter, 12 Cond. Engl. Chanc. Rep.) 8 Leigh 503, Stuart v. Hamilton's ex'rs; 10 Leigh 405, McClung v. Beirne; 2 Gratt. 50, Taylor's adm'r v. Spindle; 438, Leake v. Ferguson; 5 Gratt. 84, McNew v. Smite; which, as to their principle, are not affected by V. C. 1849, ch. 186, sect. 6. His lordship's mistake, in supposing that the courts had at length "got rid" of that case as an authority proceeded (probably) from his failing to discriminate between it and cases widely different; as 1. where there are more judgments than one to be satisfied; (11 Ves. 33, Burroughs v. Elton; 2 Scho. & Lefr. 24, O'Fallen v. Dillon; 2 Moll. 484, Williamson v. Park; 6 Rand. 618, Coleman v. Cocke; 12 Leigh 573, Kent v. Matthews; see 3 Ridgew. P. C. 33-34, Barnewall v. Barnewell; Hardr. 23, Att. Gen. v. Andrew; 27 Crook's case, cited; Com. Dig. tit. Execution, C. 14; 2 Barn. & Cr. 232, Morris v. Jones; 3 Dowl. & Ryl. 603, S. C. 2 Shepp. Touchst. 560-561, Ath. edit. 5 Bingh. 327, Doe v. Creed; 2 Moore & P. 648 S. C.) or, 2. where the satisfaction is to be made out of a fund that is equitable: (Lew. Trusts, 542-546; 1 Leigh 140, Haleys v. Williams; 2 Leigh 279-281, Coutts v. Walker; 4 Gratt. 417, Withers v. Carter; 6 Gratt. 119, Barbridge v. Higgin's adm'r; see 9 Mod. 393, Elwys v. Thompson; 2 Atk. 440, S. C. 3 Sim. 286, Tunstall v. Trappes; 4 Munf. 539, Mut. Ass. Soc. v. Stanard; 7 Leigh 341, Claiborne v. Gross; 8 Leigh 439, 440-441, McCullough v. Sommerville; 10 Leigh 394, McClung v. Beirne;) or, 3. where the suit is brought after the debtor's death, (see 3 Call 329, Tinsley v. Anderson; and the more complete statement of that case from the record with Judge Green's remarks upon it, at the end of this article; and for a general administration of his whole assets both real and personal, (1 Dan. Chanc. 410-411, Perk. edit.) or for some purpose, other than merely satisfying the judgment, which for its accomplishment requires a sale to be decreed. 3 Myl. Cr. 416, Neate v. Duke of Marlborough. Or perhaps (see Lew. Trusts, 541, note q,) he confounded the cases, which are broadly distinguished, of a person dying indebted by specialty binding his heirs, and of a decedent against whom in his lifetime judgment had been rendered, upon such an obligation; for the difference between which see 2 Saund. Rep. 7-7 a, note 4; 3 Coke's Rep. 11, b, note B. Thom. edit. Ambl. 16, Stileman v. Ashdown; 2 Atk. 609, S. C. 2 Leigh 57, 61, Blow v. Maynard.—From these cases, particularly Leake v. Ferguson, Higgins v. York Buildings Company, and the class represented by Stileman v. Ashdown, it would seem to be the rule in England and in Virginia, that against any person holding real estate in any manner whatever under the judgment debtor, whether in his lifetime or after his decease, a judgment creditor, claiming in that character only, cannot, even in equity, recover rents and profits which have been received prior to the decree. But the same rule, as against voluntary or fraudulent alienees, does not obtain in some of our sister states, (see 1 Amer. Lead. Cas. 79, 2d edit. and cases there collected:) nor in regard to the profits of personality, subsequent to the death of the indebted donor, in this. See 2 Leigh 67, Blow v. Maynard; 1 Brockenbr. 500, Backhouse's adm'r v. Jett's adm'r; 516, n.

(92) In Laurence v. Blow, 2 Leigh 29, though this was not the precise point to be determined, (see post, note 94,) it was much considered, and by two Judges (Green and Cabell) made a ground of the decision. The third Judge (Carr) withheld his concurrence, and rather indicates a leaning towards dissent, on that occasion; (see 2 Leigh 53;) though, while he was Chancellor, he had before decided the same point in the same manner. 2 Tuck. Comm. edit. 1837, B. 3, p. 114, Alstadt v. Vestal. It was again determined, in effect, in Jones v. Lackland et als. 2 Gratt. 81, by the Circuit Court, whose decree, favorable in this particular to the appellant, was affirmed without objection made (so far as appears) on the part of the appellees. And Judge Stanard, in Hudson v. Yancy, 2 Gratt. 77, 78, seems to have been, as certainly the reporter understood him to be, (see 2 Gratt. 73;) of the same opinion. See also 1 Dev. & Batt. Eq. Rep. 439, Harrison v. Wood; 7 J. J. Marsh. 110, Ellis v. Gosney's heirs.—But it is certain that in the first mentioned case, and probable that in the rest, this doctrine was advanced under a misconception respecting the state of antecedent authorities. "There is," said Judge Green, in Lawrence v. Blow, (2 Leigh 58;) "no adjudged case either here or in the courts of Westminster Hall,—so far as I am informed, (and the counsel in this case admitted it to be so,)—which determines the question whether or no, in a case where there is no incumbrance on the land descended either by judgment against the ancestor or otherwise, and a creditor by bond binding the heir sues him at law or in equity, the rents and profits received by him can be reached as assets." Which statement, expressly confirmed by Judge Cabell, (2 Leigh 65;) and not gainsaid by Judge Carr, has been also corroborated by the late President Tucker. 2 Tuck. Comm. edit. 1837, B. 3, p. 114. Nevertheless it was indubitably mistaken; as appears, in a manner the most explicit that can be conceived, from the terms of the decrees in King v. King, 3 P. Wms. 358; Plunket v. Penson, 2 Atk. 290; Set. Decr. 89; Gregory v. Barefoote, Set. Decr. 84; Penoulbet v. Pessavant, Set. Decr. 92; Robinson v. King, 1 Dick. 297; Wride v. Clarke, 1 Dick 382; Set. Decr. 102; Silk v. Prime, 1 Dick. 384; Davies v. Topp, 1 Bro. C. C. 524; 2 Bro. C. C. 259, n. Set. Decr. 95; Lawthian v. Hasel, 4 Bro. C. C. 167; Petty v. Woodville, Set. Decr. 134; see also 1 Dick. 178, Rowe v. Beavis; 2 Bro. C. C. 628, 633, Curtis v. Curtis; Set. Decr. 86, Dence v. Smith; 1 Russ. 538, Player v. Foxhall; 2 Smith's Chanc. 2d edit. 263, 264; Adams on Eq. 263; Stor. Eq. Jurisp. sect. 512, 1216 c. In the words of the last mentioned book, (quoting such of them as are relevant to the present purpose,) "where there is a specialty debt binding the heirs, and the debtor dies,—at law, the creditor can only take out execution against the whole lands, and hold them, as he would under an elegit, until the debt is fully paid; but, in equity, the creditor will also be entitled to an account of the rents and profits received by the heir since the descent cast, and courts of equity will go further and decree a sale of the inheritance in order to accelerate the payment of the debt." From them all it is apparent, that the dictum attributed to Lord Hardwicke in Higgins v. York Buildings Company, which is mentioned in the last preceding note, would be substantially correct, if before the word "creditor's" were read "bond" instead of "judgment." And from the general language of them it would seem, that ordinarily the accounts of rents and profits is now taken from the death of the ancestor, notwithstanding that in some early cases (Mosel 123, Chambers v. Harvest; 124, Montague v. Ford, cited; 1 Eq. Abr. 141, S. C. cited;) it was limited to the time of filing the bill. In some of them (3 P. Wms. 358, King v. King; 1 Dick. 297, Robinson v. King; see also 1 Dick. 299, Walter v. Goring;) this species of relief was administered for the benefit of the plaintiff alone; but even at that time the general practice seems to have been, that though it might be administered at his instance alone and upon a bill not in form on behalf of himself and all other creditors, yet it should not be for his sole benefit; (Set. Decr. 84, Gregory v. Barefoote; see ibid. 52, note 1; 1 Ves. Sen. 213-214, Martin v. Martin; 4 Johns. Chanc. Rep. 637-638, Thompson v. Brown;) and, according to the practice now for a long time past prevailing, neither such an account (2 Dick. 707, Bedford v. Leigh;) nor a sale (4 Sim. 37, Johnson v. Compton; 47, Saddler v. Richards, cited;) will be decreed, unless the bill be for a general administration of the assets and satis-

426 *(93) or donee, (94) shall not be subject to such a liability; for rents and profits which have been appropriated prior to the decree. Is the same rule applicable in the case of a mortgage? Towards a solution of this question the point is of great theoretical, which was just now mentioned as of no practical, consequence here: For, if the liability of the debtor himself is, that of others holding by derivative title under him must be, the same in both cases.

In England that point (respecting the mortgagor's accountability for rents and profits) is perfectly settled in the neg-
427 ative. *(95) With a knowledge that it was so, Chancellor Wythe nevertheless took the opposite side of the question; and maintained, that a mortgagor, or his devisee, (the case before him being probably that of the latter,) who would not redeem the estate pledged, but retaining the possession took the profits thereof, after the time limited for the performance of the condition was accountable to the mortgagee for such after-taken profits. (96) But his decision (for such it seems to have been) was never binding as an authority beyond the parties in the particular case; and though no decision of a Virginia court overruling it* has been discovered, (97) yet his immediate successor's opinion was (98) and those of other Virginia jurists, as far as indicated in print, have been uniformly, (99) against it. The question, therefore, may be regarded here as still open to be considered on principle. Chancellor Wythe's argument could not be answered easily, nor perhaps at all, if the ground of the doctrine in England were what he supposed it to be; namely, "that the mortgagee ought to take the legal remedies to get into the possession." (100) But, though that remark is reported to have been, on one occasion, made by Lord Hardwicke in connection with this subject; (101) yet it appears to be rather an answer to some objection of fancied hardship to the mortgagee, while the true ground of the doctrine itself seems to
428 be this: (102) A mortgage *is, in substance and effect, a security by means of a specific lien for the payment of a debt or the performance of something stipulated; whereby, to that end, the legal estate is vested in the mortgagee, with the consequent right, in general, (103) of assuming the possession, (104) if (105) and whenever (106) he will, and of receiving, for the purposes of the mortgage, (107) the

faction of all the creditors according to their respective priorities. See 1 Dan. Chanc. (Perk. edit.) 285, note f; 410, Biscoe v. Waring. The differences between this system of practice and that heretofore subsisting among ourselves need not be more particularly pointed out.—See the new provisions, affecting this subject, in V. C. 1849, ch. 131, sect. 3, 5, 6.

(93) Since the year 1691, in England, (3 & 4 Wm. & Mar. cap. 14, sect. 5;) and 1726 in Virginia, (4 Hen. Stat. Larg. 164, chap. 3, sect. 28;) devisees and heirs have stood upon the same ground in this respect; except that, as between themselves, heirs are bound to exonerate devisees. Ram on Assets, 374; 2 Jarm. Wills, 546-547; Set. Decr. 98, note 2.

(94) This was the precise point which the court had to determine in Lawrence v. Blow, 2 Leigh 29; see ante note 91.—In that case (it is further observable) the conveyances set aside as fraudulent were made to two children of the grantor: (2 Leigh 32;) his heirs were those two children and another; (2 Leigh 34) so that the case presented the same point as Parslowe v. Weedon, 1 Eq. Abr. 149; and the court, without mentioning yet (in effect) overruled the decision therein. That decision, however, had often before been disapproved. See Prec. Chanc. 521, Templeman v. Beke, cited; Cas. temp. Talb. 64. Jones v. Marsh; (1 Madd. Chanc. 2d edit. 275, note b, S. C. Gilb. Lex. Praet. 102-103, Dubl. edit. 293, Lond. edit. 1 Fonbl. Eq. 5th edit. 283-286; Rob. Fraud. Convey. 591-593; 596-600; Bac. Abr. tit. Heir and Ancestor F; 1 Stor. Eq. Jurisp. sect. 375, 376.

(95) 2 Atk. 107, Higgins v. York Buildings Company; 3 Atk. 244, Mead v. Lord Orrery; 3 Ves. 32, Coleman v. Duke of St. Albans; 2 Ves. & B. 252, ex parte Wilson; 1 Rose 444, S. C. 1 Swanst. 573, Gresley v. Adderley; 4 Russ. 64, Thomas v. Brigstocke; 1 Young. & Col. C. C. 688, Clarendon v. Barham; 1 Pow Mortg. 6th edit. 156, and note A; 174, a, note D; 177; 3 Pow. Mortg. (Rand's edit.) 946, and notes A. and I; Coote on Mortg. 3d edit. 325-327, 368, 530. "Nothing is better established, than that a mortgagee cannot have an account of by-gone rents; that principle is so settled that it cannot be impeached." Per Sugden, C. in Turkington v. Kearnan, Lloyd & G. 85. Nothing is now more clear, than that a mortgagee is not, as against the mortgagor, entitled to an account of by-gone rents." Per Lord Langdale, M. R. in Coddington v. Johnstone, 1 Beav. 524.—The same doctrine prevails in New England, (as to which see ante, note 39.) 15 Mass. Rep. 270, Fitchburg Cotton Manuf. Corp. v. Melven; 1 Pick. 87, Wilder v. Houghton; 8 Pick. 462, Boston Bank v. Reed; 10 Metc. 128, Massachusetts Hospital Life Insurance Comp. v. Wilson; 9 Conn. Rep. 225, Toby v. Reed; 15 Conn. Rep. 556, Cooper v. Davis.

(96) Wythe 58, (new edit.) 188, Cadwallader v. Mason.

*See Bank of Washington v. Hupp, 10 Gratt. 23.

(97) The cases of Little & Telford v. Brown, 2 Leigh 353; and Clarke v. Curtis, 1 Gratt. 289; did not present this identical point; and whether it is to be governed by the principle of those decisions, is the precise question to be determined.

(98) 2 Hen. & Munf. 25, Scott. v. Wharton.

(99) 1 Tuck. Comm. edit. 1836, B. 2, p. 54-55, 114-115; 4 Rand. 476, Allen v. Gibson; 1 Gratt. 291, Clarke v. Curtis.

(100) See ante note 8.

(101) 3 Atk. 244, Mead v. Lord Orrery.

(102) See 1 Leigh 305, Crews v. Pendleton.

(103) See 4 Rand. 468, Allen v. Gibson. This right may be modified by the parties' agreement; (2 Hen. & Munf. 95, Lawson v. Tilden;) but, where it is not, a court of equity will in no case restrain the mortgagee's exercise of it. 2 Meriv. 359, Cholmondeley v. Clinton; 6 Price 504, Williams v. Medlicot; Coote on Mortg. 3d edit. 339.

(104) Actually, (as in the cases cited in note 106;) or constructively, by requiring the tenant, where there is one to pay the rent to him. 1 Smith's Lead. Cas. 1st edit. 293, Keech v. Hall; (1 Dougl. 21, S. C.) 310, Moss. Gallimore; (1 Dougl. 279, S. C.) and the notes to them; Coote on Mortg. 3d edit. 339-342.

(105) See 5 Ves. 106, Penrhyn v. Hughes; 3 Pow. Mortg. 6th edit. 952, and note L.

(106) Even without giving the mortgagor notice to quit, (8 Barn. & Cressw. 767, Doe v. Maisey; 3 Mann. & Ryl. 109, S. C. 5 Bingh. 421, Doe v. Giles; 2 Moore & P. 749, S. C. See 1 Pow. Mortg 156, and note 1, Rand's edit.) and without allowing him to take emblements, the fruits of his own industry, (1 Dougl. 22, Keech v. Hall; 1 Smith's Lead. Cas. 1st edit. 294, S. C. Coote on Mortg. 3d edit. 332-333;) then growing on the land. See 1 Beav. 520, Codrington v. Johnstone. Such emblements, growing at the time of a foreclosure sale of the land, pass to the purchase of it. 1 Leigh 297, Crews v. Pendleton; 8 Wend. 584, Lane v. King; 2 Denio 174, Shepard v. Philbrick. But, it seems, that, by special direction in the decree, the land and the emblements may be sold separately. See 1 Bland 75, n. Rawlings v. Carroll; 365, Dorsey v. Campbell; ibid, n. Wright v. Wright, and Taylor v. Colegate; 3 Bland 39, Tessier v. Wyse.

(107) Whatever the mortgagee receives he must account for; (2 Stor. Eq. Jurisp. sect. 1016; Coote on Mortg. 3d edit. 530 et seq. See 1 Wash. 162, Kennedy v. Baylor; 1 Bland 22, n. Rawlings v. Stewart; but, where the mortgage is to secure a debt, this account, if it does not quite extinguish the debt, only diminishes the price of redemption; and if, for default of redemption, a strict foreclosure (after the manner in England,) occurs, he keeps both the estate and what he has so received. 8 Shepl. 465, Weeks v.

rents, issues, and profits, arising during the continuance of his possession; the beneficial ownership, in as full and ample a manner as is compatible (108) with these rights of the mortgagee, remaining meanwhile in the mortgagor and those to whom he transfers or transmits it. And if such be the true nature of the contract of mortgage, it seems clearly to follow,—first, that in England the doctrine is properly settled as it is there;—and secondly, 429 that, notwithstanding the *difference between their method of foreclosing and ours, (109) the same doctrine ought also to prevail here. (110)

A reference is made, in note 91, to this place for a more complete account of Tinsley v. Anderson, 3 Call 329, than has heretofore appeared in print. The report of that case is so defective, as to be for the most part unintelligible; and, as it has been frequently cited of late in the Court of Appeals, the following contribution towards elucidating it may be useful. It is taken verbatim from a note of Judge Green in his copy of Call.

"N. Anderson was surety for R. Anderson, in a bond to A. Bayne, upon which there was a judgment; for the payment of which N. Anderson had given a deed of trust on his whole property. In 1783, R. Anderson purchased from C. Thompson a tract of land, and W. Anderson joined him in bonds for the purchase money. R. Anderson thereupon executed to W. Anderson a mortgage on the same land and twenty slaves, to indemnify him against that and all other suretyships for him—which was duly recorded. W. Anderson in his answers admits that he was indemnified, except as to twenty shillings.—But J. Woodson having, as a surety for R. Anderson for a part of the purchase money, (as the Court of Appeals supposed, but without any proof of the fact in the record,) paid money to C. Thompson, the twenty shillings due to W. Anderson and this money paid by J. Woodson upon Thompson's judgment were primarily charged on the proceeds of the land and slaves mortgaged in W. Anderson; and the surplus of those proceeds was thrown into the general fund. In 1787, R. Anderson mortgaged to J. Fox twenty-two slaves, thirty head of horses, [and] ninety head of cattle, to indemnify him against all damages which he might suffer by reason of his being surety for Anderson to W. Johnson, A. Bayne, D. Ross, and others; and the mortgage was duly recorded. The Court considered this as giving Fox no preference, it being a mortgage of personal property only; but placed him in the shoes of W. Johnson, to whom he was surety for R. Anderson, and who had obtained judgments against R. Anderson,—although Fox had paid no part of those judgments, but had obtained, in 1796, after this suit was instituted, a decree of Louisa court against Anderson for damages sustained on account of his suretyship to Johnson, in the payment of fees to counsel, and witnesses, clerk's fees, and his expenses in attending court, and especially for loss incurred by his keeping his property out of the way of the sheriff to avoid the effect of Johnson's execution, and for the balance upon an old account beginning in 1767. In 1788, R. Anderson conveyed in trust to W. Smith, for the purpose of indemnifying J. Fox against his said suretyship to Johnson, several tracts of land; but the deed was not duly recorded. In 1789, R. Anderson conveyed to W. Smith several tracts of land, thirty-six slaves, and a great variety of other personal property, in trust to indemnify J. Woodson as his surety in replevin bonds to T. Denicot, the administrators of C. Tinsley, the executors of B. Anderson, R. Hart, J. Thompson, and C. Thompson; but the deed was not duly recorded. In 1789, [also,] R. Anderson mortgaged to T. Johnson two tracts of land, many negroes, and his interest in his father's estate, together with his equity of redemption in the property conveyed by all the foregoing deeds,—to indemnify him against the consequences of an appeal bond, in which he had joined R. Anderson to R. Hart; but this deed also was not duly 430 recorded. *In 1793, R. Anderson executed a mortgage to Fleming, on two horses, to secure the payment of a debt of £8 14s; which also was not recorded. [Here peruse the statement in 3 Call 329-330.]

"The following claims were proved before the commissioner.—1. C. Thompson; twenty shillings for balance of judgment for purchase of the land conveyed by the first deed.—2. W. Johnson; judgments for the balance of the debts mentioned in the second and third deeds.—3. T. Denicot; judgment mentioned in the fourth deed.—4. R. Hart; judgment mentioned in the same deed.—5. Fleming; debt secured by the deed to him.—6. J. Fox; decree of the County Court of Louisa before mentioned.—7. N. Anderson; judgment the foundation of the bill.—8. J. Shelton; decree of the High Court of Chancery. 1786.—9. Wm. Smith; bond, judgments, and upon account.—10. Administrators of C. Tinsleys; judgments mentioned in the fourth deed, the second to W. Smith.—11. D. Johnson; bond.—12. P. Clarkson; judgment.—13. Walker's executors; note under seal.—14. Walker, assignee of T. Johnson; judgment in 1768.—15. J. Watson; bonds.—16. J. Woodson; payments on judgments against him as surety for R. Anderson, noticed in the [second] deed to W. Smith, and other judgments paid by him as surety, and an open account against R. Anderson.

"☞ These notes are taken from the record. [Here see the decree of the Chancellor, 3 Call 330; and that of the Court of Appeals, 3 Call 332-333; which latter is probably reported verbatim.]

"The case," Judge Green's note continues, "seems to me to have proceeded upon the assumption of several very questionable propositions. To pass over that asserted in Eppes v. Randolph, [2 Call 125; see 2 Gratt. 44, 57, 68. Taylor's adm'r v. Spindle:] and here again acted upon,—can it be maintained, that a court of equity can take into its hands the whole estate of a living debtor, even when it is incumbered by judgments, deeds of trust, and mortgages, (—although the Court in this case held that all the deeds, except the first which affected but a small part of the debtor's property, were void and of no effect even as against creditors at large, who had no judgments or decrees,—) and administer it as if he were dead; treating it as equitable assets, except so far as there were liens upon it by deeds or judgments or decrees; and that, by allowing all creditors, in a suit by one only, to come in before the commissioner, and prove their debts; as was done in this case? [See the sequel of it, 1 Hen. & M. 12. Anderson v. Anderson.] Or, than deeds of trust and mortgages not recorded do not give a preference, to creditors thus secured, over such as have not bound the property, if real, by judgment or decree, and, if personal, by an execution delivered to the sheriff? It is true, that in this case the whole property of the debtor was conveyed for securing specific debts, by the unrecorded deeds; but can this give the court a greater controul over it, than if no such deeds had been made, or than if they had been duly recorded? What gave the bond and simple contract creditors, having no judgments, a right to satisfaction out of the real property of the debtor? And what occasion was there for any creditor, by judgment or otherwise, to come into a court of equity to reach the property, real or personal, embraced in the unrecorded deeds?—Those who had judgments might have taken it in execution: and those who had not might have sued and obtained judgments, and thus have taken it in execution; the first judgment having priority as to the real property, and the first execution delivered to the sheriff as to the personal.—Again: W. Johnson's judgments, for the debts for which Fox was surety, and to indemnify him against which the mortgage of April 30, 1787, upon slaves and other personal property was given and duly recorded,—were pronounced on the second

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Thomas; 1 Applet. 99, Portland Bank v. Fox. See 6 B. Monr. 15, Tharp v. Feltz's adm'r.

(108) 2 Stor. Eq. Jurisp. sect. 1017; Coote on Mortg. 3d edit. 332; see 2 Bland 461, Murdock's case; 3 Bland 180, Salmon v. Clagett; Lloyd & G. Rep. temp. Sugd. 35, Turkington v. Kearnan; 2 Hen. & M. 25, Scott v. Wharton; 11 Leigh 559, Clarke v. Curtis.

(109) In New York, where the method of foreclosing by decree was (if it is not now) substantially the same as among us, this point is settled in the same manner as in England. 10 Paige 43, Howell v. Ripley.

(110) See 4 Rand. 476, Allen v. Gibson; 1 Gratt. 291, Clark v. Curtis.—The practical consequence of which would be, that for rents and profits received, the heir, devisee, or donee, of a mortgagor must account in the same manner as, and not otherwise than, the heir, devisee, or donee, of a debtor whose land came into their hands subject to no lien. As to which see ante, note 92.

day of September 1785. Hart's judgment, for which Fox was not bound, was dated April 30, 1784; and Walker's judgment was in 1768. The Court held, that these two last judgments had a preference over Johnson's, in respect to the personal property mortgaged to Fox to secure [him against] that very debt, and that Fox was only to stand in the place of Johnson as a judgment creditor, and to take satisfaction out of the mortgaged property, if any were left after satisfying the prior judgment?"

These remarks, which their author did not design for public inspection, it is nevertheless thought not improper to submit to the candid consideration of the learned.

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431 *No. 3.

MISCELLANEOUS.

I.

Farrer v. Jackson. Ante, pp. 1—4.

In the first edition there is a printed list of errata, which in this have been corrected as indicated in that list. Besides which, in a copy that, as early as 1795, belonged to Thomas Nelson, Jr., of York Town, some other corrections are made in MS. which are noted to be "taken from the author's own private copy." One of these occurs in this case; the words, "shall not be admitted to plead the act," being added after the word "act" in p. 3, l. 15, (from the bottom,) of this edition.

II.

Ross v. Pleasants, Shore & Co. Ante, pp. 10—37.

The rule, as to the method of computing interest where, from time to time, partial payments have been made without a special agreement concerning their application, which the Chancellor after great consideration adopted in this case, and which ever since among us has been followed in similar cases, (4 Hen. & Munf. 431, Lightfoot v. Price; Instructions for Commissioners in Chancery, by Chancellor Taylor, published in 1818, pp. 3-4; 1 Rob. Pract. 257;) though sometimes spoken of as if he had first introduced or (at least) established it, (Franc. Max. 101-102, Hen. edit.; 3 Leigh 359, Burwell's ex'rs v. Anderson;) might have been borrowed by him from the civil law, (Dom. Civ. Law, P 1, b, 4, tit. 1, sect. 4, art. 5, 6; vol. 1, p. 510, edit. Lond. 1722; Poth. Obl. no. 583, vol. 1, p. 334, edit. Philad. 1826; vol. 2, p. 51, edit. Newb. 1802;) had it not been already settled in our own, by being settled in England, from (if not before) the time of Lord Clarendon's chancellorship, 1 Chanc. Cas. 23, Crispe v. Blake; 2 Chanc. Rep. 88; Rep. temp. Finch 89, S. C. on a rehearing; 1 Chanc. Cas. 105, Haynes v. Harrison; 2. Freem. 261, Chase v. Box; 8 Mod. 242, Bostock v. Bostock; Cas. temp. Talb. 39, Bosanquett v. Dashwood; 1 West's Hardw. 601, S. C. 1 Atk. 81, Bromley v. Goodere; 1 Craig & Phill. 351, Bower v. Morris, and cases cited in that. Either in its whole extent, or subject only to some slight modification not affecting its principle, it prevails also in New Hampshire, (2 N. Hampsh. Sep. 169, Hodgdon v. Hodgdon;) Massachusetts, (17 Mass. Rep. 417, Dean v. Williams; 1 Pick. 194, Fay v. Bradley;) Connecticut (1 Swift's Syst. 388-390; Franc.
432 *Max. 106, Hen. edit.; 14 Conn. Rep. 445, Treat v. Stanton;) New York, (1 Johns. Chanc. Rep. 17-18, Connecticut v. Jackson; 3 Cowen 86, Williams v. Houghtaling; 15 Wend. 19, Stone v. Seymour; 11 Paige 635, Jencks v. Alexander;) New Jersy, (1 Halst. 408, Meredith v. Banks; 2 Green's Chanc. Rep. 300, Stark v. Huston;) Pennsylvania, (1 Dall. 124 Tracy v. Wikoff; 378, Penrose v. Hart; 8 Serg. and R. 458, Comm. v. Miller's adm'rs; 8 Watts and S. 17, Spires v. Hamott;) Maryland, (1 Harr. and G. 42, Lamolt v. Sterrett; 98 Frazer v. Hyland; 754, Gwinn v. Whitaker;) North Carolina, (1 Hayw. 279, Bunn v. Moore's ex'rs; 2 Hayw. 17, Anon. 151, North v. Mallett; Camer. and Norw. 513, Yancy v. Mutter's ex'rs; 1 Dev. 341, Peebles v. Gee;) South Carolina, (2 McCord's Chanc. Rep. 10, Black v. Blakely; 204, Wright v. Wright; 1 Strobh. 426, De Bruhl v. Neuffer; 2 Strobh. Eq. Rep. 166, Singleton v. Allen;) Florida, (2 Flor. Rep. 445, Hart v. Dorman;) Louisiana, (10 Rob. Louis. Rep. 51, Union Bank of Louisiana v. Kindrick;) Mississippi, (8 Smed. and M. 377, Bond v. Jones;) Tennessee, (5 Yerg. 310, Scanland v. Houston; 10 Yerg. 161, Jones v. Ward;) Kentucky, (1 A. K. Marsh. 584, Guthrie v. Wickliffe; 4 Dana 445, Steele v. Taylor;) Indiana, (2 Blackf. 43, Harvey v. Crawford;) Ohio, (Wright 169, Hammer v. Neville; 5 Hamm. 260, Miami Exporting Comp. v. Bank of United States;) and in the federal courts of the Union; (2 Wash. C. C. Rep. 167, Smith v. Shaw's adm'rs; 13 Peters 371, Story v. Livingston; 4 How. S. C. Rep. 286, 288, United States v. McLemore.) And perhaps at no time anywhere (but in some parts of Connecticut, see 1 Swift's Syst. 388-389;) has a different rule been enforced by the courts, unless out of deference to some actual or presumed understanding between the parties. See 2 Johns. Chanc. Rep. 210, 214, Stoughton v. Lynch; 2 Paige 207, Hart v. Dewey; 3 Washb. (18 Verm.) Rep. 451, McIntyre v. Corss. At the time of making a partial payment, the debtor may direct that it shall be applied to the principal and not to the interest; and if the creditor accepts the payment on those terms, he must abide by them; (10 Leigh 481, Pindall's Ex'rs v. Bank of Marietta; 2 Rob. Virg. Rep. 1. Miller v. Trevillian;) but he cannot be required unless there is a particular agreement to that effect, thus to receive his debt "by dribblets." 9 Mod. 299, Wilkinson v. Sterne. If he does accept satisfaction of his whole principal leaving the interest unpaid; then, whether he can afterwards recover the interest, depends perhaps upon this distinction: it is perfectly clear that he can, where by the terms or legal effect of the contract interest, as such, is payable; (15 Wend. 76, Fake v. Eddy's ex'r; 8 Missouri Rep. 41, Stone
433 v. Bennett; 10 Leigh 481, Pindall's *ex'x v. Bank of Marietta;) but according to many decisions he cannot, where interest is only recoverable, as damages, for non-payment of the principal when due. See and compare, 1 Esp. Rep. 110, Dixon v. Parkes; 1 Stark. Rep. 298, Hellier v. Franklin; 11 Mass. Rep. 217, Gage v. Gannett; 3 Johns. Rep. 229, Tilletson v. Preston; 13 Wend. 639, Stevens v. Barringer; 3 Edw. Chanc. Rep. 512, Gillespie v. Mayor of New York; 2 Hill's S. C. Rep. 343, Pinkney's adm'r v. Singleton; 1 Americ Lead. Cas, 2d edit. 536-537.—The case of Mercer's adm'r v. Beale, 4 Leigh 189, was one sui generis.

III.

Overstreet v. Randolph. Ante, pp. 47-50.

In this case the Chancellor based his judicial action upon a proposition, which on another occasion (ante, p. 25, Ross v. Pleasants, Shore & Co.) he stated incidentally; to wit, that an assignee of a bond, "continually since he hath been permitted to maintain an action in his own name on the obligation," has had "a legal right to the money acknowledged by the obligation to be due." From this proposition he deduced the conclusion, that where the consideration of a bond is so tainted with fraud, as that the obligee would be restrained by a court of equity from coercing payment thereof; yet, if it has passed into the hands of a bona fide assignee, for valuable consideration, without notice of the fraud, the obligor cannot even in equity be relieved against it. A conclusion, which has been since exploded completely; (2 Wash. 233, Norton v. Rose; 255, Pickett v. Morris, 3 Munf. 68, Stockton v. Cook; 3 Leigh 602, 607, Moore v. Holcombe; 5 Leigh 34, Feazle v. Dillard; 3 Gratt. 4, Jameson's adm'x v. Deshields; 4 Gratt. 267, Wayland v. Tucker;) but which seems to be drawn with logical accuracy from the proposition enuntiated above, and therefore to be necessarily true, unless that proposition be false. Accordingly we find Judge Green, in Garland v. Richeson, 4 Rand. 269-270,—with apparent unconsciousness of the principal case here, yet—arguing, to prove the reverse of that proposition, from such of the decisions as had then occurred by which Chancellor Wythe's conclusion is overthrown, in precisely the same manner as the latter himself argued in maintenance of his conclusion. And upon that and some other considerations the court, in that case, were of opinion that the assignee of a bond does not acquire the legal title to the debt, but an equitable right only, which the statute respecting assign-
434 ments has *empowered him to assert at law in his own name; and therefore they decided, that notwithstanding such an assignment an action at law may be maintained on the bond, in the name of the assignor, for the use of the assignee. This decision (upon the authority of which innumerable like cases have since passed, and are constantly passing, through the courts of original jurisdiction,) was, however, never satisfactory to the late President Tucker, (1 Tuck. Comm. B. 2, p. 348, and note edit. 1836; 6 Leigh 296, Clopton's adm'r v. Morris; 11 Leigh 209, Dunn v. Price;) though once he cited it without expressing his disapprobation; (5 Leigh 34, Feazle v. Dillard;) but it did not, as he seems, at least at one time, to have thought, (1 Tuck. Comm. B. 2, p. 347, edit. 1836,) contravene a former decision in Gordon v. Browne's ex'r, 3 Hen. and Munf. 219; for in that case it was not decided, that the holder of a bond by assignment "must sue as assignee;" but (at the utmost) that, if he did sue in his own

name, it must be not as if he were obligee, but agreeably to the truth of the fact. A case almost, if not quite, parallel to that which the statute concerning assignments, as expounded in Garland v. Richeson, has introduced among us, exists in England, see Com. Dig. tit. Assignment, D; citing Dyer 1, b. pl. 7, Anon. and marg. Cro. Jac. 82, R. v. Wendman; 179, R. v. Twine; Sav. 2, R. v. Lee; 133, York v. Allen; Hardr. 158. Young v. Pennington.

IV.

Hill v. Gregory. Ante, pp. 73-89.

1. As to the application of payments discussed at large in this case, and since very much discussed in many others, see 2 Greenl. Evid. sect 529-536; and particularly 1 Amer. Lead. Cas. 2d edit. 273-309, where the subject seems exhausted by the learning and diligence of Mr. Wallace. The recent Virginia cases affecting it, that are not mentioned by him are Wilson v. Burfoot, 2 Gratt. 134; and Law's ex'ors v. Sutherland, 5 Gratt. 357.—In the course of his reasoning in the principal case, Chancellor Wythe says: "When the debitor delivereth the money, which before was his property, to the creditor without instruction to apply it to the credit of this or that account, the property is changed immediately to the receiver, who, so soon as it is in his possession, is complete owner of it, it is his own money: if it be his own money, by what law is he bound to make a recent application of it, or an application which is called a proper application; or by
435 what law restrained from *exercising the same power over it which he can exercise over any other part of his own property?" But, on the other hand it may be questioned, does the consequence supposed ensue from a bare and simple delivery? To produce that effect must not the delivery be made as a payment? See 1 Americ. Lead. Cas. 2d edit 308-309. And can a payment take place without, to that extent, liberating the debtor from some obligation which commensurately becomes extinct in the same instant wherein ownership of what is paid changes from him to the creditor? If the contrary be possible and that by the delivery the money becomes the property of the creditor, so that he can thenceforth exercise over it the same power as over any other part of his own property; how comes it that, against the creditor's will, it shall ever extinguish any part of the debtor's obligation to him? In principal, therefore, the doctrine of the civil law (Poth. Obl. No. 529, vol. 1, p. 329, edit. Philad. 1826; vol. 2, p. 45, edit. Newb. 1802, 1 Stor. Eq. Jurisp. sect. 459 e. See also 6 Watts and S. 9, 14, Logan v. Mason;) seems to be, well founded; namely, that the creditor's right, appropriating to what debt he chooses a payment made indefinitely by the debtor evanishes if not exercised in the moment of his accepting the payment, and that in such case, if the parties cannot agree, the courts must upon all the circumstances determine what particular debt was, by the payment, in that moment, ipso facto, discharged either in whole or in part. But authority, both English and American, greatly preponderates in favour of the opposite doctrine. See 2 Greenl. Evid. sect. 532, 1 Americ. Lead. Cas. 2d edit. 295-297.

2. In the opinion and decree of the Court of Appeals, the following passage occurs: "On viewing this account a doubt arose, whether the mode of stating interest was a proper one, whereupon one of the Judges, declaring himself affected in his character of an administrator by a decision of that question, retired from the discussion; and the Court, discovering it to be of small importance in its operation in the present case, chose to pass it over on the ground of the master's report not having been excepted to, or the point argued in court; with this caution to avoid an inference of approbation, rather than by a decision either way to establish a precedent which in other cases might be important." Would the Court, then, have acted otherwise, had the matter been of greater importance? The doubt, which is unfortunately left upon this point, detracts much from what otherwise might have been the weight of this precedent as an authority respecting a subject of considerable interest to the profession; namely, where and in what cases an exception is necessary to be taken to the report of a com-
436 missioner, in order *that an error in it may be corrected either in the court of original jurisdiction or in an appellate tribunal. On this subject, the Court of Appeals perhaps has not been always consistent; and therefore the following list of cases is submitted to the reader, that he may for himself, if he can, elicit from them the distinctions. 1 Wash. 162, Kennedy v. Baylor; 225, Beckwith v. Butler; 2 Wash. 198, Walker v. Walke; Humphrey v. Smith, there cited; 3 Call 22, Brewer v. Hastie & Co.; 4 Call 364, Holcomb v. Innis; 6 Call 50, Triplett v. Dunlop; 2 Hen. & Munf. 420, Perkins v. Saunders; 2 Munf. 285, White's ex'rs v. Johnson; 305, 310, Winston v. Johnson's ex'rs; 3 Leigh 364, Burwell's ex'rs v. Anderson; 7 Leigh 412, Foreman v. Murray; 10 Leigh 639, Dunbar's ex'rs v. Woodcock's ex'r; 1 Gratt. 12, Turner v. Turner's adm'r; 2 Gratt. 116, Kee's ex'r v. Kee's creditors; 3 Gratt. 139, Moores v. White; 4 Gratt. 87, Gray v. Dickenson's adm'rs; 5 Gratt. 384, Willis's adm'r v. Dunn's adm'r.

3. In Mr. Nelson's copy, mentioned supra div. I. of this article, there is the following MS. addition. "taken from the author's own private copy," after the words, "Carter Braxton possibly might have thought it so," in p. 87, l. 33, of this edition: "but that any other citizens besides the judges of appeal thought so, the commentator doth not know. He doth not recollect what was his own opinion at that time. Possibly he was asleep, when the years 1777 and 1778 ended, and their successors began, their revolutions. He inclines to believe that he thought or dreamed, that depretiation, if he thought or dreamed at all about it, was the same on the new years days of 1778 and 1779, as it was the days before." In point of expression this differs a little from the text as it stands in this edition, which follows in this particular the printed list of errata that is appended to the first.

V.

Pendleton v. Hoomes. Ante, pp. 94-95.

1. A testator gave the residue of his estate to be equally divided between the children of his uncle B. H. and his cousin J. H., to them and their heirs forever, share and share alike; and died before 1 Jan., 1787, leaving J. H. his heir. Among the children of B. H. that were living at the date of the will, was a daughter who died afterwards in the lifetime of the testator, leaving children that survived him. Held:

(1) Her death did not occasion a lapse.

(2) The children of B. H. living at the testator's death and J. H. were the designated objects of the testator's bounty.

437 *(3) An equal division per capita was to be made among them. As to the first point, see the first article of this Appendix, ante, 361-364.—As to the second point, which involves a threefold consideration: 1. that the predeceasing daughter of B. H. was not one of the devisees or legatees, so designated as that her death could occasion a lapse, see the cases collected in notes 10-13, ante 363-364; and 2. Jarm. Wills, 74-75. It is there said: "An immediate gift to children (i. e. a gift to take effect in possession immediately on the testator's decease,) whether it be to the children of a living or a deceased person, and whether to children simply or to all the children, and whether there be a gift over in case of the decease of any of the children under age or not, comprehends the children living at the testator's death (if any), and those only; notwithstanding some of the early cases, which make the date of the will the period of ascertaining the objects." And for a reference to some of those "early" cases, see Bac. Abr. tit. Legacies, B. 2. 1; where) it is remarkable) even in the seventh London edition, 1832, the law is stated as if it were still according to them. —2. That the children of that daughter of B. H., who themselves survived the testator, were not among the designated objects of his bounty, see 2 Jarm. Wills 69-73; 1 Rop. Leg. 4th edit. 68-76; and the cases there collected—3. That J. H. himself was (and not his children) to share with the children of B. H., see 1 Cox 258, Lugar v. Harman; 2 Jarm. Wills, 112. As to the third point, which admits of a twofold consideration: 1. that the division was to be per capita, not per stirpes, see 1 Cox 258, Lugar v. Harman; 1 Leigh 74, Crow v. Crow; and the cases collected in it, and in 1 Rop. Leg. 4th edit. 156-163; 2 Jarm. Wills, 111. In the last mentioned book it is said: "Where a gift is to the children of A. and B., or to the children of A. and the children of B., they take per capita, not per stirpes. The same rule applies, where a devise or bequest is made to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation; as to "my brother A. and the children of my brother B.;" in which case A. takes only a share equal to that of one of the children of B., though it may be conjectured that the testator had a distribution according to the statute in view. And of course it is immaterial, that the objects of gift are the testator's own children and grand children: as where a leg-

acy was bequeathed "equally between my son David and the children of my son Robert." But (continues Mr Jarman) this mode of construction will yield to a very faint glimpse of a different intention in the context. Thus the mere fact, that the annual income, until the distribution of the capital, is 438 applicable per *stirpes, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital. 4 Beav. 239, Brett v. Horton. Perhaps the doctrine contained in the last two sentences of this extract will explain the decision, which the Court itself did not explain, in Hamletts v. Hamlett's ex'r, 12 Leigh 350. 2. That the children of the predeceased daughter of B. H., who were the plaintiffs in this case, could not come into the division, by virtue of any title derived from either their mother or the testator, even as the law now stands, see ante 364, 367, notes 15 and 26, and particularly the case of Gross's Estate, 10 Barr. 360. They recovered, as assignees of the other children of B. H., so much as was by the latter assigned to them. See 2 Barn. B. R. 422, Reynolds v. Hyde in canc.

2. Where the Chancellor in this case says, "if some decisions of the English courts be orthodox," he doubtless alludes to Plowd. 345, Brett v. Rigden; Cro. Eliz. 243, Hartop's case; 1 Leon. 254, S. C. Cro. Eliz. 422, Fuller v. Fuller; Moore 353, S. C. 2 Sid. 53, 78, Packman v. Cole; 1 Mod. 267, Strode v. Perryer; 2 Mod. 313; 1 Freem. 292, 477; 2 Lev. 243; 1 Ventr. 341; T. Raym. 408; T. Jones 135; 3 Keb. 845; 2 Show. 63; Pollexf. 546, S. C. 2 Vern. 722, Hutton v. Simpson; Prec. Chanc. 439, S. C. 1 P. Wms. 397, Goodright v. Wright; 1 Stra. 25, S. C. 445, Busby v. Greenslate; 2 Ves. Sen. 77, Marlborough v. Godolphin; 3 Bro. P. C. 2d edit. 95, Wynn v. Wynn; 416, Ambrose v. Hodgson; 1 Dougl. 387, S. C.; 344, note 4, Warner v. White; 3 Dougl. 4; 1 Bro C. C. 219, n.; 6 Durnf. & E. 518; 11 East. 521, n. 3 Bro. P. C. 2d edit. 435, S. C. Other cases to the same effect have been decided since the principal case here. See 4 Durnf. & E. 601, Doe v. Kelt; 6 Durnf. & E. 517, Denn v. Baggshaw; 11 East 548, Doe v. Colyear.

VI.

Dandridge v. Lyon. Ante, pp. 123-128.

In this case Chancellor Wythe vindicates at large some former decision (or decisions) by him, to the effect that the owner of a female slave may, by will, give her to one person, and unborn children of her to others: the contrary whereof had been "agreed," (quaere whether determined,) in the General Court, anno 1736, Jeff. Rep. 43-49, Spicer v. Pope. See also ibid 55-56, Giles v. Mallicote. It had, however, been decided before, anno 1731, (Jeff. Rep. 5, Tucker v. Sweney;) and the point has probably never been seriously doubted since, (see 2 Brevard 439 *307, McVaughters v. Elder;) that increase of slaves born after their owner's death are so far part of his estate, as to be liable for his debts. Which being settled, a necessary consequence thereof would seem to be, that (no positive law restraining him) he must have the same power to dispose of such afterborn increase as of any other portion whatever of his personal estate. See 10 Leigh 280-281, Crawford v. Moses. And so has it been long, and often from time to time, held in reference to the precise proposition (of Chancellor Wythe) stated above. Cam. & Norw. 113, Mullington's ex'rs v. Shipman; 4 Dev. & Batt. 60, Pearson v. Taylor; 72 Conner v. Satchwell; 3 Litt. 275, Bank's adm'r v. Marksberry; see 4 J. J. Marsh. 369, Fanny v. Bryant. Another question, which lies close to this, if not intimately connected with it, is, whether increase of a female slave, born during a temporary ownership of her, belongs to the temporary owner or not. From what has just now been said it results, that where such ownership is created by will or deed, it is in the power of the person creating it to regulate that matter as he pleases: and therefore in all such cases this question respects the meaning of the particular instrument, and is a question of construction only. 7 Leigh 592, Patterson v. Franklin; 7 Monr. 233, Miller v. McClelland. But if, upon all the other considerations that property touch it, there is, about the meaning a doubt hanging in equilibrio, then a presumption, that it was not intended to separate the mother from her offspring, comes in and turns the scale. 6 Pet. Cond. Rep. S. C. 652, Williamson v. Daniel; 12 Wheat. 568. S. C. Hence, where female slaves are bequeathed, or limited by deed, (see Mart. N. C. Rep. 22, Tims v. Potter; 1 Hayw. 234, n. S. C. 2 Hayw. 130, 182, S. C. cited; 4 B. Monr. 220, 222, Young's adm'r v. Small;) to the use of one for life and afterwards of another, without further indication of what is designed in regard to their interim increase, it is settled in Virginia, (3 Call 25, 28, Chisholm v. Starke; 6 Munf. 368, Ellison v. Woody; 2 Leigh 377, Madden v. Madden's ex'rs; 7 Leigh 13, Roneys v. Roneys;) North Carolina, (1 Hayw. 233, Glasgow v. Flowers; 3 Hawks 456, Erwin v. Kilpatrick; 2 Dev. & Batt. 125, Knight v. Wall; 2 Ired. Eq. Rep. 316, Covington v. McEntire;) South Carolina, (4 Desauss. 611, Ellis v. Shell;) Tennessee, (Cooke 113, Preston v. McGaughey; 381, Craig v. Estis;) Kentucky, (1 A. K. Marsh. 532, Murphy v. Riggs; 7 Monr. 223, Miller v. McClelland;) and, it is probable, (12 Wheat. 568, Williamson v. Daniel; 6 Pet. Cond. Rep. S. C. 651, S. C.) in all the other slave-holding States, except Maryland, (1 Harr. & McHen. 160, Scott v. Dobson; 348, Somerville v. Johnson; 1 Harr & Johns. 526, Standiford v. Amoss; 7 Harr. & 440 Johns. 263, Bohn *v. Headly;) that such increase belongs to the person entitled under the limitations over,—often, but improperly, (see Smith on Executory Interests, sect. 159, 159 a;) called the remainderman. And,—if need be upon the same presumption, corroborated by the favour which in doubtful cases is always shewn to liberty, (6 Rand. 652, Isaac v. West's ex'r;)—where the testator or settlor, after creating a life estate in his slaves, directs that at the termination thereof all his slaves shall be free, those born during the continuance of the life estate, no less than those in esse before, are entitled to their freedom. 4 Leigh 252, Elder v. Elder's ex'r; 9 Leigh 188, Erskine v. Henry; 11 Leigh 616, Anderson's ex'r v. Anderson, 2 Gratt. 36, Lucy v. Cheminant's adm'rs. See 1 Gratt. 327, Binford's adm'r v. Robin; 6 Monr. 49, Hart v. Fanny Ann; 4 J. J. Marsh. 368, Fanny v. Bryant; and as to this point in Maryland, 6 Harr. & Johns 16, Hamilton v. Cragg; 20, n. Jack v. Hopewell; 526, Chew v. Gary; 2 Bland 314, Hammond v. Hammond; 17 Peters 1, Williams v. Ash; 1 How. S. C. Rep. 1, S. C. Where the law creates the temporary ownership, the result, as undoubtedly settled in this State, (3 Rand. 230, Maria v. Surbaugh; 10 Leigh 280-281, Crawford v. Moses;) is the same; but upon what precise ground it was originally so considered may be difficult now satisfactorily to discover. "It seems (says Mills, J. delivering the opinion of the Kentucky Court of Appeals in Miller v. McClelland, 7 Monr. 233;) to be an historical fact, that from an early period of Virginia that State adopted the maxim partus sequitur ventrem, with respect to such offspring; and it probably arose out of the decisions of her colonial courts, [see Jeff. Rep. 67, 70, Coleman v. Dickinson;] of which we have no report; and it became so firmly established as a rule of property that none now question it in her courts." But perhaps a solution approaching more nearly the truth is suggested in a learned and ingenious note of Judge Haywood, to the North Carolina case (above cited) of Timms v. Potter, 1 Hayw. 234-237. After admitting the doctrine of that case to be time-honored there, but mentioning as in contrast with it the supposed rule (which presently will be more fully noticed) of the common law respecting increase of all inferior animals, and that which obtains in Maryland respecting increase of slaves; the note (which, with a slight modification that will occur readily to the reader, is as applicable here as there,) proceeds thus: "It would not be a matter of difficulty to trace [the origin of the rule adopted and confirmed by the case of Timms and Potter,] with some degree of probability. This country, though it began to be settled as early as the year 1668, it is to be presumed had not come under 441 an established government, having *courts for the regular and constant administration of the laws, till about the beginning of the present [eighteenth] century. The first acts of the legislature, that appear in our statute-book were made in the latter part of the year 1715, though there are judicial records purporting to proceed upon acts passed in the year 1712. It is probable, and indeed it is a fact very generally admitted, that this country in its infancy was for the most part settled by emigrants from Virginia, who, as all other emigrants do, brought with them the customs and legal notions of the country they left. Every one who has practised in North Carolina will be immediately satisfied with this observation if he will but recollect how many legal notions, borrowed from the laws of Virginia, are yet current amongst the inhabitants of this country. The law of Virginia of the year 1705 made slaves in many respects real property, and annexed them to the lands of the owners, thereby placing them in the condition of the ancient villians in England, who were adscriptitii glebae and went, as also did their posterity, to the absolute proprietor of the land. The act of 1705,

expressly considered the increase as a part of the inheritance that belonged to the heir, [see ante 180, Nance v. Woodward;] and provided that the tenant in dower or usufructuary owner should not remove them out of the country 1705, c. 23, s. 10, [rather 11; 3 Hen. Stat. Larg. 335.] Hence, it is not improbable, arose the idea first entertained in this country that the increase of slaves belonged to the absolute proprietor, exclusive of the claims of the temporary owners or usufructuaries; and that idea, for want of examining its foundation, having once become general, the inhabitants of the country began to act under it in making their contracts, wills, and settlements as provisions for their families; and probably continued to do so, until at length it became dangerous and fraught with mischievous and unjust consequences to attempt the establishment of a different rule, or the true one; and the courts were necessitated, as they have been in some other instances, to permit common error to make the law. Thus, what at first was but a crude opinion, without any legal foundation, hath in process of time and by long usage been adopted into the body of our laws, as a fixed and settled rule of property.—This seems to be a more rational mode of accounting for the rule laid down in Timms and Potter, than that which seeks to support it upon principles of the common law; all of which, so far as they can be traced, or as they afford any deductions that can be rationally inferred from them, are certainly repugnant to the rule established in Timms and Potter."—This was published in 1798: Yet when in 1801 it was held, in the same state, that the increase of cattle ad infinitum belongs to
442 the owner of *the original stock,—a decision which, as applied to the facts of the particular case, seems indubitably correct,—the Judge who pronounced it said: "It has been decided, that the increase of negroes and their increase belong to the owner of the wench from whom all descend; and I cannot distinguish the case of negroes from that of all other animals;" (2 Hayw. 147, Tyson v. Simpson.) The distinction he was not able to make has, however, been established most conclusively there, by subsequent adjudications; (1 Dev. & Batt. Eq. Rep. 441, Perry v. Terrel; 1 Ired. Eq. Rep. 286, Poindexter v. Blackburn;) which in regard to brute animals, have settled a rule comformable to what Judge Haywood (in his note just now quoted) supposed, and what has been taken elsewhere, [1 A. K. Marsh. 533, Murphy v. Riggs;] to be the rule of the common law,—namely, that a tenant for life of horses, cattle, and what is generally called live stock, has an absolute right forever to the young thereof produced during his tenancy. Whether English authorities, or any besides those above cited, can be found, that will warrant so large a statement respecting the common law, may be perhaps doubtful; certainly those mentioned in Bac. Abr. tit. Leases and Terms for Years, A., vol. 3, pp. 300-301, first four editions; vol. 4, pp. 638-639, 7th edit. Lond. 1832; [whereof only one case touches this subject at all, viz. Wood v. Ash and Foster, Godb. 113; Owen 139; 1 Leon. 42;] and 8 Johns. Rep. 432, 435, Putnam v. Wiley, do not. See also 2 Penns. Rep. [by Penr. & Watts,] 166, Allen v. Allen; 2 Rand. 230, Maria v. Surbaugh; and post, div. VIII of this article. But, however that may be, such was the rule of the civil law; [Dom. Civ. Law, P. 1, B. 1, tit. 11, sect. 3, vol. 1, pp. 198-200, edit. Lond. 1722;] which nevertheless disposed of the increase of slaves [Just. Inst. lib. 2, tit. 1, sect. 37; Jeff. Rep. 131, note to Carter v. Webb; 2 Kent's Comm. 361;] in like manner as is done among us:—And Daniel Dulany, perhaps as able a man as has ever adorned the profession in America, contemplating simultaneously the rules both of the common and, of the civil law, would have recommended a decision agreeably to the latter, as he said himself, to the court he was then advising in Maryland, had it not been for the regard which in his estimation was due to the maxim stare decisis. 1 Harr. & McHen. 352-354, Somerville v. Johnson.

VII.

Bailey v. Teackle. Ante, pp. 173-180.

1. As to the execution of the will in this case, see 1 Gratt. 454, Waller v. Waller, and the cases
443 cited in that; 4 Dana 1, *Miles's Will; 1 B. Monr. 56, Brown's Will; V. C. 1849, ch. 122, sect. 4.

2. As to the point stated in the reporter's note a, see 5 Call 481, Blunt v. Gee; 4 Hen. & Munf. 35-36, S. C. cited; 3 Rand. 361, 371-372, Wiseley v. Findlay; V. C. 1849, chap. 123, sect. 12. See also 1 Lom. Dig. 119-120; V. C. 1849, chap. 110, sect. 4, 5.

3. By the common law, collaterals of the half blood were excluded in fee simple descents of real estate; (2 Blackst. Comm. 224-233; see 1 Steph. Comm. 383-391;) but in other cases they were regarded as kindred, occupying such a position as to be not so near as those of the whole blood in the same, yet nearer than even those of the whole blood in any remoter, degree. See 2 Anders. 171, Swanne v. Gatland; Cro. Eliz. 825; Owen 128; Moore 685; 2 Roll. Abr. 40, pl. 6, S. C. Sir T. Jones 17, Sadler v. Draper; Hargr. Co. Litt. 88, b, note 5. Hence, in contests for administration upon the statute 21 Hen. 8, cap. 5, sect. 3, a brother or sister of the half blood was to be preferred before an uncle or nephew of the whole; (1 Ventr. 424, Collingwood v. Pace; Hargr. Co. Litt 10, b, note 2, Brown's case;) but, contrary to what is stated by Blackstone and others following him, (2 Blackst. Comm. 505; 2 Steph. Comm. 241; Toll. Ex'rs, 5th edit. 91; 1 Wms. Ex'rs, 4th edit. 348;) either of them was to be postponed to either a brother or sister of the whole blood, both by the rule of the ecclesiastical, [2 Roll. Abr. 303, pl. 28, Anon] and by that of the common law courts; and therefore, when the ecclesiastical courts were proceeding, at the instance and in favor of the latter to revoke administration already granted to the former, prohibitions were in several cases refused, [2 Keb. 333, 336, Johnson v. Reeves; 395, Dutton's case cited; 533, Pattenden v. Burghesse;] while none that was ultimately perfected appears ever to have been granted. The case of Wingate v. Fitch, 2 Roll. Abr. 303, pl. 27; which is evidently the case reported A. Benl. 129 [mispaged 133,] by the name of Wingate v. Glasscock, and cited in Aleyn 36; was terminated by compromise. Palm. 416; Latch 68, S. C. cited. And the case of Brown v. Wood, Aleyn 36; Styl. 74; which is the sole authority cited by Blackstone and those who have followed him, and also by Comyns, [Dig. tit. Administrator, B. 6;] upon this point, appears by Sir Matthew Hale's more reliable account of it to be the reverse of what they supposed. Hargr. Co. Litt. 10, b, note 2, Brown's case, Mich. 23 Car. 1, and Mich. 1650; see also Brown's case, cited 1 Ventr. 307; 2 Keb. 336; 3 Keb. 731, 777; and quaere whether that was the same case, or an earlier one to the same effect. When these cases were
444 agitated, this point *was one of considerable practical importance, inasmuch as an administrator was then entitled to retain, for his own benefit, the clear surplus of the personal estate remaining after the payment of debts and expenses of administration; [2 Wms. Ex'rs, 4th edit. 1271; 5 Rand. 55, 66, Coleman v. McMurdo; see 1 Hen. Stat. Larg. 401, chap. 10; 479, chap. 102;] but it ceased to be so when the statute 22 & 23 Car. 2, cap. 10, "for the better settling of intestates' estates," was passed; and after that in place of it, two other questions arose. The first was, whether those of the half blood were entitled to come into the distribution at all along with those of the whole blood in equal degree. From the beginning the ecclesiastical courts held the affirmative; but it was for some time in doubt whether the common law courts would not, by prohibition, restrain them from making distribution to such; at length, against the strong leaning at least of Hale's and Twisden's opinions, it was, after the retirement of the former from office, settled in favour of allowing the ecclesiastical courts to proceed. 1 Ventr. 307, 316, 323, Smith v. Tracy; 3 Keb. 601, 620, 669, 730, 776, 806, 831; 1 Freem. 288, 294; 1 Mod. 209; 2 Mod. 204; 2 Lev. 173; T. Jones 93, S. C. 2 Vern. 125, S. C. cited. The second question, which related to their manner of proceeding, was, in what proportions the distribution should in such cases be made. As to this, some [if not all] of the ecclesiastical courts, [2 Lev. 173, Tracy v. Smith; 1 Vern. 437, Winchelsea v. Norcliffe; 2 Vern. 125, Crooke v. Watt;] and particularly Sir Richard Lloyd in several cases before him, [cited Show. P. C. 108, Watts v. Crooke;] originally decided that each one of the half blood should receive only half so much as each one of the whole blood; and for a time the same opinion prevailed in the courts of equity, both in chancery, [1 Vern. 403, Winchelsea v. Norcliffe; 2 Freem. 95, S. C.] and in the exchequer; [2 Freem. 95, Anon. cited;] but after much fluctuation and conflict of authorities in the courts of original jurisdiction, the point was in 1690 settled by the decision of the House of Lords, [Show. P. C. 108, Watts v. Crooke; 2 Ventr. 317, S. C.,] affirming a decree of the Lords Commissioners of the Great Seal, (2 Vern. 124, Crooke v. Watt; 2 Freem. 112, S. C.) by which a sister of the half was allowed an equal share with a brother and a sister of the whole blood. And ever since, in point of distribution there has been no distinction between them;

[Bunb. 158, Wall v. Theedham, cited; 1 Ves. Sen. 156, Burnet v. Mann; 7 Cond. Engl. Chanc. Rep. 220, n. S. C. 1 Myl. & K. 665, Jessopp v. Watson;] but in point of administration it is still the rule of the ecclesiastical courts, that, in a competition between the half and the whole blood, the latter is [caeteris par-
445 ibus,] to *be preferred. 2 Lee 499, Mercer v. Morland; 500, Webb v. Griffin, cited. Among us, since 1 Jan. 1787, both in descents, [12 Hen. Stat. Larg. 139, chap. 60, sect. 13; V. L. 1794, p. 178, chap. 93, sect. 15; 1 R. C. 1819, p. 357, chap. 96, sect. 15, V. C. 1849, chap. 123, sect. 2;] and in distribution, [12 Hen. Stat. Larg. 146, chap. 61, sect. 25; V. L. 1794, p. 172, chap. 92, sect. 57; 1 R. C. 1819, p. 382, chap. 104, sect. 29; V. C. 1849, chap. 123, sect. 10;]—with some qualification in regard to the estates of infant descendents, [as to which see V. C. 1849, chap. 123, sect. 9, and references ibid.]—the rule has been, that collaterals of the half blood are to share along with those of the whole blood, but not to share equally; the portions of the latter being the double of those of the former.—From this review of the authorities in England and Virginia, there seems to be no reason for doubting that the same decision ought to be made here, as was there in an unreported case, which is thus cited in Show. P. C. 109: "In the case of Milborne and Milborne, 30 March 1670, before the Lord Keeper Bridgman; W. M. had by will devised all his lands in trust to pay every brother and sister he had living forty pounds per annum each, and he had several brothers and sisters both of the half and whole blood; the brothers of the whole blood did oppose the payment of the forty pounds per annum to those of the half blood; but 'twas adjudged and decreed that they are [were] equally entitled to the forty pounds per annum apiece,—and enjoyed accordingly." But if, in a marriage settlement, a limitation, in default of appointment by the wife be made to her next of kin of her own blood and family, equally to be divided among them; though the half blood would, in England, have the benefit of such limitation as much as the whole blood, [1 Madd. Rep. 44, Cotton v. Scaranche;] upon the idea that the statute of distribution furnishes the rule in such case; yet there may be serious doubt concerning it here, since our statute and the limitation itself prescribe different proportions in regard to the distribution. And, to solve this doubt, it may be necessary to consider well the older authorities which have been cited in the course of this note. See also 2 Eq. Abr. 290, pl. 7, Anon.

VIII.

Nance v. Woodward. Ante, pp. 180-2.

1. As to the point arising upon the construction of the will, and presenting a kind of question which is [I believe] very little, if at all, considered in the texts books, see 1 Wash. 45, Seekright v. Car-
446 rington; 4 Call 472, S. C. 4 Gratt. 16, Purcell *v. Wilson; 1 Ired. 166, Doe v. Posten; Dyer 19, b. pl. 115-117, Anon. Dalis. 50, pl. 15, Anon. Moore 52, pl. 158, S. C. 1 Leon. 57, Wiseman v. Wiseman; 1 Anders. 160; Owen 140; Sav. 80, S. C. 1 Roll Abr. 844, pl. 1, Anon. pl. 2, Anon. pl. 3, Fawcet's case; Godb. 146, Pinder's case; Yelv. 209, Wallop v. Darby; Cro. Jac. 290, Browne v. Jerves; 1 Roll. Rep. 369, Anon. cited; 3. Bulstr. 124, 127, S. C. cited; Cro. Car. 368, Spirit v. Bence; Vaugh. 262, Gardner v. Sheldon; 1 Sid. 105, Bryan v. Fitzharris; 1 Mod. 100, Wilson v. Robinson; 2 Lev. 91, S. C. 2 Ld. Raym. 831, Cole v. Rawlinson; 3 Bro. P. C. 2d edit. 7; Cas. temp. Holt. 744; 1 Salk. 234, S. C. 239, Hopewell v. Ackland; Comyns 164, S. C. 8 Viner. 217, Redoubt v. Redoubt; 2 Dougl. 759, Right v. Sidebotham; 8 Durnf. & E. 64, Doe v. Wright; 4 Bos. & Pull. 335, Doe v. Child; 9 East. 278-275, Right v. Compton; 14 Ves. 364, Paice v. Archbishop of Canterbury; 4 Maule & S. 58, Fenny v. Ewestace; 4 Barn. & Cress. 667, Doe v. Westley; 7 Dowl. & Ryl. 112, S. C.

2. As to the disposition of the increase of slaves, see supra div. VI of this article. And as to the disposition of the increase of other animals see ibid. and 1 Eq. Abr. 361, Hayle v. Burrodale; Jeff. Rep. 123, Carter v. Webb; 2 Rob. Pract. 97-99; 10 Leigh 628, Dunbar's ex'rs v. Woodcock's ex'r; 2 Dev. Eq. Rep. 426-429, Smith v. Barham.

IX.

Hylton v. Hunter. Ante, pp. 195-210.

In Mr. Nelson's copy, mentioned supra div. I of this article, there is a MS. correction "taken from the author's own private copy," whereby "supposing the money assigned now to be 9596" is substituted for "supposing the deficiency now to be 9596," in p. 201, l. 31 of this edition.

X.

Farley v. Shippen. Ante, pp. 254-268.

1. As to the light in which joint tenancy should be viewed, and is viewed in courts of equity, see 1 Salk. 158, York v. Stone; 2 P. Wms. 281, arg. Barker v. Giles; 4 Bro. P. C. 2d edit. 580, 585, Staples v. Maurice; 1 Wils. 165, Hawes v. Hawes; 1 Ves. Sen. 13; 3 Atk. 524, S. C. 4 Kent's Comm. 361.

2. It is now perfectly settled, that "a court of equity in this commonwealth can decree de-
447 fendants, who are within its jurisdiction, *to convey lands which are without its jurisdiction." Most of the numerous English cases relating to this subject are collected in 1 Spence's Eq. Jurisd. 426-427, and 2 Spence's Eq. Jurisd. 6 et seq., which is one of the reasons for not citing them here; another is, that when several of them were cited in Vaughan v. Barclay, 6 Whart. 392, counsel arguendo said: "In all the english cases cited, where a conveyance has been decreed of lands out of England, it has been where the lands were in a subordinate jurisdiction, —as in the colonies, or in Ireland; but we ask to be shewn a decree of conveyance of lands in France, or other foreign country, as that alone would be a case analogous to the present." Without investigating the accuracy of this criticism, or pausing to consider its value, the decision in that case is not obnoxious to it, nor does it apply to other American authorities: 1 Hen. & Munf. 5, Guerrant v. Fowler; 6 Cranch 148, Massie v. Watts; Hopk. 213, Ward v. Arredondo; 2 Paige 606, Mitchell v. Bunch; see also 5 Munf. 431, Hughes v. Hall; 1 Bibb. 409, Dunn v. McMillen. And a conveyance executed by the party, pursuant to such decree, passes the title with precisely the same effect as if it had been executed voluntarily. 3 McLean 358, Tardy v. Morgan. But neither the decree itself, nor any conveyance under it unless by the person in whom the title is vested, and therefore no conveyance by commissioners appointed by the decree, can operate a change in the title to lands so situated, 1 McLean 200, Watts v. Waddle; 6 Peters 389, 396, 400-401, S. C. 16 Peters 25, 57, Watkins v. Holman; see also ante, 144, Love v. Braxton; 5 Call. 540, S. C. 1 Rob. Virg. Rep. 45, Cocke's adm'r v. Gilpin; 3 Gratt. 148, Vanmeter's ex'rs v. Vanmeters; ante 418, note 63.

XI.

Rose v. Nicholas. Ante, pp. 268-272.

1. The Chancellor's decision upon the principal point in this case was in conflict with the decree made by the High Court of Chancery, 5 Nov. 1788, when it consisted of himself and two other judges, and with the decision of the Court of Appeals affirming quoad hoc that decree, July 1790, in King v. Hanson, 4 Call 259; and it was in effect overruled by the reversal [2 Wash. 141,] of his decree in Cole v. Scott, ante, 272. See also 11 Leigh 559, Clarke v. Curtis; 2 Rob. Virg. Rep. 474, Wade's heirs v. Greenwood. In order to determine how far these authorities are to be followed, in respect to transactions arising since 30 June 1850, it is material to remark that the ques-
448 tion in them was entirely distinct from that with which *Chancellor Wythe appears to have thought it [in substance] identical; namely, whether an equitable lien exists for unpaid purchase money, binding the land, in favour of a vendor who has conveyed it, and against a vendee by whom the conveyance has been accepted. For assuming that such a lien exists, as it certainly does in most cases not coming within the operation of V. C. 1849, chap. 119, sect. 1; still it may be said in favour of Chancellor Wythe's decision, that a difference not merely nominal distinguishes the case of a purchaser voluntarily perfecting his contract, and so submitting tacitly to the lien in question, from that of one who resists a specific performance; and, on the other hand, assuming that the lien does not exist, still it may be said in favour of the decisions which have overruled his, that a vendor, who by conveyance executed has parted with his estate and has not expressly reserved a lien, is in a very different condition from one, who, though seeking to force his estate upon another, is yet not willing to part with it himself but upon terms that are equitable and proper. And as the two questions are thus distinct, it would seem to be clear, that where the vendor has not executed any conveyance, the recent enactment above referred to makes no change at all in the law for other cases not coming within it, see 5 Munf. 342, Hundrey v. Lyons; 1 Rand. 53, Hatcher's adm'r v. Hatcher's ex'rs; 2 Gratt. 88, Hopkin's adm'r v. Cockerell; 3 Gratt. 243, Hanna v. Wil-

son. And quaere how it affects cases like Beirne's ex'rs v. Campbell, 4 Gratt. 125.

2. In Mr. Nelson's copy, mentioned supra, div. I of this article, there is a MS. correction "taken from the author's own private copy," substituting "plaintiff" for "defendent," in p. 271, l. 14, of this edition.

XII.

Hinde v. Pendleton. Ante, pp. 354-357.

For authorities, which at the time of the decision in the principal case were few, but have since become numerous, concerning the employment of a puffer or by-bidder at an auction, see 4 Bro. P. C. 2d edit. 198, Walker v. Nightingale; 13 Viner 544, pl. 13; Grounds & Rudiments of Law and Equity 89, S. C. nomine Walker v. Gascoigne; Treat. Eq. book 1, chap. 4, sect. 4; Cowp. 395, Bexwell v. Christie; 2 Wentw. Plead. 515, S. C. [noticed particularly by the present Lord Chief Justice of the Queen's Bench, in his life of Lord Mansfield, 2 Campb. Chief Just. 313-314, edit. Philad. 1851;] 2 Bro. C. C. 326, 331, Twining v. 449 Morrice;—which were of date prior to *this decision; and the following, posterior in time to it.—1 Fonbl. Eq. 5th edit. 227, note x, Att. Gen. v. Christie; 6 Bro. P. C. 2d. edit. 520, S. C. 6 Durnf. & E. 642, Howard v. Castle; 8 Durnf. & E. 93, 95, Blachford v. Preston; 2 Carr. & P. 208, Crowder v. Austin; 3 Bingh. 364; 11 J. B. Moore 283, S. C. Mood. & Malk. 123, Wheeler v. Collier; 3 Young. & Jerv. 331, R. v. Marsh; 6 Carr. & P. 671, Icely v. Grew; 15 Mees. & W. 367, Thornett v. Haines; 3 Ves. 625, n. Conolly v. Parsons; 620, Bramley v. Alt; 5 Ves. 508, Oldfield v. Round; 12 Ves. 477, Smith v. Clarke; Sugd. Vend. 7th. edit. 24, note q, Fitzgerald v. Foster; 5 Madd. Rep. 34, Meadows v. Tanner; 2 Coll. C. C. 279, Woodward v. Miller; 2 Phill. 372, Robinson v. Wall; 1 Hall 655, Hazul v. Dunham; 1 P. A. Bro. 346, Donaldson v. McRoy; 11 Serg. & R. 86, Steele v. Ellmaker; 4 Harr. & McHen. 282, Moncrieff v. Goldsborough; 2 Hayw. 328, Troughton's adm'r v. Johnston; 2 Dev. 126, Den v. Greenlee; 1 Dev. Eq. Rep. 35, Morehead v. Hunt; 411, Woods v. Hall; 2 Const. Ct. Rep. 821, 837, Jenkins v. Hogg; 13 Louis. Rep. 287, Bahan v. Bach; 3 A. K. Marsh. 526, Miller v. Campbell; 6 B. Monr. 630, Latham's ex'rs v. Morrow; 3 Story 611, Veazie v. Williams; 3 Metc. 386-388, Phippen v. Stickney; 2 Kent's Comm. 537-539.

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ADVERTISEMENT, PUBLISHER'S, p. 5.

ARBITRATION AND AWARD.

1. R. bought of Defts. lands to be paid for in so much tobacco of certain inspections, as referees named should value them at. Some other transactions intervened. The referees (in 1781) made their valuation, not only in tobacco, but sterling money, and also adjusted the accounts between the parties. —Judg'ts were obtained against R. on the penal bonds he had executed. R. filed a bill for an injunction and for relief against the award. The Referees deposed that they had valued the lands as high as they did in tobacco, in reference to the whole award, and that they would not have thus valued them had they not combined therewith the adjustment made of the accounts. The H. C. C. set aside the award, and appointed other valuers than those selected by the parties. Wythe C. dissented from said appointment; and, when sole chancellor, reinstated the first valuation and made that in sterling money the basis of his decree.—The Court of Appeals also held that it wus error to have appointed other valuers, without the consent of the parties: set aside their valuation; and also the first valuation, in tobacco, because of the manner in which the referees were induced to make it.

Ross v. Pleasants, &c., 10

2. The first valuation is a proper foundation for a just and equitable decision: if understood as intended by those who made it; i. e. according to the valuation in sterling money, not variable by changes in the value of tobacco. The Court of Appeals also held the same; but, as the contract was a specific one for tobacco, that the sterling valuation should be converted into tobacco, according to its price in sterling money, at the date of said valuation, to ascertain which an issue should be directed by the C. C. Instead of such issue, the price was fixed, by consent, by referees, whose decision both Courts affirmed. Ibid

3. Injunction to judgment founded on an award. D. owing only £100 was induced to give his bond for £150—the £50 being regarded as a penalty. Equity will relieve against said penalty, not only upon the general principle of making compensation, but because in this case the plaintiff was prevented by the defendant (who was also guilty of fraud) from performing one of the alternatives agreed upon.

Dawson v. Winslow, 114

4. An award will be set aside for improper and unfair conduct of the referees. Ibid

5. The Chancellor's remarks on the opinion of the Court of Appeals; and as to their power to correct awards. [See Ross v. Pleasants, Shore & Co., in this volume, p. 25; and 1 Wash. 156.] Ibid

6. An award condemning a party to pay damages for refusing to ratify an illegal and fraudulent contract is not binding; and relief against a bond given in conformity with said award is properly sought in equity. Excessive damages alone ground of relief, as proving the arbitrators to have acted in some unjustifiable manner.

Beverley v. Reynolds, 121

See Legacies, No. 3, and

Dandridge v. Lyon, 123

456 *ASSIGNMENT; ASSIGNEE; &c.

1. R., indebted to P., S. & Co., of whose firm he was a member, obtained an assignment to him of a bond executed by P., S. & Co. and which their agent agreed to receive in part payment of said indebtedness; but before said assignment, the firm of R. S. & Co., of which R. was also a member, had assumed, for value, payment of said bond. Of this R. was bound to take notice and was not entitled to be credited therefor against P., S. & Co.

Ross v. Pleasants, &c., 11, 17, 27

2. An obligor unfairly dealt with in the purchase of a slave may be discharged from his obligation against the seller; but not against an assignee, for value, without notice of the unfairness.

Objections to this opinion, and the chancellor's answers thereto.

Overstreet v. Randolph, &c., 47

See Injunction, and

Hylton v. Hunter, &c., 195

See Equity, and

Wilson v. Rucker, 296

BANKRUPTCY.

1. If a British subject be declared a bankrupt in England, having debts due him in this Commonwealth, his British creditors cannot recover satisfaction out of said debts in our Courts; for

2. The English Law will govern in our Courts in such a case and by that Law said debts would be transferred to the assignees in Bankruptcy.

Devisme & Co. v. Martin, &c., 298

BONDS.

Contract for the purchase of, how construed. See Injunction, and

Hylton v. Hunter, &c., 195

See Joint Obligors; Equity, 2, and

Field v. Harrison, 273

BRITISH DEBTS.

1. A debt due to a British creditor was not discharged by payment in paper money into the loan office, under the Act of 1788, which enacted that such payments should have that effect.

The right to money due to an enemy cannot be confiscated.

Page v. Pendleton, &c., 211

BY-BIDDING.

1. The pltff., known to have a feeling of attachment for certain slaves that were sold at auction, was induced to bid and buy them at an exorbitant price by a by-bidder. One of the defts., suspecting that some would decline bidding in order to favor the pltff., instructed the auctioneer not to let the slaves be sold under a reasonable value. The auctioneer then employed the by-bidder, without any special instructions to do so. Judgt. for the purchase money enjoined, and the sale set aside as to the excess of price and an issue directed, or a reference to a commissioner, by consent, to ascertain a fair price.

Hynde v. Pendleton, &c., 354

BYRD'S LOTTERY.

1. In Byrd's lottery, one of the prizes was described as "McKeand's tenement," to which had been attached more than half an acre of land; and also as No. 327, by the survey made by said Byrd, and to which only half an acre was attached. Said survey had been opposed and once defeated by the tenants; but, was made and publicly hung up in the building where the lottery was drawn. S. drew the prize. Byrd afterwards sold land adjoining said tenement to McKeand and he to others. S. over 14 years after the lottery, brought his bill claiming all that had ever been attached to the said tenement as included in his prize. HELD by the H. C. C.

2. That a survey and plan of the lands were a necessary part of the scheme: and that S. took by and for his prize only the half acre lot No. 327. But the Court of Appeals held that he was entitled to all that had been attached to "McKeand's tenement," and gave him a decree against Mc-
457 Keand's estate; *dismissing the bill as to the defendants who were purchasers from him without notice. 1 Wash. 336.

Southall v. McKeand, 95

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1. By Chancellor. Depositions may be read against a lite pendente purchaser, though they were taken

when he was not a party to the suit. Court of Appeals rejected said depositions; because he was not a party to the suit; but say, that had he been a pendente lite purchaser, they might perhaps have been read. See 1 Wash. 231.
Williams v. Jacob, &c., 145

DEPRECIATION.

1. B. indebted to S. by bond in 1776, sold S. merchandise in 1777-8 and '80. The H. C. C. held that said goods ought to be set off against said bond, only at their true value, as ascertained by the statutory scale of depreciation; not as a measure of legal obligation; but one as just as any that then occurred. The Court of Appeals held the legal scale not a just and proper rule for 1777 and 1778; and allowed the goods to the end of 1778 to be set off at their nominal value against the principal and interest of the bond; and so much of the residue of the goods as would pay the interest on the balance due to S. also to be set off at their nominal value; but subjected the residue of said goods to the legal scale of 1780;—of 60 to 1.
Hill v. Gregory, &c., 73
2. A legacy from a father to his daughter, (payable 100 £. within twelve months from August, 1777, and the rest at the discretion of his executors, when it could be conveniently raised from the profits of his estate,) paid in 1778, to her guardian in depreciated paper money, is, by the subsequent act of 1781, good, and will be a discharge at the nominal amount, as to both the executors and co-legatees.—And the guardian, having lent out part of the money, and received it in depreciated paper, which he at last funded, is not liable for the loss by depreciation.
So held by the Court of Appeals: see 1 Wash. 226. The Comments thereon by the Chancellor, who had held otherwise.
Yates v. Salle, 163
3. A. had sold W. houses and lots in Yorktown, valued at £1000, one-half payable in twelve months:—during which great depreciation had occurred; and the main question was whether W. should be allowed to pay in paper money. See Yates v. Salle, ante p. 163, and
Hamilton v. Urquhart, post.
Ambler v. Wyld, 235
4. The statutory scale of depreciation not applied to a bond in 1777, under the exception allowed by the stat. of 1781;—and the value of paper money during the dealings between the parties before the depreciation began, not being shown to have been less than of money current at this time.
By the statute, in case of tender and refusal, or of non-payment caused by the creditor, or where "other circumstances" would in the opinion of the Court make the statutory table unjust, the Court may award such judgment as may seem just and equitable. 10 Hen. Stat. 473.
Hamilton & Co. v. Urquhart, 295

DEVISES.

See Legacies: Wilts & Turpin v. Turpin, 137
" " Shermer v. Shermer's executor. 159
458 *1. 1751. A testator devised lands to his wife during her widowhood; and then to his daughter A. and her heirs after the time limited to her mother; also other land and a negro to another daughter and her heirs; and then added, "in case my two children should die without heirs of their bodies, then I give my said wife my plantation, [before devised to her and to A.] during her life, and after her death to my brother: my will is that my wife have all my estate till the first child marries or arrives to the age of twenty-one years; and my will is that there shall be an equal division of my estate and settlement." HELD, that the condition annexed to the first devises to the wife, viz: the continuance of her widowhood, is not discharged by the subsequent devise to her until the elder child should be married or attain the age of twenty-one years. She is entitled to all the estate: to part, if she continues a widow; and to the remainder, in the other event, whether she married again or not.
If she marry again, (as she did,) her title under the will to the land devised over to A. ceases; but her title to dower in it remains.
Bailey et ux. v. Teackle et als, 173
2. 1751. J. B., who was seised of lands in fee, devised them to his eldest son, who was also heir in tail of other lands which J. B. held in tail, and which he devised to his sons T. and W. The heir of the eldest son recovered the entailed lands which the father had devised; but an injunction was granted: and it was HELD, that it was plainly contrary to the testator's intention, that he should have all the lands; and having elected to take those in tail, he was compelled to convey the others to those who claimed through T. and W.
Along with the lands held by the testator in fee, he bequeathed slaves to the eldest son. HELD, that he should also account for said slaves and their increase, and for the rents and profits of the lands to be conveyed by him; and the plaintiffs should account for the rents and profits of the lands recovered by him.
Cary et als. v. Buxton, 183
See Wills, and
Aylett v. Aylett, &c., 219
See Distribution, No. 2, and
Harrison v. Allen, 291

DISTRIBUTION.

1. The section of the statute of 1785-7: that an intestate's real estate shall descend to his children; if none, to his father; if none, to his mother, brother, and sister, &c., was re-enacted in 1792, by an act which repealed that of 1785-7, and which was to be in force from its passage; but subsequently, in the same session, the operation of the Act of 1792, was suspended. By Act of 1789, the mere repeal of a law did not revive a law which it had repealed. HELD, that the section of the Act of 1785, above cited, was not repealed, nor the Act itself, during the suspension of that of 1792. So that,
Sisters could participate with their brother in an inheritance.
Harrison v. Allen, 291
2. Lands acquired after the date of a testament could be transferred by said testament if such be the testator's intention. Ibid
3. If such after acquired land did not pass by a testament, it would descend, in default of children and their descendants, to testator's father, and so on down, according to the statute. Ibid
4. See Devises &
Bailey v. Teackle, 173
5. On the words, 'provided that there be no representations admitted among collaterals, after brothers and sisters children,' which are literally transcribed into our statutes, english courts have decided, that the collateral kindred, whose representatives succeed to the shares, to which their parents, if they had been living, would have succeeded, must have been brothers and sisters of the intestate: So that although B. the surviving brother, and D, the child of C. a deceased brother, would
459 succeed *to the goods, of A. dying intestate, and childless, &c.
Yet B, the surviving uncle, should succeed to all, excluding D, the child of C, a deceased uncle, from succession to a part of the goods of A, in the same circumstances. So, if B. and C, had been nephews of A: or if B. had been the uncle, and C, the nephew, who, by the case in 1 Atkyns rep. 454, are in equal degree of kindred to A.
The argument of North C. J., (in T. Ray. Rep. 496.) in support of these decisions, examined by the Chancellor; who holds that
The children of those next of kindred to the intestate in equal degree, however remote, are not excluded from succession, to the portion to which their stock, if living, would have succeeded. His reasons for such an explication of the Statute.
Case upon the Statute of Distribution, 302

DOWER.

1. By marriage settlement, the wife, at the death of her husband, was to have one-third of all the negroes whereof the husband died possessed, in lieu of dower; and if she survived and had no child by him, she was to have all the negroes which came by her, in her absolute right. She did survive and had no child by him. HELD, that she was entitled to the dower slaves in addition to her own before the marriage.
She is not precluded by a different division and assignment in the county court to which she was no party.
Hearne et ux. v. Roane, &c., 90

EQUITY.

1. See Arbitration, No. 1, and
Ross v. Pleasants, 10
2. See Arbitration, No. 2, and
Dawson v. Winslow, 114
3. In controversies respecting conflicting titles, by grant, to lands, where fraud is suggested and proved, Courts of Equity have competent jurisdiction, are most usually and properly resorted to, and can afford ample and adequate relief. Held, by the

Court of Appeals and also by the chancellor, on reconsideration. Bill dismissed, because fraud was not proved. See this appeal in 1 Wash. 116.
Jones v. White, 111

4. H. purchased of B. a London estate; thereby hindering L. from enjoying a right and exercising a lawful power derived to him from an agreement and letter of Attorney from B. to L. If H. had notice thereof, before his purchase was complete and before payment of the purchase money, he was liable to L. for damages in an action at law,—L. not being able, by decree of any Court here, to subject the estate which lieth in Great Britain; nor ought L. to be compelled to resort for redress to any court of Great Britain, where, if H. be so liable, the remedy is no more proper than here; and he might be disappointed of his remedy against the land by a sale thereof to a purchaser without notice of his claim. Equity will also grant him relief in a suit for discovery whether H. had such notice; and though H.'s answer deny such notice, the bill is still sustainable in order that plaintiff may endeavor to prove the purchase such an one as ought not to avail him who pleaded it.
Love v. Braxton, &c., 144

5. The Court of Appeals, reversing the decree of the Chancellor, who had decreed otherwise, HELD (2 Wash. 136,) that if a bond be made joint without fraud or mistake, equity will not charge the executors of the surety who have become discharged at law by his death in the lifetime of the principal. Aliter, if the money for which the bond was given had been lent to both obligors.
Remarks of the Chancellor in support of his opinion: which is supported now by the Code, p. 582, sec. 13.
Field v. Harrison, 273

6. R. lost a military certificate, and obtained
460 from the Auditor a duplicate, *which, however, he returned as soon as he knew the original was found. In the mean time, the original had been purchased by the plaintiff for value and without notice. HELD: that R. was entitled to the certificate, with interest thereon received; or to the principal and interest.
Wilson v. Rucker, 296

7. A court of equity may decree a plaintiff to pay money to a defendant, who had not demanded it by a cross bill. Ibid

8. If the Sheriff neglect to return an execution, at the request of the plaintiff, he is not liable to a fine; and a judgment for such fine may be enjoined; and though the answer deny such request, yet the testimony of the one witness proving it is sufficiently corroborated by the plaintiff's having rested for three years without complaint that the execution had not been returned, and there being no inducement to have it returned, as there was no property on which a new execution could be levied.
Goodall, &c. v. Bullock, 328

9. Though the answer deny the allegations of a bill, if a discovery be not required the defendant is not bound to answer on oath, and against his answer whether on oath or not, the testimony of one credible witness will prevail over it. Ibid

10. Equity may relieve against such a fine, on the principle upon which it relieves against forfeitures and penalties. Ibid

12. The Court of Appeals, 3 Call, 44, October, 1801,—affirmed the decree of the Chancellor; and said that the fine imposed on an officer who had committed no fault, for the benefit of one who had sustained no injury was superlatively excessive, unconstitutional, oppressive, and against conscience. And that equity ought to give relief even if appellant B. had pleaded to the jurisdiction or demurred, as was done in Pryor v. Adams, 1 Call, 390. Ibid

13. Bill for relief against a verdict dismissed: the motion for a new trial,—the only ground for the interposition of the Court,—having been rejected.
Cobbs v. Mosby, 137

EXCESSIVE DAMAGES.

1. Sufficient ground of relief in equity against an award, as shewing unjustifiable conduct by referees.
Beverley v. Rennolds, 121

FEE SIMPLE ESTATE.

1. What devise constitutes it.
Shermer v. Richardson, &c., 159
2. See Legacies & Wills, no 6.

FINES.

See Equity, 8, &c. &
Goodall v. Bullock, 328

FRAUD.

1. An obligor unfairly dealt with in the purchase of a slave may be discharged from his obligation against the seller; but not against an assignee, for value, without notice of the unfairness.
Objections to this opinion, and the chancellor's answers thereto.
Overstreet v. Randolph, &c., 47

2. In controversies respecting titles, by grant, to lands, where fraud is suggested and proved, Courts of Equity have competent jurisdiction, are most usually and properly resorted to, and can afford ample and adequate relief. Held by the Court of Appeals and also by the chancellor on reconsideration. Bill dismissed, because fraud was not proved. See this appeal in 1 Wash. 116.
Jones v. White, 111
See Arbitration and Award, no. 6, &
Beverly v. Rennolds, 121
See By-bidding, &
Hynde v. Pendleton, &c., 354

FRAUDULENT GIFTS.

The Statute of 1758 for preventing fraud-
461 ulent gifts of slaves,—*(that a gift not declared by testament in writing, or deed proved and recorded, should not pass the right to slaves,)—upon which Statute, if a gift had been, the plaintiffs relied, did not comprehend and avoid a delivery of slaves in consideration of marriage. This case arose as follows:
A father, upon the marriage of his daughter, delivered to her husband certain slaves. Afterwards, by his will, he lent to her and her husband all the negroes then in their possession, (with their increase,) for their lives, and after, to be equally divided among her children, if she have lawful issue. The defendant S. was her daughter. She then married the plaintiff F. S. being still an infant, her guardian demanded the slaves as her property, on the ground that the testator had permitted them to remain in the service of S.'s father, although said testator had never given them to her father but by his will aforesaid. At the time of the testator's death, that had been in the possession of S.'s father about three years, the plaintiffs had had possession of them about two years. It was agreed that the right to them should be submitted to a Court of Chancery. See these facts in S. C. 4 Call. 361.
Fowler et ux. v. Saunders, 323

GUARDIAN AND WARD.

1. A legacy from a father to his daughter, (payable 100 £. within twelve months after August, 1777, and the rest at the discretion of his executors, when it could be conveniently raised from the profits of his estate,) paid in 1778, to her guardian in depreciated paper money, is, by the subsequent act of 1781, good, and will be a discharge at the nominal amount, as to both the executors and co-legatees.—And the guardian, having lent out part of the money, and received it, in depreciated paper, which he at last funded, is not liable for the loss by depreciation.
So held by the Court of Appeals: see 1 Wash. 226. The Comments thereon by the Chancellor, who had held otherwise.

INJUNCTION.

1. See Penalties &
Dawson v. Winslow, 114
2. See Payments, &
Hill v. Gregory, 73
3. Granted and perpetuated against judgt. obtained in detinue for slaves formerly lost by pltf. in an arbitration.
Dandridge v. Lyon, 123
4. See New Trial, &
Cochran v. Street, 133

5. Plaintiff purchased of Defendants several bonds due their testator. They agreed that in case any part of said bonds had been paid to certain attornies, said sums should be refunded to the said purchaser. In a bond, given by the defendants for the due execution of the contract, the sum then due on said bonds is recited, and that "all which bonds, together with the interest accruing thereon, still remained due and unpaid." The attorneys referred to had received £920. 14s 11d.; but refused to pay the interest on it which was demanded. The amount due by the assigned bonds having been re-

ported less than above recited, one of the defendants agreed to make a deduction therefor, and a referee stated said deduction erroneously. The plaintiff agreed to rectify mistakes. Judgments at law were obtained v. the plaintiff on his bonds given for the purchase money of the bonds sold him; at law he made no claim for the deduction aforesaid, but afterwards obtained an injunction. The defendants in a suppletory answer retracted their agreement to make the deduction aforesaid. HELD, by the H. C. C. That the purchaser was not entitled to any deduction; and that the sum due on the bonds was in fact greater than that stated in the agreement; and the defendants were credited by the excess. The Court of Appeals, however, allowed the deduction.

462 *That the purchaser is not entitled to interest on the sum received by the said attorneys; the interest stated to be due being only that on the bonds before any of them were paid. The agreement was to assign said bonds, "with the interest which had accrued thereon;" and the purchase money was to be paid so many months "after the date of the assignment."

The purchaser claimed the postponement of the time for charging interest on his bonds, because of a delay in executing the assignment: but held that interest commenced with his bonds became due according to their terms.

The first effort at authenticating the assignment, &c., was ineffectual. Held that the expenses of the second powers and assignment, should be borne by the plaintiff,—the purchaser. The Court of Appeals divided them equally.

The defendants being successful except as to one small claim, were allowed their costs in Equity. But denied them by the Court of Appeals.

Hylton v. Hunter, &c., 195
6. See Equity &
Goodall, &c. v. Bullock, 328
7. See By-bidding &
Hinde v. Pendleton, &c., 354

JURORS.

Mistake in finding their verdict.
Cochran v. Street, 133
Woods v. Macrae, 253

JOINTTENANCY: SURVIVORSHIP.

1. Before our revolution two brothers, British subjects, purchased jointly lands in Virginia and in N. Carolina. One, who had acted as the agent in said purchases, and was also appointed executor of the decedent, became entitled to the legal right by survivorship; but he repeatedly declared it unconscientious to avail himself of said survivorship and made efforts during his life to confer his brother's interest upon said brother's heirs. So that it was plainly known to be his intention not to take the benefit of his survivorship. After his death, the children of the other brother claimed their father's interest. HELD:

That the survivor was a trustee for the plaintiffs, who were entitled to their father's rights and interests in and to said lands even against survivor's devisees.

That the defendents, whose title was not acquired by purchase for valuable consideration can not bar the demand of the plaintiffs by length of time: and that the plaintiffs, whose right accrued before the separation of the United States from Great Britain, are not disabled to prosecute this suit.

That the court hath jurisdiction, the defendants being amendable to its process, though the land lies in another State.

The plaintiffs are entitled to rents and profits: accounts ordered accordingly.

Farley &c. v. Shippen &c., 254

See Appendix, pp. 361 et seq.

JOINT OBLIGORS.

See Bonds; Equity, 2; &
Field v. Harrison, 273

LAPSE.

See Legacies 2.
Pendletons v. Hoomes, 94

See Appendix, pp. 361 et seq.

LEGACIES.

1. A settlement on a wife of "a carriage and horses belonging to it," embraces only the two that have ordinarily drawn it and not the four that were sometimes driven to it.

Hearne et ux. v. Roane et als., 90

2. 1785. A testator gives "all the residuum of his estate to be equally divided between the children of his uncle and his cousin, and their heirs forever, share and share alike." Between the date of

463 the *will and the testator's death, one of the children of the uncle dies. Held her share does not lapse, or that the heir at law takes it, as if by intestacy; but the surviving legatees, or their assignees share it as if the deceased child had never existed.

Pendleton v. Hoomes, 94

Appendix, 361 et seq.

3. The testament of M. F., besides a bequest of a negro girl to E. W. after the death of her mother, said, "I give and bequeathe unto my mother all the remainder of my estate during her natural life: then after her death, this estate to return to W. P." After the death of the mother, M. F.'s heir at law brought detinue for certain slaves then held through W. P., as said legatee. By arbitration, the said heir lost said slaves. But his son and heir brought detinue again for them and obtained verdict and judgment. On the trial, the award and judgment upon it having been destroyed by fire, could not be produced, nor legally authenticated, (although they were afterwards authenticated.) HELD, that the verdict and judgment were contrary to right, and a Court of Equity should give relief; and an injunction was perpetuated. M. F.'s father, after bequeathing to her said mother all his estate during her life, bequeathed the three first children a certain slave H. might have, to his three children of whom M. F. was one, and she succeeded to the rights of the others. HELD: that the slaves of M. F. were embraced by her bequest to W. P., whether they were the said children of H. or not; and whether her mother was already entitled to them for life, by the will of the father, or not.

Dandridge, &c., v. Lyon, 123

4. A testator can appoint an owner before the existence of the thing to be owened; as well as an owner not in existence at the time of appointment.

Ibid

5. P. T.'s will, dated 1789, gave and bequeathed ten negroes, naming them, and lands. He then owned neither, but only possessed part of the land. He afterwards acquired them by the will of his father. HELD by the H. C. C. and decree affirmed by Court of Appeals:

That the devise of the lands was valid, by the Stat. of 1785-7, allowing devises of all estates, right, title and interest in possession, reversion, or remainder, present and future, in and to lands, tenements and hereditaments;

That though the negroes are not embraced in said statute,—not even in the term "hereditaments," which might include them,—yet the devise of them is also valid, on general legal principles.

The decision of the Court of Appeals, 1 Wash. 75, seems confined to the lands.

Turpin v. Turpin, &c., 137

6. The words (in 1775) "I give to my wife the use and profits of my whole estate, during her natural life, and after that is ended, my will is that the whole of my estate exclusive of that already given my wife, be equally divided betwixt whoever my wife may think proper to make her heir or heirs, and my brother R. S.," create a fee simple in the wife to one half the estate; just as if he had said, "I give one half of my estate to her and to her heirs, and I give the other half to her during life and after her death to my brother." Affirmed by Court of Appeals. 1 Wash. 266.

Shermer v. Richardson, &c., 159

7. A legacy from a father to his daughter, (payable 100 £. within twelve months after August, 1777, and the rest at the discretion of his executors, when it could be conveniently raised from the profits of his estate,) paid in 1778, to her guardian in depreciated paper money, is, by the subsequent act of 1781, good, and will be a discharge at the nominal amount as to both the executors and co-legatees. And the guardian having lent out part of the money, and received it in depreciated paper, which he at last funded, is not liable for the loss by depreciation.

464 So held by the Court of Appeals: *see 1 Wash. 226. The Comments thereon by the Chancellor, who had held otherwise.

Yates v. Salle, 163

8. The words in a will, "I give to my wife S., all my personal estate and negroes, (naming them,) and the use of the plantation whereon I now live, during her natural life," confer only a life estate in the personalty and the negroes, as well as in the

plantation; the phrase "during her natural life" qualifying the whole.
Nance et ux v. Woodward et ux, 180
9. See Will &
Wilkins v. Taylor, &c., 338

LETTER.

Of Hon. Henry Clay, 32

LIMITATIONS, STATUTE OF.

1. Statute of limitations pleaded to a bill by heir in tail to recover a slave, her increase and their profits. Defendant at time of purchase had no notice of plaintiff's title. Plaintiff replied that defendants vendor had removed said slaves to a distance for the purpose of concealing them; that he could not by diligent search find out where, or in whose possession said slaves were, till three months before he commenced suit. HELD, by two chancellors, that "upon the whole circumstances," the statute should not bar.
Remarks thereon by Wythe, Ch. who dissented.
Farrar v. Jackson, 1
The circumstances as stated by the Chan. were, the warranty contained in the bill of sale from John Pruett to the defendent; the removal of the slaves by John Pruett to a great distance, for the purpose of concealment; the defendent's failure to disclose his possession of the slaves to the plaintiff, after his title to them, and searches to discover the possessor of them, were known to the defendent; the defendent's treaty, with a dealer in slaves, to transport them to remote places, and thereby to hinder the plaintiff from reclaiming them.
[Id. p. 2
2. P. & L. were joint endorsers of W., who made to P. an assignment to indemnify him for said endorsement among other liabilities. In 1756, P. took in the protested bill of W. endorsed by him and L. and executed P.'s own bond for the balance due thereon. 1768, he sued L. for half of said balance, with interest. L. plead the stat. of limitations. P. replied that he was employed many years in settling W.'s affairs, and the suit was within the time since the amount to be contributed had been ascertained. Plea overruled by county court and appeal to H. C. C. The two chancellors being divided, case, adjourned to court of appeals, who held: That under the particular circumstances the statute should not bar.
Remarks thereon of Wythe, C., who thought the cause of action arose in 1756, when P. took up the bill of Exchange and gave his bond for the money due upon said bill. But it was held that the act of limitations ought not to commence till the trust was concluded. The bill stated this to have been in 1762, but from the Commissioner's Report it appears that the last receipts for W's estate was in 1764, and the last disbursements in 1765. So that the suit was not barred. 3 Call, 545.
Pendleton v. Lomax, 4-5
3. W. being indebted to R. made R. one of his executors and guardians of his children, in 1755. R., however, attended very little to the duties of executor: and the devisees having got possession of the estate R. endeavored to have a settlement of the administration, that he might receive the balance due him. R. died in 1766. After that and as late as 1784, the parties interested expressed a willingness to have the accounts settled: and an order of court was made for the purpose; but the defendents, refusing to proceed therewith, R.'s administra-
465 tors filed their bill for a *settlement, &c. The defendants plead the stat. of limitations; which was held to be a bar.
Pendleton v. Whiting, &c., 38
4. There was nothing in the promises or acts of the defendants as to a settlement of accounts, to prevent the bar of the statute. Some of them had in writing referred to a settlement of R.'s estate; and one had written to one of the plaintiffs desiring and proposing a settlement. Ibid
5. Even if R.'s remedy had been suspended by his being executor as well as creditor, (which the court doth not admit,) the suspension ceased with his death; and if as executor he did not assent to the devisees taking possession, as is alleged, he could have maintained a suit for the estate; and also as guardian; besides his right to sue for his own debt in equity, or to retain for it as executor. Ibid
6. The doctrine that, as a trustee is not discharged by length of time from the obligation of accounting for his transactions and administration in and about the subject committed to him, so a like privilege ought to attend a remedy of the trustee requiring an account from the cestuis que trust, is fallacious. Ibid

MARRIAGE SETTLEMENT.

See Dower, &
Hearne et ux. v. Roane, &c., 90

MEMOIR OF MR. WYTHE. 11

MILITARY CERTIFICATE.

See Equity &
Wilson v. Rucker, 296

MORTGAGOR.

A mortgagor, or his devisee, who will not redeem the estate pledged, but retaining the possession taketh the profits thereof after the time limited for the performance of the condition, ought to account for such aftertaken profits.
Cadwallader, &c. v. Mason, 188
Appendix, No. 2.

NEW TRIAL.

1. Will not be granted because the Court below certified in adjourning the case, that the weight of evidence was in favor of the Deft. and the verdict was not satisfactory.
Ross v. Pines, 69
2. The jury, who tried the issue of boundary directed in the case, found for the defendants. But the Court certified that the weight of evidence was in favor of the plaintiff S. The H. C. of Chancery concurring with the jury sustained the verdict; but the Court of Appeals took up the case upon its original merits, and reversed it.
Southall v. M'Keand, &c., 95
3. In an action for slander, the judgment was enjoined, and new trial was awarded by the County Court, on the ground that four of the jurors would not have found any damages but for the impression produced on them by the other jurors that they were bound to yield to the majority. The jurors were allowed to testify as to the facts. The H. C. C. refused new trial, and dismissed the bill. Reversal by the Court of Appeals; on the ground that the verdict was found under a mistake. See this case reported in 3 Wash. R. 79.
Cochran v. Street, 133
4. New trial in action of assault and battery refused;—The judge below having refused it, and there being no matters before this Court which ought to have changed his sentiments.
Hoomes v. Kuhn, 136
5. Bill for relief against a verdict dismissed: the motion for a new trial,—the only ground for the interposition of the Court,—having been rejected.
Cobbs v. Mosby, 137
466 *6. Motion for a new trial on the ground that a paper offered in evidence and rejected by the Court, had been taken out by the jury and influenced their verdict. The paper was a certificate of three of the witnesses in the case and did not vary from their viva voce testimony. A new trial should not be granted.
Ambler v. Wyld, 235
7. A county court has no power to interfere by bill in equity, with a verdict in another court; but the H. C. C. having possession of the case by appeal from a bill improperly brought in the County Court will proceed with it, as if originally commenced there; and
New facts being disclosed, which might have procured from the jury a different verdict; or from the court that tried the case a new trial, the H. C. C. will grant a new trial. Issue directed to be tried again in County Court of Henrico. Ibid
8. New trial granted for a mistake in the verdict: Jurors examined to prove the mistake.
Woods v. Macrae, 253

PAYMENTS, APPLICATION OF.

1. If a debtor who owes money on several accounts do not at the times of making payments, or before, direct in which of those accounts they shall be credited, the creditor may enter the credit in either account he pleases.
Hill v. Gregory, 73
2. B., indebted to S. on a protested bill of Exchange and also on a bond, assigned to him some securities, which were accepted as if they had been payments in money of the principal and interest due by said securities. B. claimed credit therefor against the bill of Exchange, S. claimed the right to apply them first to be bond, which the H. C. C. allowed him to do, B. not having directed otherwise. The Court of Appeals, "without contra-

vening the rule giving creditors the right of application of payments to either of different debts due at the time," held, that the said securities should "from the combined circumstances of the case be applied to the protested bill; since it is evident the payer so intended it; and that if the receiver did not assent thereto, yet he did not make such recent and proper application of them otherwise as ought to control the choice of the payer." Ibid

3. Judgment against the person making the payments will be injoined, until the right appropriation of the payments can be settled. Ibid

PAWN.

1. A creditor with whom a pawn yielding profit is deposited, ought to account for such profit, though he has not undertaken to do so: e. g. If A. lend B. tobacco and, to secure the payment thereof, B. deposit with A. a slave, A. shall account for the profits of said slave, after deducting therefrom the interest on the tobacco.
Woodson v. Woodson, 129

2. B. by the agreement was restrained from paying the tobacco in the beginning or middle of a crop, so that said slave might not be recalled from A. at either of those times. B., by contract with J., would have paid it in March, but A. refusing to deliver said slave then, prevented the payment, and so defeated the contract with J.; qu? whether he ought to make amends to B. for the loss occasioned thereby. Ibid

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PREEMPTION & SETTLEMENT.

1. Priority of right to land and pre-emption,
467 by settlement, sustained *by the chancellor: but denied by Court of Appeals, as to the pre-emption, against a survey prior to 1776 under an order of council.
Maze v. Hamiltons, 51

2. M. claimed land and pre-emption by virtue of settlement in 1764.—H. claimed same land, and the commissioners affirmed his claim. M. entered a caveat and appealed to the General Court, which in 1782 reversed the sentence, and rejected a motion for an appeal. In 1783, the court of appeals awarded a writ of error but quashed it, on the ground that the judgment of the General Court in such a case was final. Prior to this, in the same year, the Court of Appeals had, (under the act of 1779, § 10,) decreed in favor of the claims, under orders of council, of the Greenbrier and Loyal Cos. The surveyor of the Gr. Co. in 1775 surveyed the land in controversy, but in blank, owing to the contest between M. and H. H. afterwards procured said survey to be filled up to him, and then obtained a grant embracing the said land. M. filed a bill in the H. C. C., seeking to vacate H.'s patent for his fraud in procuring it, &c. The chancellor sustained the judgment of the General Court as final; and decreed in favor of M. both as to the land and the pre-emption; upon his paying £3 for every 100 acres to the Gr. Co. Reversed by Court of Appeals, as to the pre-emption. Ibid, 51

3. Priority of claim to land, by virtue of settlement again sustained by the Chancellor, and again denied by the Court of Appeals. His remarks thereon.
Williams v. Jacob, &c., 145

4. The plaintiffs had prior claim by settlement, and one of them by sentence of the Commissioners.—The other had entered a caveat which was dismissed for want of witnesses. Defendants obtained grants for same land: and the plaintiffs afterwards also obtained grants; and filed a bill to remove the impediment to their title. The H. C. C. decreed in favor of plaintiffs. But HELD unanimously by Court of Appeals, that settlement gave no right to lands, in law or equity, before the act of 1779, and was then to operate upon mere waste land,—not to defeat any claim to lands under surveys established by that Act. Ibid

5. By Chancellor. Depositions may be read against a lite pendente purchaser though they were taken when he was not a party to the suit. Court of Appeals rejected said depositions; because he was not a party to the suit; but say, that had he been a pendente lite purchaser, they might perhaps have been read.—See 1 Wash. 281. Ibid

6. The Chancellor, supposing that he is following their opinion, again reversed by the Court of Appeals: His remarks thereon.
Reid v. Burnsides, 150

7. R. represented the right by prior settlement and claimed pre-emption. B. represented the claim by survey; part of the land having been surveyed in 1775. R. entered a caveat, and the General Court decided in favor of R,—thereby overruling the Commissioners. B. filed his bill for an injunction: and before the defendants had answered it, he procured, in 1786, a survey and grant embracing the land in controversy. R. filed his bill to vacate them. The H. C. C., in supposed congruity with the opinions of the Court of Appeals, in the cases supra, and between the loyal and Greenbrier Companies, decreed as to the pre-emption in favor of B. Ibid

8. Reversal by Court of Appeals:—this case distinguished from Maze and Hamiltons, differently, by Chancellor and by the Court of Appeals. 2 Wash. 43. Ibid

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468 *2. A mortgagor, or his devisee, who will not redeem the estate pledged, but retaining the possession taketh the profits thereof after the time limited for the performance of the condition, ought to account for such aftertaken profits.
Cadwallader, &c., v. Macon, &c., 188

3. See Jointenancy, &
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4. A creditor with whom a pawn yielding profit is deposited, ought to account for such profit, though he has not undertaken to do so: e. g. If A. lend B. tobacco and, to secure the payment thereof, B. deposit with A. a slave, A. shall account for the profits of said slave, after deducting therefrom the interest on the tobacco.
Woodson v. Woodson, 129

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1. A widow being entitled to the rents and profits of the slaves withheld from her, they will be set off against a purchase made by her at the sale of her husband's effects; an injunction granted her and an account ordered accordingly.
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2. See Pawn &
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1. McK. having died, the suit should be revived against his heirs and representatives specificially, and not merely in their general character without naming them.
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REVOLUTIONARY CLAIMS.

Revolutionary officers in one of the legions raised by Act of 1781, who continued in service from the time of entering it, until February 1783, when they were discharged by the governor, and were not afterwards required to enter into service again, HELD by Court of Appeals, not entitled to half pay, because they were discharged before the preliminary articles of peace were notified, on the 19th day of April, 1783, and did not again enter in service and continue therein to the end of the war. Opinion of General Court reversed.
Roane, &c. v. Innes, &c., 243

2. The judgment of the Court of Appeals being without prejudice to any future claim on fuller evidence, the question came before the H. C. C., which decreed the half pay; and commutation,—to such as were entitled to commutation. Ibid

3. The Chancellor's remarks sustaining his opinion against that of the Court of Appeals. Ibid

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Action by P. v. R. for slandering his title to slaves exposed to public sales, by which their sale was injured. On second trial, on demurrer to evidence,—the jury found £1000 conditionally v. R.,—the District Court adjourned the case to the H. C. C. with a certificate that they thought the weight of evidence in favor of R. and the verdict was not sat-

isfactory. But H. C. C. and Court of Appeals sustained the verdict and refused a new trial.
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469 *6. See Legacies, &
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1. Decree for specific execution of a contract for the sale and purchase of land; the plaintiff insisted that it should also have been for the sale of the land, if the purchase money should not be paid in a reasonable time; and a decree for the deficiency, if any, against the body or estate of the defendant. HELD: that an agreement is in equity specifically performed when the parties are put into the state in which they should have been, if the agreement had been punctually performed, and the court will not decree the land to be sold; but that the defendant do pay the purchase money, the dates for paying his promised bonds having passed.
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1. Mr. Wythe's will. 37
2. 1785. A testator gives "all the residuum of his estate to be equally divided between the children of his uncle and his cousin, and their heirs forever, share and share alike."—Between the date of the will and the testator's death, one of the children of his uncle dies. HELD her share does not lapse, so that the heir at law takes it, as if by intestacy; but the surviving legatees, or their assignees share it as if the deceased child had never existed.
Pendletons v. Hoomes, 94
3. The testament of M. F., besides a bequest of a negro girl to E. W. after the death of her mother, said "I give and bequeathe unto my mother all the remainder of my estate during her natural life; then after her death, this estate to return to W. P." After the death of the mother M. F.'s heir at law brought detinue for certain slaves then held through W. P., as said legatee. By arbitration, the said heir lost said slaves. But his son and heir brought detinue again for them and obtained verdict and judgment. On the trial, the award and judgment upon it, having been destroyed by fire, could not be produced, nor legally authenticated, (although they afterwards were authenticated.) HELD, that the verdict and judgment were contrary to right, and a Court of Equity should give relief; and an injunction was perpetuated.
Dandridge v. Lyon, 123
4. M. F.'s father, after bequeathing to her said mother all his estate during her life, bequeathed the three first children a certain slave H. might have, to his three children, of whom M. F. was one, and she succeeded to the rights of the others. HELD: that the slaves of M. F. were embraced by her bequest to W. P., whether they were the said children of H. or not; and whether her mother was already entitled to them for life, by the will of the father, or not. Ibid
5. A testator can appoint an owner before the
470 existence of the thing *to be owned; as well as an owner not in existence at the time of an appointment. Ibid
See Legacies, No. 4.
6. P. T.'s will, dated 1779, gave and bequeathed ten negroes, naming them, and lands. He then owned neither, but only possessed part of the land. He afterwards acquired them by the will of his father.—HELD by the H. C. C. and decree affirmed by the Court of Appeals:
1. That the devise of the lands was valid, by the Stat. of 1785-7, allowing devises of all estate, right, title and interest in possession, reversion, remainder, present and future, in and to lands, tenements and hereditaments.
2. That though the negroes are not embraced in said statute,—not even in the term "hereditaments," which might include them,—yet the devise of them is also valid, on general legal principles.
3. The decision of the Court of Appeals, 1 Wash. 75, seems confined to the lands.
Turpin v. Turpin, 137
7. The words (in 1775) "I give to my wife the use and profits of my whole estate, during her natural life, and after that is ended, my will is that the whole of my estate exclusive of that already given my wife, be equally divided betwixt whoever my wife may think proper to make her heir or heirs, and my brother R. S." create a fee simple in the wife to one half the estate; just as if he had said, "I give one half of my estate to her and to her heirs, and I give the other half to her during life and after her death to my brother."—Affirmed by Court of Appeals. 1 Wash. 266.
Shermer v. Richardson, &c., 150
8. 1751. A testator devised lands to his wife during her widowhood; and then to his daughter A. and her heirs after the time limited to her mother; also other land and a negro to another daughter and her heirs; and then added, "in case my two children should die without heirs of their bodies, then I give my said wife my plantation, [before devised to her and to A.,] during her life, and after her death to my brother: my will is that my wife have all my estate till the first child marries or arrives to the age of twenty one years; and my will is that there shall be an equal division of my estate and settlement."
1. HELD, that the condition annexed to the first devises to the wife, viz: the continuance of her widowhood, is not discharged by the subsequent devise to her until the elder child should be married or attain the age of twenty-one years. She is entitled to all the estate: to part, if she continues a widow; and to the remainder, till the other event, whether she married again or not.
Bailey et ux. v. Teackles et als., 173
2. If she marry again, (as she did,) her title under the will to the land devised over to A. ceases; but her title to dower in it remains. Ibid
3. A. died an infant, intestate and unmarried; and her share of the personalty was distributed among her mother, sister and two half-sisters; but HELD, that the half-sisters not entitled to share A.'s personal estate; and the femme plaintiff not being of age when married, the statute of limitations is no bar to recovering the portions received by the half-sisters. Ibid
4. The plaintiffs, A.'s sister and her husband, are entitled to two-thirds of the profits of the lands devised to A., made after the marriage of her mother. Ibid
5. Insertion of testator's name at top or in any other part of a will, equivalent to signature at bottom. Ibid
9. The words in a will, "I give to my wife S., all my personal estate and negroes, (naming them,) and the use of the plantation whereon I now live, during her natural life," confer only a life estate in the personalty and the negroes, as well as in the plantation; the phrase "during her natural life" qualifying the whole.
Nance et ux. v. Woodward et ux., 180
471 10. 1751. J. B., who was seised of *lands in fee: devised them to his eldest son, who was also heir in tail of other lands which J. B. held in tail, and which he devised to his sons T. and W. The heir of the eldest son recovered the entailed lands which the father had devised; but an injunction was granted; and
1. It was HELD, that it was plainly contrary to the testator's intention, that he should have all the lands; and having elected to take those in tail, he was compelled to convey the others to those who claimed through T. and W.
Cary et als. v. Buxton, 188

2. Along with the lands held by the testator in fee, he bequeathed slaves to the eldest son. HELD that he should also account for said slaves and their increase, and for the rents and profits of the lands to be conveyed by him; and the plaintiffs should account for the rents and profits of the lands recovered by him. Ibid

11. R. B., intended to divide the remainder of his estate nearly equally between his daughters; and made known that intention to them, and especially to such as were seeking alliances with his family. He made a will accordingly, and made it known to his son-in-law, Beckwith, and his wife, to assure them of his said purpose. HELD, that this intention should be executed, notwithstanding codicils to his will more favorable to some of the daughters than the rest; and the altered relations of some of the parties. The other points decided were chiefly incident to this.

Hooe &c. v. Kelsick, 190

12. R. B. bequeathed slaves to his wife for her life, empowering her to dispose of them among his daughters or some of them. Her will was set aside for fraud in its procurement. Ibid

13. W. A.'s will said: "I give to my son (the plaintiff) the plantation on which I at present live, and all my lands in King William, also my land in D. and J. C., to him and his heirs;" and after other devises of land, and declaring that his wife should hold and enjoy any part of the aforesaid lands, during widowhood, added, "all the residue of my estate, of what kind soever, I give and bequeath to my wife aforesaid, and my children, to be equally divided among them." At his death, besides his fee simple lands in K. W., he was entitled to lands there demised for 999 years, and had brought suit to recover possession of a part thereof withheld: his executors obtained it. HELD, by the Chancellor, that by the above devise said leasehold lands also passed to the plaintiff. He states that it does not appear that the testator knew that said lands were only leasehold: but the contrary is more probable, so that he must have intended to embrace them. But his decision was based chiefly upon a denial of the authority and reasoning of the case of Rose v. Bartlett, Cro. Car. 1, 292, which he here reviews. But the Court of Appeals reversed his decree. 1 Wash. 300.

Aylett v. Aylett, &c., 219

14. Bequest of the interest of stock to testator's daughter for life; then said interest over equally to testator's grandchildren; and "at their decease principal and interest to be disposed by them to their heirs, in such proportions, as they, by their wills respectively, may direct; and in case of the death of granddaughter S. C., without issue, her part to granddaughter E. C":

The Chancellor held, that this was only a bequest of the interest to the grandchildren, who were to reserve the principal and distribute it among their heirs respectively.—The Court of Appeals held, it was an absolute gift to said grandchildren after said daughter's death, and confirming the decree of the County Court, reversed that of the H. C. C., in the Appeal, 5 Call, 150.

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REPORTS OF CASES

ARGUED AND DETERMINED
IN THE

COURT OF APPEALS

OF

VIRGINIA.

By BUSHROD WASHINGTON.

VOL. I.

DISTRICT OF VIRGINIA TO WIT.

Be it remembered, that on the 15th day of February in the 22d year of the Independence of the United States of America, BUSHROD WASHINGTON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit: "Reports of cases argued and determined in the Court of Appeals of Virginia," in conformity to the act of Congress of the United States entitled "An act for the encouragement of learning, by securing the copies of maps, charts and books to the authors and proprietors of such copies, during the times therein mentioned."

WILLIAM MARSHALL, Clk. of the District of Virginia.

Reprinted by THE MICHIE COMPANY, by authority of Act of Legislature, approved February 24, 1900.

JUDGES

OF THE

COURT OF APPEALS.

EDMUND PENDLETON, Esq., President.

PETER LYONS, Esq. PAUL CARRINGTON, Esq.

WILLIAM FLEMING, Esq. JAMES MERCER, Esq.

On the 12th of November 1793, HENRY TAZEWELL, Esq., qualified as a Judge of this Court in the room of JAMES MERCER, Esq., who died during the term.

On the 13th of April 1795, SPENCER ROANE, Esq., qualified as a Judge of this Court in the room of HENRY TAZEWELL, Esq., resigned.

To EDMUND PENDLETON, Esquire,
President of the Court of Appeals,
this work is respectfully dedicated, as a
testimony of the very high opinion the
author entertains of his distinguished
character and talents.

TO THE READER.

The notes of the following cases commencing in the year 1792, were taken for my own use, without any view to a publication of them. I generally extended them into something like their present form, during the term in which the decisions were given, and whilst the impression which they made, were fresh upon my mind.

It was not until I despaired of some other gentleman of the bar undertaking a work of this kind, that I determined to revise the notes I had taken, and to publish them (with a few corrections) in the state in which I had originally written them, for I found that my professional engagements would deny me the opportunity of preparing them for public inspection in the manner I wished. The first volume has been printed during the spring term of the Superior Courts, which will account for many typographical errors.

That there should be many inaccuracies in the following reports I can easily believe. Engaged through the whole year either in attending the courts, or in preparing my suits for trial, I have had very little time to devote to a work which required much labor and attention. My sole aim has been to give a correct statement of the cases, and to make a true report of the arguments and decisions upon them. If I have succeeded in this, I shall be abundantly gratified; farther, I have never extended my views; I have not had time to polish.

The few cases which are reported prior to the year 1792, are taken from notes with which the President was so obliging as to furnish me. It is much to be wished that some gentleman who has taken notes of all the cases which have been decided since the present establishment of the Court of Appeals, may favor the public with reports of such of them as I have necessarily omitted.

It is with pleasure that I acknowledge the assistance I have received from many of the Judges of the Court of Appeals (and particularly from the President) from whose notes I have been enabled to correct those cases in which I had misconceived the opinions which had been delivered.

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CASES DETERMINED

IN THE

COURT OF APPEALS,

IN THE FALL TERM OF THE YEAR, 1790.

Groves v. Graves.

October Term, 1790.

Contracts—Usury—Penalty*—Case at Bar.—A. contracts to pay to B. 260l., current money, in final settlements, at the rate of 20s. such settlements, for each 13d. current money, on the 1st of December next, B agreeing, that the same may be discharged by the payment of a like sum, in said settlements, at any time on or before the 1st of November preceding, at the rate of 20s. such settlements, for each twenty-six pence, current money. The contract is not usurious, but the thirteen pence is to be considered as a penalty and the time of delivery is, the 1st of November.

Damages—Rule for Estimating†—Case at Bar.—The rule for estimating the damages in this case is, the value of the certificates at the time when they ought to have been delivered, and not that, when the cause was tried.

On the 1st of October 1787, John Stockdell, and Francis Graves the appellee, made a writing to the appellant in the following words, viz, "for value received we promise to pay John Groves, or order, on the 1st day of December next, the sum of £260 current money, in Pierce's final settlements at the rate of twenty shillings, such settlements, for each thirteen pence current money, the said John Groves agrees that the same may be discharged by the payment of a like sum in the said final settlements, at any time on or before the 1st day of November next ensuing the date hereof, at the rate of twenty shillings, of such final settlements for each twenty six pence current money."

On the 3d of October 1787, the appellant received from Stockdell real security for the above debt, and gave him the following receipt, viz. "I acknowledge to have received from Mr. John Stockdell an assignment of a tract of land containing 40,000 acres, Ballard Smith to said Stockdell. The condition of which assignment is, that if the said Stockdell shall pay unto me the sum of eight thousand dollars in Pierce's final settlements, on or before the first day of November next, then the said deed to be returned him, otherwise to be sold at public sale to the highest bidder, and the balance, if any, after purchasing the said settlements, to be returned to the said Stockdell."

The Contract, of the 1st of October 1787, not being performed by Stockdell or Graves, the appellant instituted a suit at law upon it against both of the contractors.

2 *The breach assigned in the declaration is, that the defendants did not deliver the final settlements equivalent to the said sum of £260 at the rate of twenty shillings, such settlements, for each twenty six pence current money contained in the said £260 on or before the 1st day of November, 1787, whereby a right accrued to demand the said final settlements, at the rate of 20 shillings of such settlements, for each thirteen pence current money contained in the said sum of £260.

The jury found a verdict for the plaintiff, and assessed his damages to £1200.

The appellee filed his bill in the High Court of Chancery, praying an injunction to the judgment entered upon this verdict, that he might be relieved from so much of it as exceeded the sum of £260 with interest, and that the 40,000 acres of land might, in the first instance, be decreed to be sold to satisfy whatever sum the said Groves might be supposed entitled to. The equity stated in the bill is, that the plaintiff Graves was but a surety for Stockdell who was and is in needy circumstances, that the £260 was a mere loan to him from Groves, and that the payment of the final settlements, at thirteen pence in the pound, was intended either as a penalty, or for the purpose of procuring an usurious and unconscionable gain to the lender. An injunction 'till further order was granted. To this bill, the defendant John Groves filed his answer, denying that the £260 was loaned to the said Stockdell and stating that he agreed to purchase from the said Stockdell 8000 dollars in final settlement certificates, to be paid for immediately and to be delivered in future, and to guard

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***Usury—Penalty.**—Where the debtor, by a punctual payment of the debt, may thus relieve himself and avoid the payment of the illegal interest stipulated for, it is not usury. Ward v. Cornett, 91 Va. 681, 22 S. E. Rep. 494. Citing 2 Minor's Inst. (4th Ed.) 348; Pollard v. Baylors, 6 Munf. 433; *Groves v. Graves*, 1 *Wash.* 1. For the above proposition, the principal case is also cited in Winslow v. Dawson, 1 Wash. 119, 120; Bull v. Douglas, 4 Munf. 306. See also, Call v. Scott, 4 Call 402; Waller v. Long, 6 Munf. 71; Campbell v. Shields, 6 Leigh 517; monographic *note* on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

†**Contracts—Damages—Estimation of.**—The principal case is cited in Reynolds v. Waller, 1 Wash. 165; Alexander v. Morris, 3 Call 102. See also, Lawrason v. Davenport, 2 Call 95; Merryman v. Criddle, 4 Munf. 542; monographic *note* on "Contracts" appended to Enders v. Board of Public Works, 1 Gratt. 364.

against any possible loss, which might arise by a delivery at a future day, in consequence of the fluctuating and uncertain value of such paper, it was agreed, that, in consideration of a longer credit, the said sum of £260 paid in advance, should be repaid, by the delivery of certificates at the rate of 20 shillings thereof, for every 13 pence specie if delivered on the 1st of December following: and to stimulate Stockdell to an earlier delivery, the defendant agreed to accept the certificates at double that price, if delivered by the 1st of November preceding, that the writing was bottomed upon this agreement. The answer admits, (as the bill states,) that the jury in assessing the damages may have converted the £260 into final settlements at 13 pence to the pound, and then valued, 3 the amount of the final *settlements thus produced, at five shillings in the pound, the then selling price of such papers.

The Chancellor, (being of opinion, that the plaintiff ought partly to be relieved against the judgment, because the writing, recited in the bill, appeared to have been designed to secure unconscionable profit to the said John Groves, and to have been obtained from one whom he had cause to believe at that time to be needy: and because the certificates which were secured to be paid, in default of payment of half the quantity on the first day of November, and the value of which was the damages assessed by the jury, were in nature of a penalty or forfeiture:) Decreed a perpetual injunction as to the plaintiff Graves, for so much of the judgment as exceeded £260 and interest thereon from the 1st of October 1787, after deducting the costs in the Court of Chancery.

From this decree Groves appealed.

THE PRESIDENT delivered the following as the opinion and decree of the Court. "The Contract between the parties ought to be taken as purporting the delivery of certificates on the 1st of November 1787, at twenty shillings, for every twenty six pence of the amount of the specie advanced, and, the payment in certificates at half the value in case of failure, only as a penalty; and, therefore, the contract was neither usurious, or so unconscionable as to be set aside in a Court of Equity, twenty sixpence being only the lowest rate of the market price of such certificates at the time. The verdict of the jury was not only wrong, as being for the penalty, but in the measure of damages, taking for that measure the value of certificates at the time of the trial when, under the peculiar circumstances of this case, the value at the time they should have been delivered, ought to be the rule. The decree, therefore, must be reversed with costs, and an issue, ought to be made up, and tried by a jury between the parties, to ascertain what was the current market value of such certificates in specie, on the 1st day of November 1787, and so much specie as the £260 turned into certificates at 26 pence, and again changed into specie at the rate so to be settled by the jury, will amount to, with interest from the 1st of November 1787, and the costs at common law, ought to be paid to the appellant. But the parties waving the trial by a jury, and agreeing, that the current market price of 4 such certificates on the *said 1st of November 1787, was twenty eight pence half penny, and that £285 specie is the value thereof as ascertained according to the above opinion, it is decreed and ordered that on payment by the appellee to the appellant of the said £285, with interest thereon, at the rate of 5 per cent. per annum, from the 1st of November 1787, 'till payment, and all costs at common law, the injunction to the judgment be made perpetual, and that on such payment, the appellant shall deliver, and assign to the appellee the deed for the 40,000 acres of land, in the proceedings mentioned, and all papers relative thereto, or such as he received, to remain as a security to the appellee for his indemnification, and the surplus for the benefit of John Stockdell in the proceedings also mentioned, and, if payment, as aforesaid, be not made to the appellant within one month after making the final decree, that the said land be sold, by commissioners to be appointed by the High Court of Chancery, at public sale, for ready money, at a time and place to be previously advertised in one of the Gazettes. That this decree be satisfied out of the money arising from such sale, and that the surplus, after satisfying the appellee all his costs at law and in equity be paid to the said Stockdell."

Johnson v. Macon.

October Term, 1790.

Escapes—Gist of Action—Proof.*—In an action for an escape, the actual escape forms the gist of the action, and therefore it must be proved by the plaintiff: but he is not bound to prove that it was with the consent, or through the negligence, of the officer; for this is to be presumed, unless a tortious

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***Escapes.**—The principal case is cited in Hooe v. Tebbs, 1 Munf. 506, 509; Stone v. Wilson, 10 Gratt. 540, 545. See Johnston v. Macon, 4 Call 367, and *note*.

New Trial—Motion for—To What Court Made.—In Newberry v. Williams, 89 Va. 299, 15 S. E. Rep. 865, it is said, in *Johnson v. Macon*, 1 *Wash.* 4, PENDLETON, P., expressed the opinion that a motion for a new trial, on the ground of misdirection, is never made to the trial court, but always to a higher court: and that it was certainly irregular and improper to make the motion to the same judge who gave the direction. This view, however, was disapproved in Guerrant v. Tinder, Gilm. 36, as being altogether too narrow.

The power of the trial court to grant a new trial is now, and since the year 1850 has been, settled in Virginia by statute. Va. Code 1887, § 3392. And, before the decision in Guerrant v. Tinder, JUDGE PENDLETON himself seems to have abandoned the position taken in *Johnson v. Macon*, in his opinion in Power v. Finnie, 4 Call 411.

The principal case is cited also in Bridgewater v. Allemong, 93 Va. 544, 25 S. E. Rep. 595; Bank v. Waddill, 31 Gratt. 478; Danks v. Rodeheaver, 26 W. Va. 290. See monographic *note* on "New Trials."

escape be shown, and that fresh pursuit was made.

This was an action on the case, brought by the appellant in the District Court of Richmond, against the appellee formerly sheriff of Hanover county, for the escape of Parke Smith committed at the suit of the appellant, upon a writ returned "executed and committed to jail" by William Bentley deputy sheriff.

The declaration sets forth the writ, service and return, that Macon kept an insufficient gaol; that he voluntarily and negligently suffered Smith to escape, and failed to take out an escape warrant against him, and to make fresh pursuit, by which the plaintiff had lost his debt, &c.

Upon not guilty pleaded, the jury found a verdict for the defendant, and on the next day the plaintiff moved for a new trial, upon the ground of a misdirection of the court, (at the trial,) who instructed the jury to find for the defendant, but the motion was over-
ruled, the court being of opinion, that
5 *it was incumbent on the plaintiff to
prove an actual escape by Smith from the custody, and by the consent or negligence of the defendant or his deputy, whereas the only evidence given by the plaintiff at the trial was the record of the suit against Smith, up to the judgment, and the oath of William Anderson the present high sheriff, that the said Smith was not at any time turned over to his custody by assignment from any former sheriff, together with the admission of the defendant, that when Smith was arrested, he the defendant was high sheriff of the county, and that Smith some years after resided in Charleston.

To the opinion of the court, over-ruling the motion for the reasons above mentioned, the plaintiff excepted, and tendered a bill, which though not appearing to have been sealed, is made part of the record.

Judgment for the defendant and appeal.

The PRESIDENT delivered the opinion of the court. A motion for a new trial upon the ground of misdirection of the judge at nisi prius is never make to the same judge, but to the court of Kings Bench. To make the motion to the same judge who gave the direction is certainly irregular, and improper. The exception ought to have been stated to the direction itself.

But as the exception states the direction of the judge, and the ground of it, so as to enable this court to decide upon the propriety of the opinion, we shall pass over the form, and enquire into the grounds of that direction.

The opinion is in part right, since the actual escape, is the gist of the action and therefore ought to have been proved, and in part wrong, so far as it required the appellant to prove the escape to have been with the consent or through the negligence of the sheriff, since the consent or negligence, tho' made necessary by the act of Assembly, ought to be presumed, unless on the sheriffs parts a tortious escape be shewn, and that fresh pursuit was made. But it is unnecessary to decide this point, since that part of the opinion which was clearly right, will justify the subsequent direction to the jury, there being no proof of an actual escape.

The parole proof is, that Macon was high sheriff when Smith was arrested, and that Smith resided in Charleston some years after, which is certainly no proof of an actual escape from the defendant or his deputy.

The record proves him to have been in cus-
tody in June 1778, when Macon could
6 not have been sheriff, as he was so *at
the time of the arrest in January 1775, more than two years before. But Anderson swears, that Smith was not turned over to his custody by assignment from any former sheriff. Let it in the first place be remarked, that Anderson was a very improper witness to exculpate himself.—But 2dly, Escapes which in England are fixed upon the sheriff from legal deductions, seem to be done away in this country, by the act of Assembly, which subjects the sheriff, only where the jury expressly find that the debtor escaped with the consent, or through the negligence of the officer. This a jury would hardly find, when it appeared that the debtor was in the actual custody of a succeeding sheriff, altho' the formality of an assignment had been omitted.

Besides, tho' no assignment were made, yet the other mode of transferring prisoners by entry on record might have been observed.

Judgment affirmed.

APRIL TERM, 1791.

Smith v. Harmanson.

April Term, 1791.

Appeals — Beneficial Error — Effect.* — In an action upon a bond, with a penalty, for the payment of money, the jury may make their verdict of the aggregate of principal and interest, and the defendant cannot appeal for that cause, since the mode of finding the verdict is for his benefit.

This was an action of debt brought upon a bond in the county court of Accomack by the appellant. Plea owe nothing, with leave to give the special matter in evidence; but oyer is not prayed. Verdict "that the defendant doth owe to the plaintiff £1147 18 4 parcel of the debt in the bill aforesaid mentioned." Judgment is entered that the plaintiff recover against the defendant £2000 the debt in the declaration mentioned and his costs, to be

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***Appeals—Beneficial Error—Effect.**—It is contrary to the uniform decisions in this court to permit a party to object to an error which is for his own benefit, and has arisen from his own act. Kirtley v. Deck, 3 H. & M. 393. Citing Hammitt v. Bullett, 1 Call 567; *Smith v. Harmanson*, 1 *Wash.* 6. For the above proposition the principal case is cited and approved in Preston v. Harvey, 2 H. & M. 66; Stegar v. Eggleston, 5 Call 457; *foot-note* to Hammitt v. Bullett, 1 Call 567. See also, Pendleton v. Vandevier, 1 Wash. 381; Eib v. Pindall, 5 Leigh 109; monographic *note* on "Appeal and Error" appended to Hill v. Salem and Pepper's Ferry Turnpike Co., 1 Rob. 263.

discharged by the payment of the said £1147 18 4 and the costs. The bond appears upon the record and is with a condition to pay £1000.

7 *Upon appeal to the District court, this judgment was reversed, "the same having been entered for the aggregate sum of the principal and interest thereon to the day of the said judgment." The judgment of the District Court is for £2000 and costs, but to be discharged by the payment of £1000 with interest from the time it was payable and the costs.—From this judgment Smith appealed.

The PRESIDENT.—The judgment of the District Court is more beneficial to the appellant than that of the County Court (with which the defendant in that Court was discontented) because it entitled him to the continuing interest after the judgment. Yet he appeals to this Court; so that each party in his turn has complained of an error in judgment, which operated beneficially for himself.

The District Court have erred upon their own principles; for if the judgment of the County Court should have been for principal and continuing interest, yet as the £1147 18 8 found by the jury did not appear otherwise than by calculation to be the aggregate of principal and interest, they should in that case have reversed the judgment, and remanded the cause to the inferior court for a new trial, to ascertain the principal sum due which was to bear interest. This court considering that the judgment of the District Court must be reversed, the next question was, what judgment they should have pronounced.

Upon this, there was some difficulty and contrariety of opinion, whether we should pursue the principle of the District Court, and in doing so, direct a new trial in the County Court, or as their judgment attained the real justice of the case, and saved expence, it should be sustained? or whether the judgment of the County Court should be affirmed? a majority of the Court thinking the jury might make their verdict of the aggregate of principal and interest, which tending to the benefit of the defendant, he did not object to it at the time, and could not appeal or complain of it, are for affirming that judgment, pursuing in this, the judgment of the General Court in the Norfolk case mentioned at the bar, which was the same as this; except that here there was leave to give special matter in evidence, from whence the jury might have drawn some ingredients for compounding the £1147 18 4, besides the aggregate of principal and interest, either to increase or diminish that aggregate.

The judgment of the District Court must be reversed with costs, and that of the County Court affirmed with damages from the time of entering it, to that of the judgment of the District Court.

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8 *Pleasants v. Bibb.

April Term, 1791.

Bonds—Scale of Depreciation.*—Bond dated 1st of February, 1780, payable on or before the 17th of December, 1781, and to carry interest from the 16th of February, 1779. These latter words, with other circumstances, will fix the period, at which the scale of depreciation ought to be applied, to February, 1779.

This was an action of debt brought in the County Court of Prince Edward by the appellant upon a bond bearing date the 1st of February 1780, with condition to pay £105 9 2½ on or before the 17th of December 1781, with interest thereon from the 16th of February 1779. Upon the plea of payment, the parties consented to submit the trial of the cause to the Court without a jury.

The Court upon a view of the bond, together with sundry exhibits (all made part of the record) were of opinion that the scale of depreciation ought to be fixed to the 16th of February 1779, and so the judgment was entered, from which Pleasants appealed.

This judgment was reversed in the District Court of Prince Edward, and entered for the debt in the declaration mentioned, to be discharged by the payment of £2: 6: 10½ specie, the value of the sum due, reduced according to law, with interest from the 16th of February 1779. From this judgment Pleasants appealed.

The PRESIDENT delivered the opinion of the Court.

The single question upon this record is, at what period the scale of depreciation should be applied to the bond upon which the judgment was rendered.

The bond was dated on the 1st of February 1780 with condition for payment on the 17th of February 1781, with interest from the 16th of February 1779, thereby indicating, if not expressing, that the debt arose on the day last mentioned, though not reduced to a specialty until the year 1780. The record also contains letters from the obligor, shewing the debt to have arisen on account of money lent at different times in the year 1779.

Upon the bond and those circumstances, the County Court very properly decided that the debt arose in February 1779 and was to be scaled as of that period. The judgment of the District Court which considered the date of the bond as the proper period for scaling, is therefore erroneous, and must be reversed, and that of the County Court affirmed.

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9 *Brown v. Belches.

April Term, 1791.

Pleading and Practice—Partnerships—Failure to Serve Process on One Member—Abatement.*—Action

*Bonds—Scale of Depreciation.—On this question the principal case is cited in Gilkeson v. Smith, 15 W. Va. 60; Bierne v. Brown, 10 W. Va. 761; Dearing v. Rucker, 18 Gratt. 465 (see *note*); Bogle v. Vowles, 1 Call 245 (see *note*). See also, Hill v. Southerland, 1 Wash. 128; Skipwith v. Clinch, 2 Call 253, and *note*; monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

***Pleading—Partnership—Failure to Serve Process on One Member of Firm—Abatement.**—All contracts with partners are joint and several, and every partner is liable to pay the whole, and in what proportion the

against two partners to recover a partnership debt. The writ was executed on one only, and as to the other, he was returned "no inhabitant of the city," and the suit was entered, abated as to him. One partner may be sued alone for a partnership debt, and he can help himself only by a plea in abatement. Though the declaration state a joint contract, this does not vary the rule. The suit was properly abated, as to the partner not served with the process, under the act of assembly.

This was an action on the case, upon an insimul computasset, instituted in the Borough court of Williamsburg by Belches against Brown the appellant, and William Eaton. The declaration is against both, but an abatement of the suit was entered as to Eaton, upon the return of the writ, that he was no inhabitant of the city. —Plea, non assumpsit.—By consent of parties the cause was referred to arbitrators, whose award, it was agreed, should be the judgment of the court. This order was not discharged, but at a subsequent term a jury was impanelled, who found for the plaintiff.—A new trial being granted, a second verdict was found in favour of the plaintiff, and judgment being accordingly entered up in his favour, the defendant appealed to the District Court of Williamsburg where the judgment being affirmed, an appeal was taken to this court.

The PRESIDENT.—The objection made to the judgment, is that it could not be entered against one partner only, upon a partnership transaction.

The case of Rice v. Shute,—5 Burr. 2611 shews, that one partner may be sued alone, and that the plaintiff shall not be nonsuited at the trial upon proof that there are other partners. If the defendant would take advantage of that circumstance, he must plead in abatement, and point out the other partners.

The distinction between torts and contracts is over-ruled, and the principle seems to be established that the party contracted with may be sued alone.

In this case the plaintiff took out his writ against both; one could not be found, and, according to the act of assembly, the suit abated as to him.

The defendant, who was arrested, pleads that he did not assume—The jury have found that he did—The defendant, without assigning errors or taking any exceptions, appeals from a general verdict.

Though the declaration charges, that the defendant with another assumed, a fact which as to that other is not tried, yet, this does not vitiate the defendant's assumpsit, which is found against him.

Judgment affirmed.

others are contributors is a matter merely among themselves. The plaintiff may, however, brings his action against one, but he may compel, by a plea in abatement, the plaintiff to join them; but if one partner is out of the kingdom, and not amenable to the process of the court, then the plaintiff may proceed singly against the other. Courson v. Parker, 39 W. Va. 521, 20 S. E. Rep. 584, citing *Brown v. Belches*, 1 *Wash.* (*Va.*) 9. See, citing the principal case for the above, Shields v. Oney, 5 Munf. 552; Early v. Clarkson, 7 Leigh 90; McVeigh v. Bank, 26 Gratt. 825; *foot-note* to McCall v. Turner, 1 Call 133; Swindell v. Harper, 51 W. Va. 381, 41 S. E. Rep. 117. See also, monographic *note* on "Abatement, Pleas in" appended to Warren v. Saunders, 27 Gratt. 259.

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10 *Hudson v. Johnson.

April Term, 1791.

Payment*—Authority of Attorney to Receive—Custom.†—Payment to an attorney at law is good, on the custom of the country, particularly if he have possession of the evidence of the debt. Under particular circumstances, it might be otherwise; —as if notice be given to the debtor that no such power is vested in the attorney.

Same—After Suit Brought—Costs.‡—Evidence may be given of payments made after suit brought at any time before trial; but not so as to deprive the plaintiff of costs if the payments were made after suit brought.

Appellate Practice—Judgment Reversed as to Costs—Damages.—Where the appellate Court reverses the judgment as to costs, the successful party is not entitled to damages on the costs.

This was an action of debt, instituted in the county court of Louisa by the appellant, against the appellee.—Plea, payment.

At the trial the plaintiff filed a demurrer to the evidence, stating, that the defendant offered in evidence to maintain the issue on his part, a receipt, bearing date long subsequent to this suit, given by John Lewis the attorney who prosecuted this action for the plaintiff, and amongst whose papers the bond on which the suit was brought, was found; as also, that prior to the payment made by the said defendant to the said Lewis, on which account the said receipt was given, the defendant applied to the plaintiff to know

*Payments—Authority of Attorney to Receive.—In Smith v. Lamberts, 7 Gratt. 143, it is said, in *Hudson v. Johnson*, 1 *Wash.* 10, it was decided that, in general, payment to an attorney of a debt which he is employed to recover, is good on the custom of the country, particularly if he has possession of the evidence of the debt; and in Smock v. Dade, 5 Rand. 639, it is asserted by the general court as a well settled doctrine, that while the authority of an attorney does not extend to the commutation of a debt without the client's assent, his receipt of actual payment is a complete protection to the debtor. See also, citing the principal case, Wilkinson v. Holloway, 7 Leigh 285; Yoakum v. Tilden, 3 W. Va. 170; *foot-note* to Branch v. Burnley, 1 Call 147. See also, Wilson v. Stokes, 4 Munf. 455; monographic *note* on "Attorney and Client" appended to Johnson v. Gibbons, 27 Gratt. 632.

†Custom.—The principal case is cited in Baker v. Preston, Gilmer 286.

‡Costs.—The principal case is cited in McRea v. Brown, 2 Munf. 48; Dangerfield v. Rootes, 1 Munf. 532; Douglass v. McCoy, 24 W. Va. 726. See monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

where the bond was, who replied that it was in the possession of the said Lewis.—The demurrer was not joined, but the jury were discharged, and at a subsequent term, the court, after argument, over-ruled the demurrer, and gave judgment for the defendant with full costs, from which the plaintiff appealed to the District Court of Charlottesville.

The District Court reversed the judgment, so far as costs were awarded the defendant preceding the payment to Lewis, and affirmed it as to the residue ; and entered judgment for the appellee for the costs incurred up to the time of such payment, and damages for retarding the execution thereof with the costs of the appeal.

From this judgment Hudson appealed to this Court.

The PRESIDENT.—In general, payment to an attorney at law, is good on the custom of the country, particularly if he have possession of the specialty. Under particular circumstances this rule might not apply, as if notice were given that no such power was vested in the attorney. But in this case, the circumstances support the general principle ; for upon enquiry being made for the bond, the defendant was referred by the plaintiff to the attorney.

It was objected to the payment, that it was made after the action was brought :

It has always been the practice, and very properly so, to allow discounts up to the time of the trial, but not so as to destroy the plaintiffs action, and entitle the defendant to costs; in that case, it should be considered by analogy to the case of bringing the money into Court, so as to entitle the plaintiff to a 11 *judgment for costs. Under the equity of the act, we think a payment to the plaintiff equivalent to bringing the money into court.

The judgment therefore of the District Court is right in reversing that of the County Court, giving costs to the defendant, and awarding the plaintiff his. But we cannot affirm this judgment, because it goes further, and awards damages on those costs.

It must therefore be reversed with costs for that error, as to the damages, and be affirmed as to the residue.

Shermer v. Beale.

April Term, 1791.

Awards—Setting Aside—Reasons.*—Reasons for setting aside awards, are either for some illegality, or injustice, apparent on the face of them, or for misbehaviour in the arbitrators.

Same—Same—Arbitrators Parties—Demurrer.—If the arbitrators be made parties to a suit for setting aside their award, they may demur to the bill.

The appellant having filed a bill in the High Court of Chancery against the appellee praying an account, an order was made by consent of parties, referring all matters in difference between them to the final determination of two arbitrators, indifferently chosen by them, and, in case of their disagreement, to such umpire as they should chuse, who are to proceed to determine the same, in conformity to bonds entered into by the parties on the 6th day May 1788.

The bond referred to, submits all suits, actions, litigations, and controversies to the final determination of the two arbitrators named in the above order, whose award was not to be made before the 1st of December following, that the parties might have time to procure their testimony. It stipulates that the above suit in chancery should, by a rule of Court be referred to the same arbitrators, to be proceeded in and determined according to the principles of this agreement; that all other suits depending in other Courts should also be referred to the same arbitrators ; the arbitrators to name an umpire in case of their disagreement ; the award or umpirage to be made the judgment or decree of the respective courts as far as they are applicable to the respective cases; they to be final, and no advantage to be taken of any informality of defect in the rules of reference, award, decree or judgment, nor an appeal to be prayed, or writ of error applied for, to such decree and judgment. The bond then proceeds to lay down certain rules and principles by which the reference is to be conducted, and stipulates that Shermer is to receive, in satisfaction of any sum which might 12 *be awarded him, bonds or judgments if decided to be good, by the arbitrators, but to be guaranteed by Beale. The award to be made in writing, ready to be delivered on or before the 1st of June 1789.

Upon this bond was endorsed an agreement signed by the parties, bearing date the 30th of May 1789, authorising the arbitrators by endorsement on the above bond, to appoint any person they might chuse to assist them in forming and making up the award, such person to be paid by the parties for his trouble ; the award to be ready to be delivered by the 20th of June 1789, and to have the same effect, and be entered up in Court in the same manner, as if it were made and delivered by the two arbitrators, on or before the day for that purpose appointed. The parties then bind themselves in the penalty of £10,000, each, to the other, to abide by this agreement, which is not to change or alter the bond in any respect, except as is therein expressed.

***Awards—Setting Aside—Mistake.**—On this question the principal case is cited in *foot-note* to City of Portsmouth v. Norfolk County, 31 Gratt. 727; Kincaid v. Cuningham, 2 Munf. 1. See Pleasants v. Ross, 1 Wash. 158; also, monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

Bonds—Endorsement Considered Part of Bond.—As to when an endorsement will be considered as part of a bond the principal case is cited in Price v. Kyle, 9 Gratt. 250, 251, and *foot-note* ; Manlove v. Thrift, 5 Munf. 494 ; Elb v. Pindall, 5 Leigh 117 ; Stone v. Hansbrough, 5 Leigh 424 ; Smith v. Spiller, 10 Gratt. 322 ; Carter v. Noland, 86 Va. 571, 10 S. E. Rep. 605 ; State v. Rawson, 25 W. Va. 31 ; Calwell v. Caperton, 27 W. Va. 412, 415. See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

An endorsement, bearing date the 30th of May 1789, is made upon the bond by the two arbitrators, appointing a third person to unite with them, or one of them, in forming and making up the award.

An award was made and returned, signed by the three arbitrators, by which they award to the plaintiff £3022 to be paid conformably with the agreement in the conditions of the bonds respectively set forth; and further, that the defendant in 3 months from the date thereof give bond with good security to the plaintiff, to indemnify him against two bills of exchange for £600 sterling each, endorsed by the said plaintiff. And on the defendant's complying with this award, each party to execute to the other a release of and concerning all matters and things by the said order referred to the arbitrators:—the defendant to pay the costs of this suit.

On the motion of the plaintiff to enter up the award and bond as the decree of the High Court of Chancery, the judge of that Court refused to admit the affidavit of the defendant, stating certain exceptions to the award and umpirage, to be entered as part of the proceedings in the cause, and ordered the bonds of submission, with the endorsements thereon, and the award and umpirage to be registered. But the Court refused to make an absolute decree in the terms, or according to the tenor, of the award and umpirage, lest the defendant might possibly be precluded from availing himself of any exception not appearing on the face of the award and umpirage, to which it might be liable.

13 *It was therefore decreed and ordered, "that the defendant do perform the said award and umpirage, unless cause be shewn against it by the succeeding term."

Beale then filed a bill, making Shermer and the arbitrators parties, stating various objections to the justice and propriety of the award, and charging one of the arbitrators with partiality.

To this bill Shermer filed his answer, denying all the allegations in the bill: no replication was filed to this answer, nor did the arbitrators answer the bill. At the term succeeding at that which the interlocutory order before mentioned was made, Beale shewed cause against a final decree being entered up, "insisting that the Court's authority to make the said decree must be derived, either from the submission of the 6th May 1788, or that of the 30th of May 1789: that no such authority was derived from the former, because, though it was made a rule of Court, yet the award and umpirage was not made within the time limited by it: nor from the latter, because it was not made a rule of Court." The chancellor being satisfied with the cause shewn, set aside the former order and decree, from which Shermer appealed.

The PRESIDENT delivered the opinion of the Court.

Submissions were made rules of court, by consent, at common law, before the statute. Sid. 54. T. Ray. 35. and afterwards under the statute of 9 & 10 William III.

It seems to have been practiced on bonds of submission with condition that the submission should be made a rule of court, either to proceed to the award, and to have that entered as the judgment of the court, or to have the rule previously entered. The former was the case in Baily & Chesely 1 Salk. 72. Since, on deciding the question about consent, the award, not the submission, was made the rule of the court.

Under the authority of this case, (the indorsement being considered as evidence of consent that the award should be made the judgment of the court,) the award might have been confirmed without a previous rule of submission.

In 2 Atk. 501. New rules of court were made to enlarge the times, but this does not prove that they were necessary. The court of chancery in England is always open, and it might have been a more convenient practice, than to enter into new agreements to extend the time.

14 *The indorsement is to be considered as incorporated with, and part of the condition of the bond, so as to constitute one entire agreement, and to be taken by relation to the date of the bond, so as to bring it within the original rule. In this view of the case, the Chancellor erred in his decision upon the cause shewn, on the ground which he took.

We have examined this voluminous record, to see if there be any other ground more tenable. Reasons for obstructing or setting aside awards, according to the best construction of the statutes, are either for some illegality or injustice apparent on the face of them, or for misbehaviour in the arbitrators. Every argument, derived from the spirit of the statutes of Jeofails in favor of judgments, applies with increased force in favor of awards, since the judges in the latter case are of the parties own chusing.

The bill filed in this case, shewing cause against the award, not only goes over the whole subject of dispute, referring to former bills, answers and accounts, but contains a libel against one of the arbitrators, and all of them are made defendants.

This is a strange proceeding, first to chuse judges to decide a dispute, and then to make them defendants to a suit, in order to demand of them the reasons of their decision. The arbitrators might have demurred to the bill, not being obliged to answer.

The defendant Shermer has fully denied all the charges in the bill, and has done away the ground of suspicion (for it was only suspicion) of a partial attachment to him, in one of the arbitrators.

The causes therefore being fully done away in the mode chosen by the appellee, (like the case of an injunction which in such a case would have been dissolved,) there appears no reason to obstruct the decree directing the award to be performed.

Decree reversed with costs.

Ross v. Norvell.

April Term, 1791.

Absolute Deeds—Parol Evidence to Show Intended as a Mortgage.*—Parol evidence may be admitted to prove, that an absolute deed was intended to operate as a mortgage. It cannot be laid down as a general rule, that parol proof to contradict a deed, is not to be admitted in any case, or that it is to be admitted in all cases.

Mortgages—Redemption—Statute of Limitations.†—The reason why twenty years is generally fixed upon as the time, within which an application to redeem must be made, is not because the entry is taken away after that period, but because the right of redemption, after such a lapse of time, is presumed to have been abandoned. Slaves may be redeemed after five, and within twenty years.

The appellee on the 5th of April 1779, filed his bill in the High court of Chancery, praying to redeem certain negroes which he states he had mortgaged to the appellant in the year 1765, to secure the payment of a debt due to him. The slaves were conveyed by an absolute bill of sale, bearing date the 18th of June 1765, with a warranty, and a receipt for the consideration stated in the deed, was indorsed thereon. The bill states, 15 *that the conveyance, though absolute in form, was intended as a security, and that it was verbally agreed at the time, that the plaintiff might redeem at any time, upon payment of the principle and interest,

The answer admits the conveyance, but insists that the sale was absolute, and was intended as a satisfaction of a prior debt due to the defendant.

Sundry depositions were taken in the cause, some of which fully establish the allegations in the bill, but there is considerable contrariety in the evidence as to the real intention of the conveyance.

Upon a hearing of the cause, the Chancellor decreed the defendant, to deliver the slaves and their increase to the plaintiff, and to pay the profits of them, (after deducting therefrom the debt and interest to secure which they were conveyed,) to the plaintiff, for ascertaining which profits an account was directed.

From this decree the defendant appealed.

The defendant Ross, filed a cross bill in the terms of his answer, and in addition thereto stated two promissory notes signed by Norvell, in this year 1767, the one for £5: 8: 6 for the hire of the above mentioned negroes, from the 18th of June 1765, until the 8th of June 1767, and the other for 13s. 9d. for their hire from the last mentioned date until the 10th of September following: and that at the hearing of the original suit he was unable to produce the above notes, which would have proved the sale to be absolute. The bill prays a suspension of the original decree.

The answer to the cross bill is a flat denial of all the allegations in it, and states that the notes were given for the accruing interest of the debt due.

Upon a hearing of the cross cause upon bill and answer, the bill was dismissed, from which decree also, Ross appealed.

The PRESIDENT delivered the opinion of the Court.

It is objected in this case, that here is an absolute deed, and that no parol proof is to be admitted to contradict it. This is a question important in its consequences, but which, in its full latitude, cannot be admitted either way, as the general rule. That is to say, we cannot determine that it is not to be admitted in any case, or, that it is to be admitted in all cases.

To say that it shall be admitted in no case, would be to overturn all the decisions in which relief has been granted against 16 *deeds, upon the ground of fraud, mistake, oppression or imposition; or that they were made upon a secret trust between the parties. In all which cases, the fact which is the ground of relief, is established by the testimony of witnesses. Of the first class, the books abound with instances which are stated in the case of lord Irnham v. Child. Brow. Ch. Rep. 92. Of the latter there are also many. The case of Gascoin v. Thwing, 1 Vern. 366, is a strong one. A purchases in the name of B, to whom the conveyance is made. A was admitted to prove that he paid the purchase money, so as to make it a resulting trust to himself. So in the case of Hill & wife v. Wiggett, 2 Vern. 547, a surrender of a feme covert,

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***Absolute Deeds—Mortgages—Parol Evidence.**—Parol evidence may be admitted to prove, that an absolute deed was intended to operate as a mortgage. For this proposition the principal case is cited in Robertson v. Campbell, 2 Call 431, and *note*; Dabney v. Green, 4 H. & M. 110; Roberts v. Cocke, 1 Rand. 128; Land v. Jeffries, 5 Rand. 270; Kroesen v. Seevers, 5 Leigh 439; Bank of U. S. v. Carrington, 7 Leigh 587; Moss v. Green, 10 Leigh 272; Hancock v. Talley, 1 Va. Dec. 447; Walraven v. Lock, 2 Pat. & H. 552; Jarrett v. Johnson, 11 Gratt. 336; Snavely v. Pickle, 29 Gratt. 31; Klinck v. Price, 4 W. Va. 9; Nease v. Capehart, 8 W. Va. 125; Vangilder v. Hoffman, 22 W. Va. 19; Lawrence v. DuBois, 16 W. Va. 448; Hoffman v. Ryan, 21 W. Va. 430. See further, upon the admission of parol evidence to explain written instruments, Flemings v. Willis, 2 Call 5, and *note*; Gatewood v. Burrus, 3 Call 194, and *note*; Herbert v. Wise, 3 Call 239, and *note*; monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564; monographic *note* on "Mortgages" appended to Forkner v. Stuart, 6 Gratt. 197. The principal case is reported in 1 Am. Dec. 422.

†**Mortgages—Redemption—Statute of Limitations.**—In Jones v. Comer, 5 Leigh 354, it is said: "In mortgages even on land, the right of redeeming after twenty years is presumed to have been abandoned, and *a fortiori* it applies to mortgages of slaves; and if the creditor does not seek to foreclose the equity of redemption within that time, a strong presumption arises that the debt has been paid, or the deed released. *Ross v. Norvell*, 1 *Wash.* 14." See also, citing the principal case on this point, *foot-note* to Hanna v. Wilson, 3 Gratt. 243; Snavely v. Pickle, 29 Gratt. 39; *foot-note* to Smith v. Railroad Co., 33 Gratt. 617; Pitzer v. Burns, 7 W. Va. 72, 75; Camden v. Alkire, 24 W. Va. 678; Criss v. Criss, 28 W. Va. 396, 398, 401. See monographic *note* on "Mortgages" appended to Forkner v. Stuart, 6 Gratt. 197.

and the admission upon the roll, were of a moiety only of her estate. Yet an entry on the stewards book, and parol proof by the foreman of the jury, were admitted as good evidence to prove that she surrendered the whole.

But against the current of authorities is cited the case of lord Irnham v. Child, Brow. Ch. rep. 92. Child as agent for Mr. Lutterel son of lord Irnham, (but that circumstance not known to the father) treated with lord Irnham for the purchase of an annuity. The terms being settled, it was agreed that the annuity should be redeemable, but both parties consented that it should not be inserted in the grant, on a supposition that it would make the contract usurious and void. The annuity was assigned by Mr. Lutterel to others, and then lord Irnham brought his bill to redeem on the ground of the private agreement. Parol proof was offered to prove it, and in support of its admissibility a string of cases are cited. Does the chancellor overrule their authority? By no means; he affirms them. Having stated the rule of law, that a deed in writing will admit of no contract that is not part of the deed whether it adds to, or takes, from the contract, he comes to the chancery cases, and says, "It is contended to be the general authority of a court of equity to relieve in cases of fraud, trust, accident or mistake, which applies to agreements as well as to other subjects. This must always clash with the argument drawn from the statute. It is admitted, that if there be no fraud the deed will bind. But objected, that when fraud interferes, there the evidence may be introduced." Does he overrule the objection in the cases on which it is founded? On the contrary, he says, "it is founded on a great deal of wisdom and good sense. But the question is, if it were to be admitted in all cases, whether it would not be subversive of justice: The court have held that it would."

17 *He then puts the question of fraud; if there were proof of that, the rule of evidence would not be subverted in admitting it. Then, the case of mistake; he says, the court would not overturn the rule of evidence by varying the deed, but that it would be an equity dehors the deed. He then proceeds to state the circumstances of that case, and concludes thus: "I have no idea of this being notice to the assignee of the annuities, that they were redeemable. It is argued several ways; that they had notice personally; that they had notice by their agent, and that it was necessary for them to apply to lord Irnham: this might have place, if they were bringing a bill against lord Irnham, but here it has no place, for the deed was shewn to them by which he conveyed absolutely. I am not able to conceive, that they were obliged to recur to him, any more than if it had been a dormant equity:" and so dismissed the bill.

I think this case turns principally upon the equity of the assignees, who purchased on the faith of the absolute deed, and would have applied strongly in favor of a purchaser from Mr. Ross without notice. The general principles of the case prove, that parole evidence, when there is a deed, is not to be admitted in all cases, nor refused in all, every case must depend on its own circumstances. In that just noticed, the Chancellor admitted the proofs to be read, to discover if there were ground for relief on a new head of equity, and on the testimony, determined there was not.

The court have the less difficulty in admitting the proofs on the present occasion, since Norvell was suffered to remain in possession of the slaves, two years, as appears from the written papers; and this being contrary to the ordinary effect of a sale, gives an impression of a trust of some kind, between the parties, and admits the introduction of evidence to explain that trust.

The next objection is to the length of time. It is contended that after 20 years, the Chancellor will not admit a redemption of lands, where the mortgagee is in possession, because by that possession the entry is taken away, and an ejectment barred. From hence it is argued, that, by analogy to this principle, the redemption of mortgaged slaves after 5 years would be refused, that being the length of time allowed for commencing an action of detinue or trover.

The first answer to this argument is, that if this were the case of an action of detinue upon a legal title, it would not be barred by the act of limitations.

18 *Mr. Johnson proves, that in 1770 or 1772, Mr. Ross acknowledged to him, that Mr. Norvell had a right to redeem, on payment of principal and interest at any time. This acknowledgment of title in Norvell, was sufficient to discharge the case from the preceding lapse of time. The tender was in 1778.—Now take both extremes,—the conveyance in 1770, and the tender in 1778, is eight years; from which deduct the four years disallowed in the computation of time by the act of 1777, and the party will come within the 5 years.—Again, take one extreme and reject the other, and he will have brought his suit within a time far short of it.

It is laid down in Ld. Ray. 289 that the act of limitations is not to be taken by construction, but the possession must be clearly stated, to shew a party entitled to it.

But 2dly we doubt, whether the time mentioned in the statute having occurred, is the true rule of barring the redemption. As to lands, 20 years possession takes away the entry, and of course bars an ejectment. But what then? It does not bar other remedies to recover the land, since longer periods are allowed to commence various writs of right. It would seem therefore, that this is not the true ground upon which to adopt the rule which has been mentioned.

A more correct principle would seem to be, that after 20 years, a dereliction of the right of redeeming ought to be presumed, as a debt due by bond or even a judgment is presumed paid if that length of time has elapsed without payment of interest, or some acknowledgment which may

repel the presumption. If this be the proper principle, it extends as well to slaves as to lands, and the Court of Chancery adopted that as the rule in the case of Rose and Dade, and allowed a redemption of slaves after five, but within twenty years. This I understood was approved of by the bar.

However, the period of twenty years, tho' generally fixed upon as that within which a redemption may be permitted, is sometimes departed from, and a redemption allowed upon equitable circumstances, after a much longer time: for

3dly, We are taught by the language of Chancellors, that no time for redemption can be limited. It is a case, not within the act of limitations, because there is a trust supposed between the parties; and a creditor can never be injured if he gets his principal and interest; a debtor may, if he loose his estate at perhaps half its value. Stale redemptions have however been denied
19 after forty years.—2 Ventr. 340. *A demurrer was over-ruled as to a mortgage of 60 years old, upon the allegation of an agreement, that the mortgagee should enter and hold 'till he was satisfied, which was compared to a Welsh mortgage. Vern. 418. However the general rule was 20 years.

In recurring to the principles and nature of mortgages, we are told, they were borrowed from the civil law. They had their pignus, where the pledge was delivered into the possession of the creditor; and their hypotheca, where the debtor remained in possession; but no time for redemption appears in either case to have been limited. But in the former case, the creditor might bring his actio pignoritia, and in the latter, his actio hypothecaria, and on sentence, he was permitted to sell or use the pledge as his own property answering to our bills of foreclosure.

This is mentioned in answer to the objection, on the part of Mr. Ross, that he was risking the lives of those slaves, whilst he was at the expence of raising and improving the issue of them for another. This risk and inconvenience, he might have put an end to, at any time, by a bill to compel a redemption of foreclosure; this case is a common one, and in most others, more slaves have been raised, and decreed to be delivered after a much longer time.

The decree must be affirmed, and remitted to the Court of Chancery to have the account of the profits taken, wherein a liberal allowance will no doubt be made, for the expences incurred in improving the slaves, which certainly ought to be done.

Hooe & Harrison, and Others, v. Oxley & Hancock.

April Term, 1791.

Agency—When Principal Bound by Acts of Agent.*—To what extent an agent may bind his principal. If in consequence of a notorious agency, the agent is in the habit of drawing bills, which the principal has regularly paid, this is such an affirmance of his power to draw, that the principal will be bound to pay other bills, though the agent should misapply the money raised by such bills.

In the year 1783, Oxley and Hancock merchants in Great Britain, appointed Richard Ponsonby their agent in this Country, authorising him to purchase tobacco for them on Potowmack river, and to draw bills of exchange upon them to enable him to make the purchases. On the 31st of December 1783, they write to Ponsonby as follows, "we will take care "to give due honor to thy bills as they appear"—in their letter of the 9th February 1784 they write "thy bills on
20 us are many *of them now in course of payment, and we have received no tobacco but what came by the Peace and Plenty, &c. the being in advance, besides payment of the duties, makes it inconvenient. We must beg of thee in future to avoid, if possible drawing bills 'till the ship with the tobacco is ready, as we may then have a better chance of being in cash before they are due, but we do not mean to limit thee to any fixed plan, wishing thee to act as nearly in conformity thereto as circumstances will admit." On the 21st of February 1784, they write him thus, "we duly honored thy bills as they have appeared, many of which are paid, and we have made nothing of the tobacco as there has been no demand for that article lately, for which reason we request that thou wilt endeavor in future not to draw any bills till the ship is ready to sail." In their letter to him of the 19th of March 1784 they point out the necessity of his being cautious in advancing money for tobacco and conclude with saying "and the bills becoming due before the arrival of tobacco must be obviated if possible We think no money should be paid, till the ship is ready to sail, which would be the means of expediting the lading of her, we just drop these hints for thy government, having no doubt of thy acting in the best manner for our interest—on the 18th of May 1784, they say, "the several bills mentioned in your letters of the 20th and 22d of March will meet due honor."—In their letter of the 27th of March 1784, they write, that they shall endeavor to charter a ship of 400 or 500 hogsheads to be in the Chesapeake about August, and wishing that Ponsonby may by that time have a full cargo for her. On the 15th of April following, they inform Ponsonby that they had chartered the Snow Lady Johnson then ready to sail for Quebeck, and to be at St. Mary's by by the 1st of September, if she sails, it is to be at the option of us or our agents to accept or refuse her; from this early notice we hope the tobacco will be ready to load her." On the 29th of September 1784, they write, "we hope

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***Agencies—When Principal Bound by Acts of Agent.**—On the question as to when the principal is bound by the act of his agent, the principal case is cited in Hopkins v. Blane, 1 Call 373, 379; Blane v. Proudfit, 3 Call 214; Kramer v. Blair, 88 Va. 461, 13 S. E. Rep. 914. See monographic *note* on "Agencies" appended to Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. 119. The principal case is reported in 1 Am. Dec. 425.

the Lady Johnson will get loaded and have no doubt of thy best endeavours—all thy bills as advised will be regularly paid;" this is again repeated in October and November. Ponsonby not having a cargo engaged for the Lady Johnson, and without any expectation of being able to procure one on consignment, by the time of her arrival, determined to purchase, and did actually purchase about 500 hogsheads in order to load her. To enable him to raise money for this purpose, he drew bills on Oxley and Hancock, which
21 *were either paid away for the tobacco or sold for cash, and that applied to the purchase of this commodity.

The Lady Johnson did arrive about the 10th of September 1784, was taken up and loaded by Ponsonby with the tobacco thus purchased, consigned to Oxley and Hancock, but chiefly shipped on his own account.

The bills drawn on account of this cargo which bore date between the 11th of October, and the 4th of December 1784, were protested.

In their letter to Ponsonby of the 30th of November 1784, they say, "we are sorry to observe that the Lady Johnson was taken up, as it will lay thee under the necessity of purchasing a large quantity of tobacco to compleat her loading; this is a plan we do not approve, as we never intended to be purchasers on our own account, so we by no means wish thee to adventure largely, or, indeed in any degree (especially when it must be attended with a certain loss) to promote our interest; our original intention when we accepted thy agency was solely for thee to procure us consignments from the planters and not for either of us to be concerned on our own accounts. This must be highly disadvantageous in the present state of the trade, and though in this instance the loss whatever it may be, will fall upon thyself, yet it will give us pain, &c." they add that there was no necessity of taking up the vessel, as the captain would have taken in any quantity which was ready to be put on board, and conclude thus "what we are now saying is not by way of blame, for we are well satisfied of thy acting intentionally for the best; but we wish our sentiments to be rightly understood, for thy government in future; that is, we are unwilling thee should ship any tobacco either on our account, or thy own, except in the latter case a few hogsheads now and then. We wish not to have any tobacco shipped, except such as may be consigned to our address, nor is it our intention to honor any bills, but on their account." In a letter dated December the 1st, 1784, they express themselves dissatisfied with his present mode of doing business, and inform him, that they have authorised Haxall and West to investigate his transactions, and either to put them in such a train as in future to be consistent with their intentions, or finally to close them; that they are pleased with his diligence, but wish to prevent his becoming a purchaser and speculator, to so large an amount.

22 *On the 14th of January 1785, after expressing their surprise to find the cargo of the Lady Johnson (except a few hogsheads) shipped on his, the said Ponsonby's own account. They write thus, "notwithstanding thou hast acted in this strange manner, we shall use every exertion in our power to make the matter as little injurious to thee as possible, and hope we shall be enabled to pay a great part of thy bills; we shall accept no more of thy drawing, and desire a state of thy account, that all transactions between us may cease. We shall guard our correspondents against any dependence they may have in our accepting thy bills; we must however, confess, that except this strange mode of procedure we were perfectly satisfied with thy management, we will do everything we can to prevent any of thy bills going back, under a persuasion that there will no more appear."

To recover the amount of the bills drawn by Ponsonby on Oxley and Hancock, and which they had protested, the holders of them filed their bill in equity in the county Court of Fairfax against the said Oxley and Hancock, Ponsonby, and sundry others who were indebted to Oxley and Hancock, in this state, praying to condemn in the hands of the latter so much of the debts due from them, as would satisfy the amount of the bills so protested.

The defendants Oxley and Hancock filed their answer, and alleged that Ponsonby had been employed early in the year 1783, by Roberts their partner, to procure consignments for Roberts, Oxley and Hancock. That the letters of Roberts, as well as of these defendant after Roberts retired from the copartnery (which happened sometime in Autumn 1783) were never intended to confer on him greater powers than those of soliciting and procuring consignments from the planters, and of advancing to them certain sums of money for tobacco actually consigned. That to enable him to make those advances he usually drew bills upon them, which, whenever they appeared to be drawn for those purposes, they accepted, notwithstanding Ponsonby was never authorised to draw them. That the above quotations from their letters were written in answer to letters from Ponsonby specifying particular bills which he had drawn. That the bills in question were drawn to enable Ponsonby to pay for tobacco purchased on his own account.

The cause being removed by certiorari into the High Court of Chancery, sundry depositions were taken, many of which
23 *prove that it was the general custom of the English merchants, who solicited tobacco consignments, to appoint agents in this country for that purpose, with power to make advances to the planters, and to draw bills on their principals to enable them to do this—that without such powers being vested in their factors here, the business could not have been carried on. That Ponsonby was generally considered as possessing those powers, and without the sanction of such an opinion, could not have sold his bills.—There are other witnesses who declare that they did not conceive that Ponsonby was authorised to draw bills on Oxley and Hancock. Leake, one of their agents for soliciting tobacco con-

signments, swears that he never conceived that he was cloathed with such a power.—It is stated in the answer and proved by the deposition of Mr. West, that West and Haxall of Baltimore were the agents and attorneys in fact of Oxley and Hancock in the states of Maryland and Virginia, and had a power of general superintendance over their business in those states. West deposes that he never considered Ponsonby as being authorised to draw bills, and expressed this opinion generally to others.

The court dismissed the bill from which decree the plaintiffs appealed.

The PRESIDENT delivered the opinion of the court.

Agents may be cloathed either with general, or special powers.—1st, A general agent may do every thing which the principal may. Powers of this sort are not usually granted, and none such appear in the present case.

2d, Of the second sort are agents limited as to the objects, or the business to be done, and left at large as to the mode of transacting it. For example. Ponsonby was limited to the business of procuring consignments of tobacco to his principals, and of loading their ships; but he might be left to his own discretion as to the mode of conducting that business.

If a particular mode is not prescribed by the original power, that which the agent may adopt, the principal may, by approving, sanctify, and give to it equal validity as if it had made a part of the original authority.

If in consequence of a notorious agency, the agent is in the habit of drawing bills, and the principal in the habit of paying them, this is such an affirmance of his power to draw, that a purchaser of his bills, has a right to expect payment of them by the principal, and if refused, he may coerce it.

24 *These, I hold to be clear principles of law. They exclude however, the idea of collusion between the bill holder and the agent, to abuse the powers considered by the principal. Such a circumstance would defeat the bill holder in his attempt to charge the principal.

The great bulk of the trade between Great Britain and this country has been principally conducted by factorage. The ostensible object of that trade was prima facie, the barter of foreign merchandise for native commodities.

Experience, however, soon proved, that money must be advanced to the planters, and this necessity introduced a custom generally practised by the factors of drawing bills upon their principals, to enable them to make those advances. The mode of doing this was various; sometimes the factor prevailed upon the planter to wait until the meeting of the merchants, at which time he would draw for as much as was necessary for his purposes; others would procure a kind of banker, to advance the money as they wanted it, and take their bills at the meeting of the merchants: whilst others who could not succeed by either of those modes were obliged to draw bills at once to enable them, by sale of them, to make advances as the tobacco was purchased.

I never before heard it doubted, but that the principal was bound to accept and pay those bills; however the factor might have misapplied the money which they produced. If any case has been otherwise determined, it must have proceeded from some proof of notice of a revocation of the factor's power, or of some collusion between him and the bill holder.

Alarm of danger to the fortunes of all principals has been founded, if this doctrine should prevail. The answer is a short one. This danger should be contemplated at the time the power is given, and not when it has been exercised, and many innocent men thereby drawn in, to advance their money on the faith of an open and notorious agency.

In this case, it appears that the appellees were warned of the danger and consequences of the agency exercised by Ponsonby, so early as the fall of 1783, but they still went on.

It is unnecessary to travel over the particular correspondence between Ponsonby and his principals. Though in their answer they say that Ponsonby derived his power not from them but from Roberts their former partner, yet they not only confirm that appointment in a letter of the 12th of December 1783, but in their circular letter of May 31st preceding, they had fixed their signatures or firms to the letter of Roberts,

25 *and these letters were transmitted to Ponsonby as their agent. The correspondence between Smith and Oxley and Hancock is very strong evidence to prove the credit which they were disposed to attach to Ponsonby's bills, for though Smith is an interested witness, and therefore, as to facts which he may relate, is not to be regarded, yet the correspondence to which, in his deposition, he refers, speaks for itself. In his letter of September 1783 he writes, that Ponsonby had applied to him to endorse his bills on them to get money to advance to the shippers, and that he had endorsed one. In answer to this letter, they thank Smith for his assistance to Ponsonby, whose bills on "them," they say, "will meet due honor;" a general expression, not confined to the particular bill which Smith had endorsed, but to Ponsonby's bills generally. This too, was in the infancy of this agency, when Ponsonby's power to draw was not so notorious, and an endorser was required; but when this letter was received, and Ponsonby's bills were uniformly paid, he required a credit for them, which afterwards gave them currency without an endorser. This continued without interruption till the fall of 1784, when the present bills were drawn.

It is said, that Ponsonby, changed his agency from that of procuring consignments of tobacco from others, to that of purchasing this article for himself, and consigning it to his principals; which not being authorised

by them, they were not bound to pay his bills drawn on that account.

This brings us to the affair of the Lady Johnson. Let it be considered as between Oxley and Hancock, and Ponsonby. On the 27th of March 1784 they apprize him of their intention to charter a ship of 400 or 500 hogsheads, to be in the Chesapeake about August, and wish that a cargo may by that time be procured for her.—In April, they name the ship in question, and say, she is to be at St. Mary's by the 1st of September, if she sail, to be at their option or that of their agents, to accept or refuse her. "From this early notice" (they say) "We hope the tobacco will be ready to load her." From these letters it appears that he was not to wait her arrival, but to procure her loading in the meantime, and that he was also entrusted with a discretionary power of taking her up or not, in case she did not arrive in time. She arrived on the 10th of September. He did take her up, and loaded her with tobacco consigned to them, but chiefly purchased by himself, and shipped on his own account.

26 *Upon a correct view of this transaction, it would be doubtful, were this a question merely between them and Ponsonby, whether he was not strictly within the limits of his agency: the hazard of loss by the purchase was his, not theirs: the only difference being, that they thereby trusted him for their advance, instead of many; and lost the opportunity, which that advance would have afforded, of engaging many future correspondents.

In their letter of November 30th 1784, with full information before them, of what he had done, they seem to confirm it, but forbid its being repeated.

But let the question, as between those parties, stand as it may, in what light is it to be viewed as it respects the bill-holders? They found him loading this ship, as he had before loaded others; selling bills as he had been accustomed to do, to raise money for the purposes of that business; they purchased his bills as usual, and were not concerned in the enquiry, whether he applied that money in making advances to others, or in purchasing tobacco to consign on his own account.

Upon the whole, we are of opinion, that Oxley and Hancock are liable to the plaintiffs, for the amount of the protested bills, with interest and such legal damages as they have been obliged to pay in consequence of such protest.

Downman v. Downman's Executors.

April Term, 1791.

Office Judgments—Plea to Set Aside—Discretion of Court.*—After office judgment, the Court has a discretionary power to admit any plea which appears necessary for the defendant's defence, though not issuable, and should refuse it only where delay seems to be intended.

Tender—Plea—What Constitutes.†—What constitutes a good plea of tender and refusal Where paper money was tendered, the plea ought to state specially the sort of money which was offered, and the defendant was always ready to pay, that very money. But if it allege a tender of money generally, the defendant must bring into Court, that which is money at the time of the plea pleaded. If he do not, the plaintiff may sign judgment; or the plea, if offered upon setting aside on office judgment, ought not to be received.

This was an action of debt, brought in the District Court of Northumberland, by the appellees against the appellant. A conditional judgment being confirmed at the rules held in the clerk's office, the appellant moved the court for leave to set it aside, and to file a plea in the following words, viz. "He defends the force, injury, and damages, when and where &c. and says the plaintiffs ought not to have or maintain their said action against him, because he says, that, he the said defendant, on the day of May 1781, at the county &c. was ready and then and there offered to pay to the said "John Chinn" (one of the executors) "the sum of £53, Virginia currency, the sum promised in 27 the bill obligatory in the *said declaration, mentioned to be paid as a just and principal sum, together with all interest due thereon, and the said John Chinn then and

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***Office Judgments—Plea to Set Aside—Discretion of Court.**—In Johnston v. Bank of Princeton, 41 W. Va. 557, 23 S. E. Rep. 519, it is said: "Looking to the early history of the practice which prevailed in regard to setting aside judgments by default, or office judgments, Robinson, in his new Practice (vol. 5, p. 200), says: 'In Virginia, as early as 1727, in certain actions in the general court, there might be a judgment by default in the clerk's office, and it might be set aside in term, on pleading to issue. There was a like provision in the act of 1788, establishing district courts, and it has been extended to other courts.' Under this provision, the practice has been very liberal in allowing a defendant to plead that which did not make an issue, but required subsequent pleadings, provided the real justice of the case, and not an intended delay, was thereby promoted. In *Downman v. Downman's Ex'ors*, 1 *Wash.* (*Va.*) 26, PENDLETON, P., said: 'The intention of the law was to leave a discretionary power with the court to stop all dilatory and frivolous pleas calculated for delay, but to admit all fair ones.' Hunt v. Wilkinson, 2 Call 58. The mere want of form in the plea is not a sufficient cause for rejecting it. *Downman v. Downman's Ex'ors, supra.* But it may be rejected on other grounds. Gray v. Campbell, 3 Munf. 251." The principal case is also cited in Hunt v. Wilkinson, 2 Call 58, and *note*; Wyatt v. Woodlief, 1 Leigh 475; Pugh v. Jones, 6 Leigh 309. See Code of 1887, § 3288. Code W. Va., ch. 125, § 46; 4 Min. Inst. (3d Ed.) 729. See monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

†**Tender—Sufficiency of Plea.**—On the question of the sufficiency of the plea of tender, the principal case is cited in Call v. Scott, 4 Call 410; Gilkeson v. Smith, 15 W. Va. 55; Thompson v. Lyon, 40 W. Va. 971, 20 S. E. Rep. 816; Shank v. Groff, 45 W. Va. 545, 32 S. E. Rep. 249; *foot-note* to Robinson v. Gaines, 3 Call 243. See also, Koon v. Snodgrass, 18 W. Va. 320. For form of plea, see 4 Min. Inst. (3d Ed.) 1754; 1 Bart. Law Pr. 493.

there refused to receive the same, or any part thereof, in discharge of the said bill obligatory; and the said defendant on the same day and year last mentioned, was ready, and at all times after was ready, and yet is ready, to pay to the said plaintiffs, the said sum of money, in the said bill mentioned, as a principal sum assumed, with all interest on the same day and year last above mentioned due thereon, and the same here brings into Court ready to be paid to the said plaintiffs, if they will accept the same, and this &c."

On the motion of the plaintiffs, the Court refused to admit the defendant to plead such a plea, because it was then too late, being after office-judgment confirmed: 2dly, because it appears to the Court, that the money, brought into court, is what was once paper money, but is not now money, under any description.

Judgment, for the debt in the declaration mentioned to be discharged by the payment of £53 with legal interest from the 24th of August 1769 till the 24th of August 1789 and costs.

From this judgment the defendant appealed.

The PRESIDENT delivered the opinion of the Court.

There are two points to be considered in this case. 1st, whether an office-judgment can be set aside, in order to let in the plea of tender: & 2dly, Whether it ought to have been set aside upon this particular plea in the form in which it was offered to the court?

The first point depends upon the correct exposition of the 28th section of the District Court law, which declares, that every judgment entered in the office against a defendant and bail, or against a defendant and sheriff, shall be set aside, if the defendant at the succeeding court shall be allowed to appear without bail, put in good bail, being ruled so to do, or surrender himself in custody, and shall plead to issue immediately." These words, plead to issue immediately, are the same as were used in the old act of 1753, for establishing the General Court; under which, the practice of that court was very liberal, in allowing a defendant to plead that, which did not make an issue but required subsequent pleadings, provided the real justice of the case, and not an intended delay, was thereby promoted. This is unavoidable in cases of bonds with collateral condition, where the defendant cannot plead to issue. This is also agreeable to the principle laid down
28 by lord Holt in 2 Salk. *622. "That tho' a judgment be ever so regularly entered, it shall be set aside at any time on payment of costs, so as the plaintiff does not lose a trial." The words of the new law, constituting the General Court, are the same as those used in the old law. What has been the practice under this law, I do not know.

A difficulty arises with respect to the plea of tender, not only from its not making an issue, but as that necessary part of it, of having been always ready, is said to be inconsistent with his taking an imparlance, and in this case with his failing to appear and plead.

I confess that I cannot discover any sound reason for this doctrine. An imparlance is intended to gain information of the real subject of the suit, which when the defendant finds to be for a debt which he had tendered, he may know he has always been ready to pay it. Nor do I see clearly what is meant by the plaintiff's granting an imparlance, which, the books say, shall preclude him from the objection.

However that may be, a judgment by default, since it may be entered for want of special bail under the act of Assembly, which the defendant may not have it in his power to give, does not imply a tardiness, as an imparlance does; nor make the reasoning, (such as it is) which rules in that case, apply in this.

I find in a book entitled "Practice in common pleas in the time of king William," page 134, this case. After a rule for time to plead an issuable plea, a plea of tender and refusal was offered, but the plaintiff signed judgment, which was held good, such a plea not being considered as an issuable plea. This is a strong and pointed case—but in Stra. 836 and 1 Ld. Ray. 254, a plea of tender and refusal is considered to be an issuable plea.

Considering the circumstances of this country, and the dispersed situation of the attornies and their clients, who can seldom communicate with each other but at court, justice seems to require a relaxation in these rules of practice. It would seem to me proper to allow a direction in the judges to admit any plea which appears necessary for the defendants defence, and only to resort to the rigour of the rule where delay appears to be intended.

However, it is unnecessary to decide this point in the cause, since the court is of opinion that upon the second point, the plea was properly disallowed.

The plea is bad in form for the following reasons. 1st, That the day of the tender is left blank—2d, Instead of computing
29 *the interest to that day, adding it to the principal, and saying, that he offered a sum certain—He pleads that he offered the principal £53, and all interest due thereon.

3dly, The plea is, always ready from the time of the tender, which was 12 years after the day when the money was payable, instead of pleading it from the time when payment should have been made. 1 Ld. Ray. 254. But the plaintiff might have demurred, for these causes, and of course the want of form in the plea did afford a sufficient cause for rejecting it.

But the ground upon which the plea was refused, we consider to be a proper one—it was, that the paper brought into court, was not money then.

A plea of tender offered at any time at rules or in court, ought not to be received, unless the money tendered accompanies it: if it do not, the plaintiff may sign judgment: 2 Barn. 296, it must be money current at that time, otherwise it is not money at all.

There was no paper current as money in April 1796, when this plea was offered.

This is a case, where a sort of money was declared by law to be a legal tender and which during the period of its legal existence was tendered, but its currency ceased before the plea pleaded. In this respect, the case struck me, upon the former argument, to be uncommon in its nature, and worthy of mature consideration; since upon legal principles, such tender ought to be supported, whether the law accorded with justice and policy. or not. It occurred to me at that time, that the plea ought to state the sort of money tendered, that the defendant was always ready to pay that very money, which he brings into court. Then upon a demurrer, which would admit the fact, it might be decided upon the law at the time of the tender, independent of the subsequent alteration in its nature and currency. Since the former argument, I have looked into the cases upon this subject, and found a quotation—in Viners a bridgment, xx. 177, from Davis's Rep. 28, and Dy. 822, which seems apposite to that opinion.

In debt on a bond for £ 24 payable at two installments—Defendant pleads, that on the day when the first installment became due, a certain money called Pollards was current in lieu of sterling, and that on that day he tendered a moiety of the debt in the said money called Pollards which the plaintiff refused to accept, and that he is uncore prist &c. and brings it into Court; and because the plaintiff did not deny it, it was awarded that he recover one moiety in Pollards, and the other in pure sterling. So in the case
30 of a fall in the value *of shillings, a tender of them was specially pleaded, and the shillings were brought into Court, and the plaintiff obliged to accept them, at the value when tendered, without damages or costs. Davis 27.

Wades case 5 Reps. 114, does not apply, because the Spanish money was current by proclamation, and besides, when the tender was objected to, English money was procured and tendered.

The present plea makes no particular case, it alledges a tender of money generally, and that the defendant was always ready to pay the said sum of money, (not the said kind of money,) and brings it into Court. It was the efore incumbent upon the defendant to bring into Court that which was money at that time, which the paper bills were not.

The judgment therefore must be affirmed; it is entered wrong in stopping interest at the end of 20 years: but this is not material, since if it had been rightly entered, the defendant might pay the penalty and costs.

Dade v. Alexander.

April Term, 1791.

Wills—Money Directed to Be Laid Out in Slaves—Annexed to Devise of Land in Tail—Effect.—Money directed by will to be laid out in slaves, and annexed to lands devised in tail by the same will, are to be considered as slaves, and will go with the land in tail.

Husband and Wife—Right of Husband to Wife's Slaves in Remainder after Her Death.*—A feme sole entitled to slaves in remainder. or reversion afterwards marrying, and dying before the determination of the particular estate, the right rests in the husband.

In this case, the following points were resolved by the court. 1st, That money, directed by will to be laid out in the purchase of slaves, and to be annexed to lands devised in tail by the same will, are to be considered as slaves, and will pass with the land in tail.

2d. A feme sole, being entitled to slaves in remainder or reversion, and afterwards marrying, and dying before the determination of the particular estate, the right vests in the husband.—The president stated, that this was the constant decision of the Old General Court from the year 1753 to the revolution, and has since been confirmed in this Court in the cases of Sneed v. Drummond, and Hord v. Upshaw, that it had become a fixed and settled rule of property.

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31 *Braxton, Executor of Claiborn, v. Winslow &c. Surviving Justices of Spotsylvania County.

April Term, 1791.

Executors and Administrators—Action on Bond—Liability of Sureties.†—An action may be maintained by a creditor of a deceased person upon the bond given by the executor for performing the duties of his office; but the plaintiff must first fix a devastavit against the executor, before he can resort to this remedy against the sureties.

This was an action of debt, brought upon an executors bond against the securities in the bond, under an act of assembly, to sub-

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***Husband and Wife—Survivorship.**—The principal case is cited in Henry v. Graves, 16 Gratt. 248, 255; Wallace v. Taliaferro, 2 Call 470; Upshaw v. Upshaw, 2 H. & M. 389; *foot-note* to Drummond v. Sneed, 2 Call 491. See Robinson v. Brock, 1 H. & M. 218; monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

†**Executors and Administrators—Action on Bonds—Liability of Sureties.**—For the proposition that, although a creditor may sue the executor or administrator on his bond for a devastavit, he must first fix such devastavit against the executor or administrator before he can go against the sureties, the principal case is approved in the following: Call v. Ruffin, 1 Call 334, 335, and *foot-note*; Taylor v. Stewart, 5 Call 524 (see *note*); Taliaferro v. Thornton, 6 Call 25; Gordon v. Justices of Frederick, 1 Munf. 7, 8, 9, 15, 18, 20; Spottswood v. Dandridge, 4 Munf. 294, 295, 296, 298; Baker v. Preston, Gilm. 291; Munford v. Overseers of Poor, 2 Rand. 316, 317; Craddock v. Turner, 6 Leigh 125; Clarke v. Webb, 2 H. & M. 9; Com. v. Colquhouns, 2 H. & M. 241. See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6; and monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

ject them to the payment of a bill of exchange. The bill of exchange was drawn by John Spotswood, for £ 344. sterling, in favor of N. W. Dandridge, who endorsed it to Benjamin Waller, (the relator in the present action,) and was returned under protest. The drawer in the mean time had died, and appointed Bernard Moore his executor: and the suit was instituted upon the bond, at the instance of the endorsee, against Moore's securities, without his having previously obtained a judgment against Moore the executor. It came into the Court of Appeals by writ of error, from the General Court. After oyer of the bond and condition, the defendants pleaded conditions performed. The replication traverses the plea, and charges a breach in not having administered according to law, in this, that the said John Spotswood had drawn a bill of exchange payable to N. W. Dandridge who had endorsed it to Waller; that it was protested, of which protest, Bernard Moore, the executor, had notice, but had not paid it; having paid debts of inferior dignity after such notice, and wasted the assetts. Defendants rejoin by protestation, &c. and that Moore had not wasted the assetts. At the trial, one witness was examined, and the deposition of another read, as to the fact in issue: to which evidence there was a demurrer, stating the whole facts which proved the waste.

The jury found that there was £ 1114, due to Waller, the indorsee, upon the bill of exchange aforesaid, and that Moore the executor had wasted the assetts; and assessed the plaintiffs damages to one penny: and upon argument, the demurrer was over-ruled by the court, and the judgment entered up for the penalty of the bond, to be discharged by the payment of £ 1114, according to the finding of the jury, as to this breach.

By the Court. In this case two questions are made at the bar, by the counsel for the plaintiff in error.

1st. Whether an action could be at all maintained upon the executors bond for the benefit of a creditor.

32 *2d. Whether this action can be maintained before a judgment first had by the plaintiff against the representatives of the debtor, and an execution and return of Nulla bona?

The first is in truth no question. This bond is taken by particular direction of the act of 1748. No less than ten sections of that act are attentive to the testators estate, for the benefit of wives, legatees, next of kin, and creditors; and one of them declares in express words, that this bond may be put in suit for their benefit. Of all those, whose rights may be involved in a testators estate, a creditor is the most to be favored: his demand is ex debito justitiæ and it would be strange to say, that a section of an act, which gives a new remedy to this favored class by express words, was inserted in the act for no purpose. But an analogy is drawn from the St. 22 and 23 Charles 2, and authorities are cited to shew that the present action was in no wise maintainable. But most of these authorities are contradictory, and therefore deserve no credit: though in truth the latest authority, that from Douglas, is expressly in point that such an action is maintainable under that statute. But besides, our act of assembly differs from the English statute. It was argued, that great inconvenience might arise from countenancing such actions. That argument cuts both ways. Greater inconvenience would probably arise if such an action could not be maintained. But suppose the inconvenience on both sides equal; then inconvenience is no ground of decision. It is a rule of construction, that where a statute is ambiguously worded, Courts will be governed by arguments drawn from inconvenience: and will pursue the equity of the case arising under the statute: but, in this act, there is not one ambiguous word. The true question then is, has the relator Waller brought himself within the act? or in other words, does it appear from the record, that he is a party injured within the words and meaning of the act. A man who claims as a creditor, and means to take the benefit of this act, must shew himself to be a creditor; that the testator left assetts; that they came to the hands of the executor; that there was a sufficiency to discharge his demand, or so much thereof after paying debts of a higher dignity; and that the executor has wasted the assetts. Without this concurrence, there is no injury done him.

An attempt was made at the bar to shew that the paying debts of an inferior dignity first, was of itself a devastavit; and, that a devastavit for ever so trifling a sum, renders the executor liable to the whole demand, although assetts to the twentieth

33 *part never came to his hands. But neither reason nor authorities warrant this doctrine: for surely if there be a sufficiency of assetts, it is of no consequence in what order they are paid. But the person who means to make use of this act, must shew himself to be a creditor in the usual course of law. It is not enough to produce a mere document of a debt; he must first institute a suit against the executor or administrator; because it is, in the first instance, a dispute between creditor and debtor whether, or no, a debt actually exist: dispute, which the securities to such a bond, who are strangers to the contract, are by no means competent to manage. It is a principle of universal law that both parties shall be heard. Let us put this case: suppose A binds himself in a bond to pay B whatever sum C owes him (B) now before a forfeiture is incurred by A, must not B first prove by an action at law the sum that C actually owes him? Mr. Waller therefore ought to have shewn by an action brought against the executor that he was a creditor: he ought to have shewn by his action against Moore the executor, that he had committed a devastavit; a suggestion of a devastavit may be likened to a criminal prosecution: and an executor shall not be presumed guilty of a devastavit, till it is found against him by a verdict. It may be objected, that the act does not prescribe that a creditor shall

not go against the securities in the first instance; and therefore this action was well brought; to which this answer presents itself, that it is an established principle of construction, that where a statute has given a new remedy, without pointing out the mode in which this remedy is to be attained, the rules of the common law, and the practice of the courts, founded upon the reason of the thing, shall be pursued. Therefore we are all of opinion that the judgment of the General Court must be reversed.

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34 *OCTOBER TERM, 1791.

Birch v. Alexander.

October Term, 1791.

Tracing Title—Necessity for Finding Seisin in Crown.*—In tracing a title in a special verdict, it is not necessary to find a seisin in the Crown: because that is the ultimate point beyond which the party is not bound to go.

Title by Adverse Possession—Special Verdict—Sufficiency.†—What is a sufficient finding in a special verdict of such a length of possession as will give a title.

Northern Neck—Nullum Tempus Occurrit Regi.‡—The maxim, nullum tempus occurrit regi, never applied to the Proprietaries of the Northern Neck, of Virginia.

This was an appeal from the District Court of Dumfries, in an ejectment brought by the appellee. The jury found a special verdict, "that Sir William Berkley, Governor of Virginia, granted to Robert Howsen, the lands contained within a patent bearing date October 21st 1669, whereof the lands in question are a part, lying within the proprietory of the Northern Neck, which patent they find in these words: to all &c." the patent is in the usual form, granting 6000 acres of land, in consideration of the transportation of a number of persons into the colony, and is abbreviated thus, "to have &c. yielding &c. provided &c."—They find the act of Assembly passed in the year 1736, entitled "An act for confirming and better securing the titles to lands in the Northern Neck, held under the right honorable Thomas Lord Fairfax, baron of Cameron, in that part of Great Britain called Scotland." Also the act passed in the year 1748, entitled "An act for confirming the grants made by his majesty, within the bounds of the Northern Neck, as they are now established." "That on the 13th of October 1669, Howsen, being seized of the lands contained in the aforesaid patent, assigned and conveyed all the lands aforesaid therein contained, to John Alexander, by deed poll, recorded in Stafford court which they also find in hæc verba.

"That John Alexander entered, and was seized and possessed as the law requires, and by a paper purporting to be his will, devised 500 acres of the said land to John Dry, 200 to Elizabeth Hoomes, and the residue to his two sons, Robert and Philip, and their heirs."

35 *"That after the death of the said John Alexander, his son, and heir at law, Robert, by a deed executed in February 1690, confirmed to his brother, Philip, the lands left him by the said will, being a moiety of the land in question.—That in February 1693, the said Philip executed a deed to his brother Robert, of all his share and interest in the land contained in the above mentioned patent, with a reservation of 500 acres, which are no part of the lands in question, and neither Philip nor his heirs nor any claiming under him have since claimed any part of the land in question.

"That the said Robert Alexander, after the said conveyance from his brother, entered into the land in the declaration mentioned, being part of the land contained in the aforesaid patent, and was seized and possessed thereof as the law requires and so continued till his death, which happened before the 1st of June 1704, having previously thereto made his will, bearing date the 22d of December 1703, whereby he devised to his sons Robert and Charles the lands in question in fee simple equally to be divided, which will they find in hæc verba.

"That the said Robert left two sons, Robert his eldest, and Charles, who died intestate and without issue. That Robert after the death of his brother, was seized and possessed as the law requires, of all the land in question, and so continued until his death, which happened in the year 1735, leaving two sons, John his eldest, and Gerald—also two daughters, Sarah and Parthenia; that by his will dated in 1735, he devised several parcels of land to his said sons and daughters, and the lands in question, comprehended within the description of the residue of his real estate, to his sons John and Gerald equally to be divided in tail," which will is also found.

"That the said John and Gerald entered into the lands in question, and were thereof seized and possessed as the law requires, and that John continued so seized and possessed until the time of his death."

"That they sued out a writ of ad quod damnum, in order to dock the intail of the said lands, and an inquisition being found thereupon, they, by a deed of bargain and sale conveyed the said land to T. Dade, who afterwards re-conveyed the same in fee simple:" Which writ, inquisition and deed are found. "That there were other intailed lands adjoining, not included in the inquisition; that no lines were shewn to the jurors or surveyed in their presence—no consideration paid by the said Dade, and that the inquisition was fraudulent.

36 *"That an act of Assembly was passed, and obtained the royal assent,

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*Tracing Title to Land.—See principal case cited in Clay v. White, 1 Munf. 173.

†Adverse Possession.—The principal case is cited in Archer v. Saddler, 2 H. & M. 377; Mooberry v. Marye, 2 Munf. 466; Lee v. Tapscott, 2 Wash. 277; Birthright v. Hall, 3 Munf. 541. See monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

‡Statute of Limitations.—The principal case is cited in Nimmo v. Com., 4 H. & M. 71. See monographic *note* on "Statute of Limitations."

for docking the intail of Gerald's part of the said land, which was an undivided moiety of the lands in question ; that no partition of the said lands was ever made between the said John and Gerald, or any claiming under them."

"That John being so seized and possessed did in his life-time give to his son Charles his undivided moiety of the said land, and delivered him the possession thereof. That he died in 1764, leaving issue six sons, of whom the said Charles (lessor of the plaintiff) was the eldest, and by his will made the 16th of October 1763, devised to his said son Charles the lands in question by the following clause." "Also I give to my son Charles all things already given him, and which he has now in possession.

"That the said testator John, in his life-time conveyed to plaintiffs lessor so much of the land in question as lies to the westward of four mile run, laid down in the said survey annexed."

They also find the act of Assembly for settling the titles and bounds of lands.

They find a grant from the proprietor of the Northern Neck, bearing date the 3d of March 1730, the bounds of which they ascertain, by reference to the survey, and is the land in question.

"That Robertson possessed the said land from the year 1733, to the year 1743, when an ejectment was served by John Alexander, for so much of the land as was included in Howsens patent, and he recovered a judgment in 1751, till which time Robertson continued in possession."

"That James Robertson recovered from Robert Alexander, and was put into possession of the lands contained within his grant by writ of possession in 1765."

"That Robertson died in 1768, leaving issue a daughter Jenet, wife of Birch, the defendant, to whom, Robertson by his will devised the land contained within his patent."

"That the land in question is included within Howsens and Robertsons grants, and is &c."

The District Court gave judgment for the plaintiff from which the defendant appealed.

The PRESIDENT. — Many objections have been made at the bar to the insufficiency of this verdict. The first is, that the crown is not found to have been seized of the land in question, at the time of the grant to Howsen. According to the feudal system, the king was seized of all the lands in Virginia, as chief magistrate; and, whatever may have been the practice in England,
37 *seizin in the crown is never found in this country, because that is the ultimate point, beyond which a party in tracing his title is not bound to go.

It was next contended, that by the patent to Howsen, only an estate for life passed, there being in it, no words of inheritance. That, for want of a seal to the patent, this grant was not embraced by the confirmation act of 1748, and of course, that the prior grant of the crown in 1668, to the proprietors of the Northern Neck, had deprived the crown of a right to make this grant to Howsen. That the assignment from Howsen to Alexander, "of all the land contained in this patent," not appearing to have been endorsed on the patent, did not pass the land in question.—These and other objections were strongly insisted upon by the appellants counsel, and though they might all of them be controverted, yet they may be all falsely admitted in this case, and then how will the cause stand ?

In 1669 John Alexander entered, and was seized and possessed as the law requires. Not having title, he was a disseisor upon the proprietor of the Northern Neck, in whom the title was. The succession from him is continued regularly down, and each successor is found to have been seized and possessed as the law requires, and no entry of the proprietor's is stated, or claim by them to the land, till the grant to Robertson in 1730. So, that there is a clear seizin and possession of 61 years found under the disseisor, without any entry in the meantime to purge the disseisin. Here is a term, not only sufficient to give a title in ejectment, but to bar a writ of right, which alone would admit an enquiry into the mere right.

The counsel for the appellant observed, that the possession was not so found as to give a title; not being found to have been uninterrupted. But the ancestors of the appellee being stated to have been successively seized and possessed from 1669 to 1730, and no interruption found, their own maxim "that what appears not, is to be taken as not having existed," fixes the adverse possession to have been uninterrupted.

The justice of the maxim, nullum tempus occurrit regi has been questioned, or rather the application of it to a case like this, where it is resorted to, to support a new grant to one citizen, to the prejudice of an antient grantee and possessor, for some defect in his grant. But that either the reason of the rule extends, or that the rule itself was ever applied to preserve the title of a lord, we do not admit ; and believe the appellants counsel was misinformed, as to the point having been otherwise decided in the old General Court.
38 *On this point therefore, we affirm the judgment, without deciding on the other points. And we are happy in believing, that in establishing this ancient possession, we accord with the spirit, if not with the letter of the several laws passed since the year 1710, for the protection of such possessions, against attacks on the ground of legal defects.

Judgment affirmed.

Wilcox v. Calloway.

October Term, 1791.

Pretensed Titles—Statute—To What Extends.—The act for preventing the purchasing of pretended titles, does not extend to a person in possession, so as to prevent him from confirming that possession, by purchasing the rights of others.

Quit-Rents—Forfeiture for Nonpayment—How Title Saved.—If land be forfeited for nonpayment of

quit-rents, want of cultivation, &c. still, if the condition be performed before the land is petitioned for, the title is saved.

Caveat—Effect.*—The effect of a Caveat is to prevent the emanation of a grant, not to set one aside.

Patent—Lapse—Effect.†—A lapse patent relates back to the original grant, so as to avoid all mesne grants from the Crown.

Caveat Emptor—To Whom Applies.—The rule caveat emptor, applies only to purchasers of defective legal titles: They are not to be affected by a latent equity, of which they had not notice, actual or constructive.

Priority of Title—Relation.—Priority of title will draw to it priority of relation.

This was an appeal from the High Court of Chancery.

The case was this:

The appellee and Wilcox having purchased two entries for land, one of 400 and the other of 403 acres, obtained patents for each of them in June 1764.

In 1768 Wilcox agreed with Donaldson to sell him these two tracts of land for £125, but no conveyance was made. Wilcox being about to leave this state, sometime prior to 1769, placed in the hands of Donaldson as much money as would be sufficient to discharge the arrears of quitrents then due on the land, which Donaldson promised to apply to that purpose. John Cox in December 1767 petitioned the General Court for the above two tracts, as being lapsed for non-payment of quitrents, and want of cultivation; and in June 1772, judgment was rendered in his favor, and patents issued in July 1774 to Donaldson assignee of Cox.

On the 8th of August 1769, Donaldson informed Wilcox of the pendency of the above petitions, and recommended it to him, to attend the trial, and defend them. But on the 28th of July preceding, he, Donaldson had purchased the right of Cox, if he should succeed, at the price of £150, and took his bond for a conveyance. Of this purchase Donaldson takes no notice in his letter of August.

Cox not having pursued his judgment and obtained a patent within six months, Wilcox filed a caveat for this cause in August 1773, against a patent issuing upon Cox's 39 judgments; in *April 1783, he obtained a judgment in his favor, which being certified, a patent issued to him for the two tracts.

In 1776, Calloway purchased the above land from Donaldson, received a conveyance for the same, and made valuable improvements on it.

Wilcox filed his bill against Calloway only, praying that he might be decreed to deliver to him the possession of the lands in question, and for general relief.

The defendant by his answer states himself to be a purchaser for valuable consideration actually paid; that he had no notice of any fraud or improper conduct in Cox or Donaldson, nor did he ever hear of any dispute respecting the title till the year 1782, long after his purchase.

There were many depositions taken in the cause, and on hearing, the bill was dismissed without prejudice; the Court being of opinion "that the defendant was a purchaser of the land in question for valuable consideration, not appearing to have been guilty of any fraud, or if any other was guilty of it, to have had notice thereof, or not being, or claiming under a like lite pendente purchaser."

From this decree Wilcox appealed.

The PRESIDENT—The first objection is, that Donaldson's purchase from Cox was void, as being contrary to the act to prevent the buying of pretenseo titles. This law prohibits the purchasing of latent titles in order to disturb the possessions of others. But it was never intended to prevent a person in possession from confirming and strengthening that possession by purchasing the rights of others.

Donaldson having lawfully acquired the possession under his purchase from Wilcox, might without violating the statute make a contract with Cox for the securing of that possession. A man sued in an ejectment may defend the suit, and nevertheless agree to purchase the title of the plaintiff in case he should prove successful.

It was next contended, that the forfeiture made void all mesne sales by Wilcox or Cox. But if land be forfeited for non-payment of quitrents, or for want of cultivation, still, if those acts be performed before the land is petitioned for, it is saved. If Donaldson had purchased absolutely of Cox, he might have dismissed the petitions, taken conveyance from Wilcox, paid the quitrents, and improved the land, and would then have been safe under Wilcox's patents, though a forfeiture had been incurred. The rule applies thus. Cox recovers, and obtains a lapse patent. This shall relate to 40 the date of the original *patent, and avoid by priority all mesne grants from the crown, this has often been so adjudged, in disputes about priority, between two patents with interfering bounds.

In April 1772 the petitions were heard, and the lands were recovered. Although the evidence will not warrant us in charging Donaldson with fraud in this transaction, yet he was deceived in relying upon his own testimony, instead of the evidence of other wit-

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***Caveat—Effect.**—For the proposition that, the effect of a caveat is to prevent the emanation of a grant, not to set one aside, the principal case is cited in Ross v. Keewood, 2 Munf. 143; Staples v. Webster, 5 Call 273.

†Patents—Lapse—Effect.—For the proposition that a lapse patent relates back to the original grant, so as to avoid all *mesne* grants from the crown, the principal case is cited in Levasser v. Washburn, 11 Gratt. 565; Whittington v. Christian, 2 Rand. 371; Noland v. Cromwell, 4 Munf. 168, 172; Norvell v. Camm, 2 Munf. 262.

Equity Jurisdiction—Fraud in Procuring Patent.—The principal case is cited in McClung v. Hughes, 5 Rand. 480, 483; Mayo v. Murchie, 3 Munf. 380, 389, 393.

See the principal case cited in Tompkins v. Mitchell, 2 Rand. 429; Clark v. Long, 4 Rand. 453.

nesses, to prove payment of the quitrents. He was adjudged an interested witness, and in consequence of it, the land was lost. Had the facts, as they really existed, been proved, the decision would have been otherwise—being recovered in consequence of a mistake, Wilcox has a good ground of equity against Cox and Donaldson.

The effect of a petition and certificate is not to vest an absolute and indefeasible estate in the person who obtains it, but it gives him a right to purchase that particular piece of land, in preference to all other citizens, but upon condition of paying the consideration money within six months. The right then, which Cox acquired, was not absolute, but conditional: it was to depend upon his perfecting his title within a limited time. This right he assigned to Donaldson, and he might lawfully do so—but the condition passed with it, and Donaldson was bound to perform it—it is objected that the caveat was entered against Cox, instead of Donaldson, the purchaser. But the purchase was a matter in pais; and it does not appear that Wilcox had notice of it. The summons was served on Cox, who must be presumed to have given notice to Donaldson, the private purchaser. But what are the effects of a caveat? to prevent the emanation of a patent, not to set one aside. And if the General Court 1783 had been informed that the patent had issued, however improperly, they would not have heard the caveat, or given a decision which have been vain in its effect, since a patent issued in consequence of their judgment, would not at law overreach the one to Donaldson in 1774. But this was denied at the bar.—It was contended, that the patent in 1784 has relation to those issued to Wilcox in 1764. But the counsel forgot, that Donaldson's patent in 1774 has relation to the same source, and priority of title will draw to it, priority of relation.

The remedy then was in Chancery to repeal the patent of 1774 as surreptitiously obtained whilst the caveat was depending, aud to be relieved against the forfeiture adjudged in 1772, when, by mistake, the plaintiff was deprived of an opportunity of making that defence which ought to have saved his land.

41 *On this ground, I should have no difficulty in decreeing the land to the plaintiff, if it remained in the hands of Donaldson, and had not been sold by the plaintiff; or decreeing the purchase money and interest (the land having been sold by him) for which he should have a lien upon the land itself.

But this is upon a supposition that he or his representatives were parties, and that the case appeared as it now does. But here is a train of examination, by which the moral character of a man long since in his grave is called in question, and the interest of his family affected, without affording to his family an opportunity of defending either—this can never be right, and either justifies the decree of dismission without prejudice, or suggests an opinion that the cause was not ripe for a hearing, until the bill had been amended and the representatives made parties: in which case the plaintiff must have begun de nove.

If Calloway had been such a purchaser, as that the land itself in his hands, was not bound to answer the purchase money, the dismission should have been final; since in that case, it would be unreasonable to keep him in Court merely to be a witness of a contest between others. If he be such a purchaser, as that the lien upon the land passed with it, and created an obligation upon him to pay the money in the stead of Donaldson, then Donaldson's representatives should have been made parties; because, being liable, either to Wilcox or Calloway, they ought to have had an opportunity of contesting the claim, or if not, it was proper that the bill should have been dismissed without prejudice.

This brings us to the case of Mr. Colloway.

The rule, caveat emptor, applies only to purchasers of defective legal titles. A purchaser of the legal title is not to be affected by any latent equity, whether founded on trust, fraud or otherwise, of which he has not actual notice, or which does not appear in some deed necessary in the deduction of the title, so as to amount to constructive notice. In these cases of notice, he will take the estate subject to the equity in the same manner as the person, from whom he purchased, had it.

Out of this principle has grown another rule, that a purchaser entitled to this protection, must be a compleat purchaser, by having a conveyance, and having also paid his purchase money before he has notice; for, if he receive that notice before either of these acts are perfected, he ought to stop, until the equity is enquired into, or he will be bound by it.

42 *Calloway states himself to have been a purchaser in 1776, for a valuable consideration, without notice of any claim of the plaintiff until the year 1782. This allegation is not disproved, nor is there any evidence of improper conduct on the part of Calloway. But in his answer, he neither ascertains what was the purchase money, nor at what time he paid it. Speaking of the purchase he says, "it was for valuable consideration." He afterwards states, that the plaintiff did not bring his suit until Donaldson had removed away, (without saying when that was, and it might have been after 1782, when he had notice) with a good estate and £4000 received from him for the land—thereby conveying an idea that the money was then paid.—Whether this was really the fact, and that the removal was after notice; or that the payment was before the removal; or that removal before notice, and the inaccuracy was produced by inattention in drawing the answer, is doubtful; it might have been explained in his answer to an amended bill, if that mode had been adopted. In that way, the plaintiff must make a new case, founded on his claim to the purchase money and interest, and insist that he has a lien

for that upon the lands in the possession of Calloway.

But this claim is disavowed by the present bill—the plaintiff denying the agreement to sell, for the sake of his claim to the land—that new case, he may make under the decree of dismission without prejudice and therefore this court approve the decree and affirm it.

Jones & Temple v. Logwood.

October Term, 1791.

Scrolls—Validity as a Seal.*—A scroll is of equal validity to constitute a deed, as an impression made by a seal on wax.

Pleading and Practice—Action on Bond—Set-Off—Notice—Case at Bar.—Notice of sett off is not practised in this State upon plea of payment of the bond sued on, and proof made of payments; the plaintiff may give in evidence another bond, due when they were made, and apply the payments to that bond.

This was an action of debt brought up by the appellee, in the District Court of King and Queen: the declaration is in common form, upon a bond—plea payment. At the trial, the defendants tendered a bill of exceptions, stating, that the plaintiff offered a writing to the jury as evidence in support of the declaration, to which there was no seal but a scroll: and the Court permitting this writing to go to the jury, the defendants excepted.

43 *Also the defendants offered in evidence, sundry receipts, to a greater amount than the debt in the declaration mentioned, and bearing date before the institution of this suit: but the plaintiff in opposition thereto, offered in evidence a bond of the defendants, dated on the same day with that mentioned in the declaration, but payable before it, and given for a larger quantity of tobacco; on which bond no suit had been instituted, and on this bond, some of the receipts were said to be credited: and the plaintiff insisting that not only those receipts, but such as were not endorsed thereon should be applied to the credit of that bond, the defendants objected to its going in evidence to the jury, urging that it was not their deed, and was given for an usurious consideration. But the Court after examining one of the attesting witnesses, who proved the execution of the bond, permitted it to go as evidence to the jury in opposition as well to the receipts which were not endorsed on the bond, as to those which were: to which opinion also the defendants excepted.

The endorsements on the bond, agree precisely with some of the receipts, as to their amount, and are stated to be in "part of this bond."

Verdict and judgment for the plaintiff and appeal.

The PRESIDENT delivered the opinion of the Court.

It is important that the Court should settle a question so interesting to the community as the following: whether a scroll used as a seal, constituted a good bond before the act of 1788, or whether to make it a seal, wax or something capable of impression, and impressed, was necessary. Acts of Parliament in England, and acts of Assembly in this country, frequently speak of seals; but none of them define what shall constitute a seal. Nor is there an adjudged case recollected, which determines that a seal must be necessarily something impressed on wax. To consider it upon the reason of the thing; a seal is required to give solemnity to the act; and I cannot perceive a difference, in point of solemnity, between the act of impressing wax and that of making a scroll.

Public corporate bodies have a known and fixed seal: and it is necessary that their acts should be under that common seal. In that instance an impression may be necessary, to shew that the act has been done in their corporate capacity.

But what is the private seal of an individual? Does an impression furnish any criterion by which to decide whether it 44 *be his seal or not? it is true that some few gentlemen have seals which impress their family coats of arms; some have such as impress the initials of their names: but these are rare indeed when compared with the great body of the community who have no seals, and who use such as are placed on the writing for them, and make them their own by acknowledging them to be such. In truth and reality then, it is unimportant whether this adoption be of wax or a scroll. Lord Coke in his 2d institute, in a commentary upon a statute which speaks of a seal, says "a seal is wax with an impression." But there is neither an act of Parliament nor an adjudged case to bind the Court. It was his opinion only, founded probably on the practice of that day, and if that gives a binding rule, we may by going further back, discover a period of time, when the impression was made with the eye tooth. There was some utility in that custom, since the tooth impressed was the man's own, and furnished a test in case of forgery. But both are founded on the usage of the times. Scrolls have been long substituted for seals in this country. The party acknowledges the scroll to be his seal, and as such this court will consider it. If there had been a positive law to bind the court, we must have obeyed it, however inconvenient; but since none is shewn or recollected, we will not make a precedent, which would not only let loose great numbers of individuals from their engagements, but all or most of the executors, administrators, guardians and perhaps public collectors, from the force of their bonds: a decision which

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***Scrolls—Validity as a Seal.**—For the proposition that a scroll is of equal validity to constitute a deed as an impression made by a seal upon wax, the principal case is cited and approved in Currie v. Donald, 2 Wash. 63; Cromwell v. Tate, 7 Leigh 304; Parks v. Hewlett, 9 Leigh 513; Bradley Salt Co. v. Norfolk, etc., Co., 95 Va. 462, 465, 28 S. E. Rep. 567. See monographic *note* on "Bonds" appended to Ward v. Churn, 13 Gratt, 801.

Custom.—See the principal case cited in Baker v. Preston, Gilm. 285.

would dishonor government; relax public and private security, and convulse the state.

The late act, if it operates, is conclusive; if it does not, it is at least a legislative construction of the law in general; agreeable to, and adding strength to, that of the court.

On this point there is no error.

As to the other point, tho' notice of a set-off is given in England, it is not usually practised here: both parties seemed to have been prepared, the plaintiff to prove the execution of the bond first payable, and the defendant, his payments: as to the dispute which of those bonds the receipts ought to be applied to, the jury have decided it, and the court think properly.

Judgment affirmed.

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45 *Seekright, Lessee of Wm. Mayo v. Paul Carrington and Others.

October Term, 1791.

Wills—Slaves—Conditional Manumission—Effect upon Other Property Bequeathed Along with Slaves.—After several bequests to different persons, and a request that her executors will endeavour to obtain an act of Assembly for the manumission of his slaves, the testator adds, that in case his executors should fail in obtaining such an act, on that condition, and no other, he gives his said slaves, and his other property, remaining after discharging his legacies and devises, to such and such persons in fee, amongst whom are his executors. The condition is confined to the slaves, and not to the other part of the residuary estate.

This was an ejectment tried in the General Court. The parties argued a case, in effect as follows, viz. "That Joseph Mayo being seized of the lands in question at the time of making his will, as well as at the time of his death, did, on the 27th day of May 1780, duly make and publish his last will and testament, whereby, after sundry specific bequests of land and personal estate, he earnestly requests his executors to petition the General Assembly for leave to emancipate all his slaves, and to use every exertion in their power to succeed in such application. But provided it should not be in the power of his executors to get this act of humanity effected, on that condition and no other, he gives and disposes of the said slaves, and his other property, which might remain after discharging his legacies and devises, in the following manner, viz. three of his slaves (by name) to John Tabb; all the residue of his slaves and other property, remaining after the discharge of the above legacies and devises, he gives to be equally divided between the sons of Joseph Mayo, William Mayo, son of Daniel, and Paul, George, Joseph, Nathaniel, and Mayo Carrington, sons of George Carrington, the same to be to them and their heirs for ever."

"That the testator departed this life in the year 1785, and that his will aforesaid was duly proved and admitted to record."

"That the lessor of the plaintiff, who is the son of Daniel in the will mentioned, is the heir at law of the said testator."

"That an act of the General Assembly was, upon the petition of the administrators with the will of the said testator annexed, passed into a law authorizing the Chancellor to make all such orders and decrees from time to time as might be necessary for carrying into effect the bequest of the said testator in favor of his slaves, having regard to the payment of all debts due by the said testator, and such legacies (if any) as ought to be paid prior to the emancipation; and also, to raise such a sum of money from the labor of the said slaves, as might be sufficient to provide for the maintenance and support of the aged negroes and such as were of tender years, so as to prevent them from becoming burthensome to the commu-
46 nity. *That so soon as these purposes were answered, it should be lawful for the High Court of Chancery to make such order or decree for emancipating the said slaves, as to the said court might seem proper: and that the slaves so decreed free should receive a certificate thereof, and be to all intents and purposes free.

"That a decree of the High Court of Chancery was made pursuant to the above law, whereby the said slaves were declared free.

"That after the personal estate was sold, the slaves were hired out for the purpose of paying the residue of the testators debts, and raising a fund for the maintenance of the aged, young and infirm; and that after paying the debts there will remain a surplus from the hires in the hands of the administrators, subject to the future decree of the High Court of Chancery.

"That the lands in question, and one other tract not specifically devised, were the most profitable parts of the testator's estate, from whence he drew his chief support: That he possessed three other considerable tracts of land."

"That the defendants are the residuary legatees of the said testator, and in equal degree of relationship to the testator, as the lessor of the plaintiff. And if upon the whole matter the law be for the plaintiff, &c."

Judgment for the defendants from which the plaintiff appealed.

The PRESIDENT delivered the opinion of the Court.

The case may be at once discharged of the condition, which, it was contended, had prevented the devise of the residue from taking effect, inasmuch as the act of manumission had been obtained. The condition is clearly confined to the slaves, and not to the other part of the residuary estate.

The testator was anxious about the liberation of his slaves, which he considered as depending very much upon the zeal of his executors in their application for that purpose to the legislature. His executors are, with others, constituted his residuary legatees, and therefore, it never could have been in the contemplation of the testator to tempt his executors to withhold the ardor necessary to promote this his favorite wish, by punishing them with the loss of all the residue if they succeeded. He was under the necessity

of confiding in them, so far as the
47 slaves *were concerned; and the event has proven that his confidence was not misplaced, or injudiciously given.

How then does this cause stand upon the principal question, throwing the slaves out of the question? It is admitted on all hands that the intention of the testator is to be sought for, and observed: but that intention is to be collected from the will itself. In questions which relate to the subject of the devise, or to the quantum of interest given, we find the judges labouring and catching at slight expressions of illiteral men, in order to effectuate their intentions. In the case of Hogan, lessee of Henry Wallace, v. Rowland Jackson, Cowp. Rep. 299, the court are seen struggling to give to the words "worldy substance"—"all my effects &c." the same meaning as property.

That term is used in this case, and is as comprehensive as any which could have been thought of, for the purpose of embracing every thing. In the case of Huxtep v. Brooman.—Brow. Ch. Rep. 437: The words; "all I am worth;" were adjudged sufficient to pass lands.

Upon the whole the court are unanimously of opinion that the judgment of the District Court is right and is to be affirmed.

Roane's Executors, v. Hern, et al.

October Term, 1791.

Marriage Agreement*—Construction of.

This was an appeal from the High Court of Chancery.

Upon the marriage of Mrs. Hern, formerly Mrs. Cook, with her former husband William Roane, an agreement was duly executed between them, which contained the following covenants;

1st. That the two parties should, during their coverture, hold, possess, and enjoy all such rights and privileges as belonged to them, in as full and ample a manner and form, as if the agreement had never been made.

2d. That if the said William should die before his said intended wife, she should immediately hold, possess, and enjoy during her life, the dwelling house, &c. with
48 the appurtenances, *together with 800 acres of land adjoining, and one third of a grist mill, in lieu of dower in the lands of the said William.

3d. That she should possess and enjoy, immediately after his death, also 20 good negroes including a full proportion of house servants, such as she might choose, and if the said 20 negroes should not amount in value to a full third part of the negroes of which the said William should die possessed, as many more to be allotted her, as will amount to a full third part of the whole of the negroes—all which, to be in lieu of dower of the slaves of the said William, and to be subject to the same laws and regulations.

*See Wythe 90, 91, 93.

4th. That if his said intended wife should survive him, and have no child living at the time of his, or her, death, the negroes and their increase that came into his estate by this marriage, should be vested in his said wife in such absolute manner as that she might dispose of them to whom she pleased; or otherwise to pass and descend to her heirs agreeably to the laws of the land: but if the said William with the consent of his said wife should sell any of those negroes, his estate not be accountable for the same.

5th. That at his death his said wife should have the best riding carriage and horses belonging to the same as her absolute property, which should not be brought into account in the division of the personal estate.

Lastly, that she should be entitled to receive one third part of the personal estate, in the same manner, and under the same rules, customs and laws, as if this agreement had never been made.

This agreement bears date, the 24th of October 1782, but was not executed until about the 14th of November, when the marriage took place.

About two or three days prior to the execution of the above marriage articles, William Roane conveyed to each of his two sons by a former wife 14 or 15 slaves.

William Roane died sometime in November 1785, leaving no issue by his last marriage; and by his will devised, that, in addition to the household furniture to which his wife was entitled by the marriage articles, his executors should allow and assign her as much more during her widowhood, as they should judge necessary for her use.

After his death, an order of the county court, upon the motion of his executors, was made, appointing commissioners to value the slaves of the said decedent; and to
49 allot to his widow, the *part thereof which she was entitled to by marriage contract; and to divide the residue amongst his children, according to his will.

In pursuance of this order, the commissioners at first allotted to the widow ten of the negroes originally belonging to William Roane, which, with those that came into the estate by his intermarriage with her, made the number twenty. But afterwards, finding that one of the negroes, which had belonged to the widow before marriage, had died since the death of William Roane, they allotted the widow only nine of the negroes properly belonging to his estate, but equal in value to the ten first mentioned; with this partition she acknowledged herself well pleased and satisfied. But afterwards, being advised that she was entitled to a greater number of the slaves, she filed her bill in the High Court of Chancery against the executors of William Roane, claiming as many more slaves as would make her proportion equal to one third of the whole number, including those conveyed to his sons, and excluding those to which she was entitled before marriage; the latter being claimed in absolute fee. The bill states that the executors had refused to de-

liver her more than two carriage horses, although four were accustomed to draw it, and had sold the whole of the personal estate, whereby the complainant had been compelled to purchase a considerable part of it, and was then actually sued by the executors for the amount of that purchase; to which suit she prays an injunction.

The executors answered, and insisted that the allotment of slaves was conformable to the sound construction of the articles. That the whole of the personal estate except slaves, would be exhausted in the payment of debts.—And lastly, that the carriage was usually drawn by two horses; a greater number having never been used, but when a journey was to be performed.

This suit having abated by the intermarriage of the plaintiff with Hern, was revived in their names, and the cause coming on to be heard, the court delivered the following opinion and decree, viz. "That in the slaves, to the possession of which the plaintiff Ann, by the marriage contract between her former husband William Roane the testator, and herself, was entitled in lieu of dower, those, which were her property at the time of their intermarriage, ought not to have been included; because the slaves which, by the contract, she should have and enjoy in the event of her surviving him, whether having a child by him or not, are supposed to be his proper slaves; since a power to settle
50 them on her, in lieu of *dower or otherwise, implieth a property in him; and because the said slaves, to be in lieu of dower of his slaves were subject to the laws and regulations of dower slaves; whereas the slaves which the plaintiff Ann had at the time of the intermarriage, were not his, but remained her property when he died without having a child by her; and were not subject to the laws and regulations of dower slaves."

"That the plaintiffs ought not to be precluded by the order and decree of Essex County Court, and the division and assignment made in obedience thereto, from recovering, now, so many of the slaves, as the plaintiff Ann was entitled to, more than what were then assigned her; because the plaintiff Ann was not a party in the suit, if it can be called a suit, wherein that order and decree was made; nor does her present demand appear to have been discussed, or even stated at that time: that, whether the gifts by the testator to his sons Thomas and Spencer be fraudulent, is a question not proper to be decided in this cause, as it is now brought on, the donees not being made parties: And that the plaintiff Ann was entitled to the two horses only which she hath received, because only that pair having ordinarily drawn the carriage to which the horses were said to belong, are understood to have been designated."

Ordered and decreed, "that of the surviving slaves, which were in possession of the testator at the time of his death, exclusive of the unprofitable from old age and infirmity, and also exclusive, as well of the plaintiffs now proper slaves, and the nine formerly received by the plaintiff Ann, as of those given by the deeds of gift to the testator's sons, although they might have been in his possession at his death, eleven, or so many more as with those nine will be equal to one third part, be assigned to the plaintiffs; together with the children of any females among those, so to be assigned, born since the testators death, the value of which slaves, so to be assigned, shall be in like proportion to the value of the stock whence they are to be taken, as one of the numbers is to the other; and that the defendants do account with the plaintiffs for the profits of the slaves so to be assigned, from the end of the year in which the testator died."

An injunction, to say further proceedings on the judgment at common law obtained by the defendants against the plaintiff, was also awarded, on the usual terms, to continue until the account of administration of the testators estate should discover
51 *whether a surplus thereof would remain, the plaintiffs share of which might discharge, or be discounted out of, that debt.

From this decree the defendants appealed.

The PRESIDENT delivered the opinion of the Court.

We will discharge the case from every thing connected with the division made under the order of Essex County Court. There was no suit commenced and the order was entirely ex parte.

It is the proper province of a court of equity to decree the specific execution of marriage articles, where the apparent intention of the parties will direct the decree without a strict scanning of the articles according to nice grammatical rules, or the technical meaning of the words.

It is objected, in the first place, that there are no parties to this statement. Mr. Roane and Mrs. Cook (the intended wife) are named as the contracting parties. All covenants refer to them, and the property spoken of refers to their property.—2d, It is objected, that there is no consideration. It is plain, that the intended marriage, was the consideration; and the motives expressed are, to make a provision for her, and to preserve peace in the family.

The first clause, tho' badly expressed, is easy to be understood: what were the respective marital rights of the parties is not contemplated, or defined; but whatever they were, the settlement was not to meddle with them, but was to commence on the dissolution of the marriage. No provision is made for the case of his surviving, but in the case of her outliving him, her provision is fixed, as to the three classes of his property.

The 2d clause relates to the land, and describes what part she shall hold in lieu of dower; about this there is no dispute: one thing however might be remarked, that as his lands, and not hers, were the subject of this clause, it induces an opinion, that his slaves, and not hers were also the subject of the 3d clause. It is contended, that under this clause, the wife's slaves are to form a

part of the 20 which are to be allotted to her; and that only so many of his are to be added, as will make up that number. This construction, it is said, is reasonable because the husband had but 40 slaves at the time of his death, and 20 would be half of that number, instead of a third, the proportion contemplated by the contract. But it is in proof that the estimate was made upon 70 slaves, of which he was possessed, at the time of the gifts of his sons.

52 *It is also argued, that Mr. Roane was possessed of his wife's slaves at the time of his death, that they formed a part of the fund out of which the 20 were to be taken, and therefore that they should make a part of the number. The possession spoken of in this clause, means property, and not a mere holding. It means the same thing as is intended by the subsequent words, "of the slaves of the said William." He had a right to hold her slaves during their joint lives, but the moment of his death put an end to his right. The contract operated upon, and gave them to another; and therefore they could not form any part of the stock out of which her dower was to be taken. Besides, the different degree of interest, which she had in her own slaves, from that which she would have in dower slaves, seems conclusive, that they were not intended to be coupled together. But if in this clause the question be doubted, the next fully explains it.

Hitherto the parties appear to have contemplated the husband's estate, and the wife's provision out of that. In the 4th clause, which in the settlement, is called the third, they take up the subject of the wife's slaves, and speak of them very inaccurately. It appears as if they had formed an intention for providing for the issue of the marriage, but no such provision is made, except by implication, and as there was no issue, it is immaterial.

Nor is any provision made for the case of the husband's surviving; in which event he would therefore have been entitled to her slaves; but neither did that event happen.

The event provided for did take place. She survived, and had no child living at his death, when she was to be vested with the slaves which came by her, and their increase, in such absolute manner, that she might dispose of them to whom she pleased, or they were to descend to her heirs. The child spoken of in this clause, means child of the marriage, since none other could be living at his death. Her death was probably mentioned in order to provide for the case of such a child living at his death, and dying before her.

Upon the whole of this point, the Court approve the decree, that the dower slaves shall be made up 20 in number out of Mr. Roane's slaves, independent of hers. They also approve the decree as to the chariot horses.

Decree affirmed with costs.

53 ***David Shelton, William Shelton and Samuel Shelton, Executors of Joseph Shelton, Deceased, v. John Shelton.**

October Term, 1791.

Wills—Devises—Construction*—Case at Bar.—Devise to five persons, brothers and nephews of the testator; to each, a tract of land, by name, with all the cattle &c., and appurtenances thereto belonging in fee. The testator then gives all his negroes, young and old, at all his plantations above named, to be equally divided between his three brothers before mentioned; and after some pecuniary legacies, he directs that, if his two nephews should either of them die before marriage, or without issue, the legacies left to one, to go to the other; and if both die before marriage, or without issue, then the legacies to go to the testator's three brothers. The testator, when he made his will had no lands but those devised, nor any slaves but those that were on the said plantations. He afterwards purchased another plantation called W. and eight slaves, only three of whom were at W. at his death; the others were at the devised plantations, from whence others were removed to W., and some were out at nurse for their maintainance. The words "all my negroes young and old, at all my plantations above named," form a specific restrictive devise of the slaves on the devised plantations, at the time of the testator's death, and not a devise of all his slaves. Nor is there any difference between the after purchased slaves, and the others; for, in this respect, they are to be considered as personal property. But their settled habitations, as fixed by the testator, ought to give the rule, and not any casual absence therefrom, at his death.

Same—Same—Same—Same.—The negroes found on the plantation at W., at the time of the testator's death, do not pass under this clause, but descend to the heir at law.

Same—Growing Crops—Appurtenances—What Pass.—The crops growing at the time of testator's death, (he having died in September,) do not pass under the word appurtenances, to the devisees of the respective plantations, but go into the surplus.

Same—Residuum—To Whom It Passes.†—The resid-

***Wills—Construction—Intention of Testator.**—Upon the question as to how far the surrounding facts and circumstances govern the court in the construction of wills, in the endeavor to arrive at the intention of the testator, the principal case is cited in Wootton v. Redd, 12 Gratt. 205 (see *note*); Miars v. Bedgood, 9 Leigh 377 (see *note*); Com. v. Martin, 5 Munf. 134; Hooe v. Hooe, 13 Gratt. 251 (see *note*); *foot-note* to Tebbs v. Duval, 17 Gratt. 349; *foot-note* to Midlothian, etc., Co. v. Finney, 18 Gratt. 304; Randolph v. Wright, 81 Va. 612; Senger v. Senger, 81 Va. 695, 708; Hurt v. Brooks, 89 Va. 500, 16 S. E. Rep. 358; Warner v. Brinton, 29 Fed. Cas. 240, 241; Bradley v. Zehmer, 83 Va. 689.

†Same—Residuum—To Whom It Passes.—In Paup v. Mingo, 4 Leigh 163, citing the principal case, at pp. 177, 181, 183, 188, it was held that the executor is not entitled to the surplus of the profits, but such surplus is a part of the testator's estate undisposed of by his will, and belongs to his next of kin. And it seems, that since the statute of distributions of 1785, the executor is not, in any case, entitled to the residuum of his testator's personal estate not ac-

uary estate goes to the executors, as is always the case where there are two or more executors, and unequal legacies of personal estate are given to them.

This was an appeal from a decree of the High Court of Chancery. The case was this. Joseph Shelton by his will dated the 20th of September 1770, after directing his debts to be paid, devises as follows, viz: "to his brother David Shelton all his land at Wild-Boarcreek, in fee, with all the cattle, horses, cows, hogs and utensils and appurtenances thereto belonging.

"To Samuel Shelton his brother, his tract of land on Licking Hole Creek, in fee, together with the cattle, &c. ut supra, thereto belonging."

"To his brother William Shelton, his tract of land on Owens Creek, (his manor plantation) with all the cattle, &c. thereto belonging."

"To William Shelton, son of his brother John, his horseshoe tract in Louisa, in fee, with all the cattle &c. thereto belonging, and £200.

"To John Shelton (the plaintiff) son of the said John after the decease of Mary Trueheart, his tract of land on Totopotomoy in Hanover, and all cattle &c. thereto belonging."

To Mary Trueheart his sister, he lends the Hanover plantation, for her life or widowhood, a limited number of cattle, hogs and horses, and some negroes by name; and, at her marriage or death, then immediately the land and cattle, horses, hogs and other appurtenances thereto belonging, to go to his nephew John.

He gives all his furniture equally to his brother William and nephew John. Then follows this clause: "all my negroes, young and old, at all my plantations above named, to be equally divided between my three brothers David, Samuel and William, and those lent to sister Trueheart also after her death or widowhood."

He next gives some trifling pecuniary legacies to others of his female relations, and then follows this clause: "It is my
54 *will also, that in case my brothers sons, John and William, should either of them die before marriage or without issue, then the legacy above left to one, shall fall to the other brother; and should both die, without such lawful issue or marriage, then the legacy left them shall be equally divided between my brothers David, Samuel and William, and their heirs forever." There is no residuary clause in the will.

The appellees proved the will, and qualified as executors thereto.

The testator had, at the time of making his will, no lands but those devised, nor any slaves but what were upon those plantations. He lived till September 1784, and in the mean time purchased another tract of land, called Williamsons, and 8 or 9 slaves, three only of whom were at Williamsons at his death. The others were at the plantations devised, from whence others were removed to Williamsons, and two were out at nurse for their maintenance. There were at Williamsons at the time of the testators death about 19 slaves, young and old. The testator died in September 1784, without revoking, altering or republishing his will.

The appellee is the heir at law of the testator, and of his brother William; he having died in the life-time of the testator. He filed this bill against the executors of Joseph Shelton, claiming the £200 legacy devised to his brother, also the slaves purchased after the making of the will, and not belonging to any of the plantations in the will named, and a proportion of the undevised personal estate.

The High Court of Chancery was of opinion that the plaintiff was entitled to the £200 legacy with interest, from the end of one year after the testator's death, that the slaves, of which the testator was possessed at the time of his death, and which were not then settled on the land devised, nor, bequeathed to the testator's sister Mary Trueheart, descended to the plaintiff as heir at law of the testator, who was also entitled to their profits from the time when they should have been delivered. That the surplus of the testator's personal estate—excluding such of the sheep as were on the lands devised, and including emplements on the lands undevised, and also the crop made on such undevised lands, the year in which the testator died,—ought to be divided.

The decree being made final upon the report of the commissioner pursuant to the above opinion, the defendants appealed.

55 *The PRESIDENT delivered the opinion of the court.

This was an appeal from the High Court of Chancery. It came on to be heard in June term 1791; but the questions being of consequence to the parties, and their decision important to the community, the court not having a library at hand, or leisure to digest the variety of adjudged cases relied on in argument, took time to consider of it, and directed the cause to be re-argued.

That has been done this term; and the court have derived much satisfaction from the laborious researches, and able reasonings of the gentlemen at the bar. They have now directed me to pronounce their final decree.

The case depends upon the will of Joseph Shelton, a rich old bachelor, which was dated and published September 20th 1770: but he living 14 years after, and in that time purchasing other lands called Williamsons, to which he removed part of the slaves from the plantations devised in his will, and purchasing other slaves, part of which were placed on those plantations; and there being three slaves (which may deserve a distinct consideration) which belonged to the plantations devised, but were occasionally absent at his death; and he dying in September 1784, without having revoked, republished or

tually bequeathed by the will. See also, citing the principal case, Granberry v. Granberry, 1 Wash. 250; Fleming v. Bolling, 3 Call 83; Hendren v. Colgin, 4 Munf. 235; Dykes v. Woodhouse, 3 Rand. 288, 312; Wernick v. McMurdo, 5 Rand. 79. See Code of 1881, § 2557.

altered his will; great difficulty is occasioned in respect to the first and most important question in the cause, which is:

1st, Whether all the testators slaves shall pass by the generality of the words "all my slaves young and old," as would have been the case, had he died in 1770; since he had, then, no plantation but those devised, nor any slaves, but upon those plantations, to have made the words "on all my plantations above named," restrictive, if such he intended it.

If all did not pass, a second subordinate question has been made; whether the devise shall be confined to such slaves as the testator had at the publication of his will, in exclusion of those after purchased; or, whether the will shall speak at his death, and define the bequest to such as were then upon the devised plantations, including such as were at Williamsons or elsewhere.

In discussing this question, it is agreed on all hands, that, the testators intention is to be the rule of decision; but the gentlemen at the bar have labored on the one side to enlarge, and on the other to narrow, the sources from whence we are to collect that intention.

56 *It is said, 1st, we must collect it only from the written will, disregarding the parol proof and all other circumstances.

2d. That we must confine our contemplations either to the time of the publication of the will, or to the time of the testators death.

As to the first; it would be a strange waste of time to go over the string of decisions upon the admission of parol proof to explain, and even to contradict, written wills, more especially as they are in direct opposition to each other, and it is impossible to reconcile them. Indeed since the case of Selwin v. Brown, cases Talbot 240 which was affirmed by the lords, the judgments have been more uniform, and the admission of parol proof less latitudinous; and if any rule upon the subject can be said to be fixed it seems to be this; That it is not to be admitted to contradict the common meaning or legal import of plain words in a will, but shall be allowed to explain a person or thing intended by doubtful words, or to correct mistakes in either discription. 3 Atk. 372.

But that, under the latter allowance, parol evidence of the testators circumstances, situation, connections with the legatees, and his transactions between the making of his will and his death, are to be admitted to discover his intention. The Chancery books ancient and modern abound with instances.

As to the trite objection, that counsel would not know how to advise, if judges are to go out of the written will; I answer,

1st. That counsel in general would be very inattentive not to enquire (previous to giving an opinion) whether there were no change in the testators situation and circumstances subsequent to the making of the will, especially in a case like this, where the testator lived so long after; from whence revocations or ademptions of legacies from change of circumstances were, at least, to be suspected.

2d. That without such inquiry into extraneous circumstances, it would be difficult to discover from this will, any thing to restrain the generality of the words "all my slaves young and old on all my plantations" by the words, "above named," since it does not appear by the will that he had other plantations or slaves.

As to the second objection, "that we must confine our view of the will to circumstances, either at the date of the will or at the time of the testator's death, and not regard both;" I answer, that as we should frequently come short of the intention, by being confined to either, so I conceive we are not only

57 authorised,*but compelled to view circumstances at, and from the former period, to the latter, to discover what was his original intention, and whether that continued to the time of his death, or was legally controuled by what happened in the mean time.

And this is proved: 1st, From the legal idea of a will, which we are told has its inception from the making, and its consummation by the death, shewing it to be one continued act. 1 P. Williams, 97. —Salk, 237. —2 P. Williams.

2d, From precedents.

In the case of after-purchased lands, which will not pass by a devise "of all the estate or lands I shall have at my death," you view the date of the will, and introduce the conveyance for the purchase, to shew it to be subsequent. This land will not pass, not for want of intention, but from the controul of law upon that intention, for under the same devise, after acquired chattels would pass; this is one instance of looking to both periods, and an intervening act.

Another is, the known disputes about the ademption of legacies. You view the will, and find the legacy given, but at the testator's death the subject is not found in his estate.

Whether this be an ademption or not, depends on the testators intention: Ca. Temp. Talb. 227: This is the general rule.

But an intention to revoke is not to be presumed, 3 Bac. 470.

As to a specific thing devised and afterwards sold by the testator: if merely voluntarily, it is an ademption, because no other motive appears. But if compelled to pay debts, or to provide immediate necessaries, it is not so, since here is another motive, and his intention to revoke is not presumed, and the money for which the thing was sold is to be paid out of the residue, 3 Bac. 470, Swinb. 524, 3 Bac. 480.

As to a devise of a specific sum of money, due from, or in, a certain persons hands: the testator receives the money; this is no ademption.

In Gilb. 32, 2 Vern. 686, 2 P. Wms. 165, a distinction is made where the payment is voluntary by the debtor in which case it is no ademption. If compelled by the creditor it is.—

But this distinction is exploded upon better

reasoning. 1 Abr. eq. Ca. 32, 1 P. Wms. 464, 561, 2 P. Wms. 469, Ca. Temp. Talbot 227.

The great desideratum is in the testators intention; but in equity it is important to consider how it affects the residuary estate, which is discharged of a debt by the sale of the specific thing, and augmented by the receipt of the specified debt.

58 *This is another instance in which we must view the whole case to ascertain the intention of the testator: and as this depends on parol proof, it aids the answer to the first objection as to admittiug parol proof.

We may reason as to the general rule from our act of wills in 1785, upon the subject of implied revocations, tho' it does not affect this case; and there that must be done, which both objections oppose.

Many other instances may occur, but these may suffice to shew, that we must consider the will upon its own words, and the parol proof as to the situation and circumstances of the testator when it was made, and at his death.

On a general view of this will, the testator appears to intend the disposition of his whole visible property.

His male relations were three surviving brothers, and two nephews, sons of his elder brother and heir, who was dead.

He had five plantations, and devised one to each of those five, with the stocks, plantation utensils and appurtenances to each belonging. Whether they were nearly equal, and that he meant to pursue the Jewish system of primogeniture, giving his eldest brothers sons a double share; or from what other motive he acted, does not appear, and is unimportant. However he makes provision out of his nephew John's land for his sister Mary Trueheart for life or widowhood, and gives her for the same term, some slaves by name, and stocks by number; at her death the stocks with the land, were to go to John, and he gives to his nephew William £200.

He then devises all his household furniture to his brother William, and to his nephew John, equally to de divided.

Then comes the clause on which the dispute arises.—"All my negroes young and old at all my plantations above named, to be equally divided between my three brothers David, Samuel, and William, and those lent to sister Trueheart, also after her death or widowhood."

He then gives £130, pecuniary legacies, and adds this clause: "If my nephews, John and William, should either of them die before marriage or without issue, then the legacy above left to one, shall fall to the other brother: and should both die without such issue or marriage, then the legacy left to them, shall be equally divided between the three brothers David, Samuel, and William:" and appoints them executors without any residuary clause.

59 *If the testator had died at that time, there could have been no doubt but that all his slaves would have passed to his brothers, since whatever he might mean by the words, on my plantations above named, they could not then have operated restrictively, he having no other plantations, nor other slaves than were upon them.

It has been admitted, that the words "all my slaves" were sufficient to pass all he had, if he so intended; and it has been argued that the following words must have been added for some purpose, and that has been variously supposed to be, amplification, explanation, restriction, or that they had no meaning, and were thrown in by the writer currente calamo.

The words "all my slaves" were so plain and comprehensive, as not to leave, in the ordinary understanding of men, any doubts of their meaning, so that he could not intend to amplify or explain: the conjecture, that he meant to shew he did not mean to pass the slaves by the word appurtenances, used in the devise of lands and stocks, is ingenious but not found. That word appurtenances, was probably never in the testator's mind; it was the writers, and unluckily used by him for the purpose (as he declares) of expressing the testator's meaning.

"Young and old" was probably his also, and can have no effective meaning. "On all my plantations above named," could not in the testators view of things, at that time, act as a restriction, and therefore it struck me at first, that he could not so intend it; but I accounted for their use by supposing that he reasoned thus; "I have severally disposed of my lands and stocks by plantations, and now give all my slaves on all those plantations as a stock, to be equally divided between my brothers:" differently from the disposal of the lands and stocks. And the testator not meaning them restrictive at the time, they extended to all, then; and dying without altering his will, all at his death ought to pass.

On more mature reflection, I discover an intention which he might have had in using those words. He disposed of all the lands and slaves he had then, but as he might live to acquire more, which he chose should depend on his future disposition, he used specific terms to confine the devises to the lands and slaves he then possessed. Whether this was really his intention or not, is immaterial; since if it be possible that it might have been his intention, it is sufficient to prevent the Court's rejecting the words, as having no meaning.

This must be taken therefore as a specific restrictive devise of the slaves on certain plantations, and not a devise of all his slaves.

60 *His intention afterwards is argued both ways: on one side it is said that intending to devise all when he made his will, and dying without altering that will; we must suppose he intended all should still pass.

On the other side it is contended that since we must suppose him to know how the devise was restrained, and finding him purchasing a plantation and making new arrangements of his slaves, fixing some on that, which would operate as an exclusion of those from the devise, and yet not altering his will, we ought to conclude he meant that those slaves

as well as the land should be left to the disposition of the law.

Whatever might be his real intention, the latter supposition is what reason and precedent will impel the court to adopt.

In very many cases of local devises, the court discover a principle to influence their decision on this point; but to state a few is sufficient.

2 Vern. 747, was a hard case in itself, and I believe would not at this day be so determined under its particular circumstances. But the rule there laid down seems a good general one "that where goods in a house are devised, a voluntary removal of them in the testator's life time, without tort or fraud is a revocation.

2 Vern. 739, goods prepared and intended to be sent to the house, do not pass. 2 Vern. 688. What he had at Wouston at his death passed.

The after-purchased slaves are not to be distinguished from the others.

1st. The testator, as to lands, speaks from the date of the will; as to personals, at his death. And slaves from their nature, (from their being purchased without a conveyance recorded, and from the act of assembly where they are devised,) are to be ranked in the personal class.

2d. The restriction and devise, is not of negroes by name but by the plantations: they were upon them, and those found there at his death will pass, whenever acquired.

Upon this point therefore the court decide the devise to be confined to the slaves on the devised plantation at the time of the testator's death, in exclusion of those at Williamsons; but are of opinion that their settled habitations as fixed by the testator ought to give the rule, and not any casual absence therefrom at his death, which could never be supposed to influence his intentions.

61 *The proofs furnish an instance: All the working slaves from Williamson's were at work at the home-house, (Horse-Shoe,) the instant of the testator's death. Could that circumstance make them pass?

Many other instances occur: A servant sent on an errand: waggoners abroad on duty, and others.

The young negroes sent from the devised plantations to assist poor people, to remain there at will, or exchanged as Sampson was for Tom, furnish no proof of an intention to change their residence or to affect the devise. Such too is the case of the girl Rachel, and the boy Cudjo sent to Williamsons to work for a short time (not to reside there,) just before his death; so the negro Mark, sent from Williamsons in like manner to assist a poor family, is to be excluded from the above devise. The Chancellor's decree therefore as to this point, is to be varied so as to take from the heir the negroes Sampson, Cudjo and Rachel the spinner, and their profits; the negro Mark, as well as all the others belonging to Williamsons, descend to the appellee as heir at law.

The slaves, devised to Mary Trueheart, being specified by name, passed in remainder to the three brothers wherever resident at the testator's death.

2d. The next question respects the crops, whether they pass by the word "appurtenances" used in the devise of the lands and stocks, or go into the surplus as undisposed of.

Here we encounter an objection from the act of Assembly passed in 1748, Ch. 3, § 30, which declares "That where a person dies between the 1st of March and 25th of December, the servants and slaves he is possessed of shall be continued on the plantations until the latter day, for making and finishing a crop; which when made and finished, shall be assetts in the hands of executors and administrators. After the expense of clothing and feeding them, of tools and utensils, quitrents of the lands, levies, and other incidental charges are deducted." Which, it is said, is a legislative disposition of the crops, and restrains the power of testators to dispose of such crops.

But this construction does by no means accord with my idea of the spirit of the act.

This clause was clearly intended to suspend the devises of the lands and slaves, or their descent to heirs, until Christmas next after the testator or intestate's death, and to appropriate both to the purpose of finishing a growing crop, which would otherwise be lost to the family and community. As 62 to the crops, the *primary design was to ease the lands of quitrents and other charges of that year, and to provide food and clothing for the slaves, as a compensation to their proprietors, for their having been employed in this beneficial work; but as to the surplus, it says no more but generally, that it shall be assetts in the hands of the executors or administrators.

What is the consequence of the surplus being assetts? Does it belong to the executors? No gentleman thinks so, but they say it will go into the residuum: this must depend on the will, and seems to admit the ground of the opinion of the court, that the testator has the same power over this surplus of his crops, as he has over his other estate.

Nay, I have no doubt but that a testator might go further than the surplus, by devising the crops entire, and directing the charges upon the lands, and the food and clothing for the slaves, to be paid out of his residuary estate; since justice, to the proprietors of the lands and slaves, is fully done, according to the intention of the act, and the testator's power over that, which the law declares shall be assetts in the hands of his executor, ought not to be restrained.

It is yet assetts, and like all other personal legacies, must pass through executors hands, and is only perfected by his assent, that if necessary, he may retain and apply it to the payment of debts, but if that be not necessary, a court of equity will compel his assent according to the will of the testator.

The case of lord Bristol v. Hungerford Chanc. prec. 81, and 1 Cas. Eq. Abr. 244, is a devise of a surplus raised by sale of lands, "to be deemed part of his personal estate and go to his executors." This case is stronger than our act, yet the surplus was distributed as undisposed of, tho' it conveys the same idea.

Upon the whole of this point, we are clear that the testator had power to dispose of the surplus of the crops. And we come to the question, whether he has done so in the devise of the lands and stocks &c. which are alike, and one only need be noticed.

"I give my brother David Shelton all my lands at Wild-Boar Creek, in Goochland county, to him, and his heirs forever, with all the cattle, horses, hogs and other utensils, and appurtenances thereto belonging."

If the crops pass at all, it must be under the word appurtenances, which I am inclined to think sufficient for the purpose, and that it was his intention the crops should pass with every thing else on the plantations except the slaves, (a distinct and important class of property,) which he afterwards particularly devises, but is silent as to the crops.—

63 *To admit the evidence of Mr. Todd, (the writer of the will) that he was directed to devise the crops, and thought he had done so by this word, would be warranted by innumerable precedents in the English Chancery.

However, I am not fond of this dangerous kind of evidence, since, tho' Mr. Todd's function and character entitle him to credit, yet we must adopt general rules. I am therefore inclined to take it upon the words of the will itself.

The determination in Trafford v. Berrige, 1 Cas. eq. Abr. 201. 14. and others of the same kind, "That a devise of all his goods, chattels, household stuff, furniture and other things which should be in his house at his death, should be confined to things of the same nature and species of those mentioned, and not extend to £265 specie found in his house," does not seem to apply; since that was founded on the words other things at the close of a string of things mentioned.

But in this will, after a devise of the lands, (as the principal,) it goes on with "all the cattle, horses, hogs, utensils, and appurtenances thereto belonging;" making each a distinct relative description and devise, which has the land for its correlative; and the words thereto belonging, have the same effect, as if inserted after each as "the cattle belonging to the said lands &c." so that we are to read the will "I give my lands with the appurtenances thereto belonging," which would include the crops growing according to the legal technical meaning of that term. For I take it that a grant of lands and appurtenances, would pass growing crops to the purchaser if no reservation were made, which would not violate the principle "he that sows shall reap," since that right to reap, like all other property may be transferred.

The crop severed indeed would not pass by such a grant, and can only pass by this will, on a supposition that the testator intended to make no difference, and from the difficulty of distinguishing which was severed.

The date of his will and his death happened in the same month tho' 14 years distant. It was in September, when corn is not severed; perhaps the fodder was, and probably all or most of the tobacco.

The case is doubtful, and tho' I am rather of opinion myself that he intended to devise the crops, I can without any reluctance yield to the opinion of my brethren, that they do not pass, but must go into the surplus, and it only remains to consider,—

64 *What is to become of that surplus, whether it belongs to the executors, or is to be distributed to the next of kin?

This is a question of difficulty, requiring laborious researches, and in which we might find in the Chancery books, like Crokes law reports, precedents for almost any opinion we should incline to give on the subject. Yet when we have labored thro' the various and contradictory decisions, the principles which are to govern them, do not seem to be so very difficult to ascertain.

As a precedent, our judgment may not perhaps be so important as I at first thought it, if I am not mistaken in my conjecture, that our new statute of distributions, has put an end to the dispute as to all cases subsequent to its passage, by directing distribution "where the person dies intestate as to his personal estate, or any part thereof: this however is just hinted at, without giving any opinion on it.

To state the principles—there are two, which seem the ground work and are fixed.

1st. A legal one. "That the naming of an executor is a disposition to him of all the personal estate, and after payment of debts and legacies, the surplus belongs to him as a recompence for his labor and trouble." 2 Bac. 423, Wentw. off. of executors 4. and if the spiritual court at this day are about to compel the executors to distribute the surplus to the next of kin, the Kings Bench will grant a prohibition. 5. Mod. 247.

2d. A contending principle of equity, "that where there is fraud in obtaining the executorship, or it manifestly appears to have been the testator's intention the executor should not have the surplus, a Court of Equity will consider the executor as a trustee only as to the surplus, for the next of kin." 2 Bac. 423.

This we are told was first introduced about a century ago in Foster v. Munt, 1 Vern. 473, where an express pecuniary legacy was given to the two executors of £10 each for their care and pains; which it was said, was apparent evidence of his intention to exclude them from the surplus, since the legacy being to come out of the surplus, the testator could not intend to give them part and the whole. And to this apparent proof of the testator's intention in cases of pecuniary devises, in consideration of care and pains, and in a few other instances, was the rule confined at first, but soon branched into a variety of other considerations, which produced determinations not to be

65 *reconciled in principle to each other, and which must be resolved into the different inclinations of the Chancellors to favor, some the legal, others the equitable rule, and endeavouring to make the favored rule apply to the case before them.

Thus some attack the rule of law and oppose to it the statute of distributions, which

they alledge gives the next of kin, a title to such of the personal estate as is not disposed of; similar to that which the heir has to the real estate—1 P. Wms. 554.—2 P. Wms. 210.—3 Atk. 203: and that the office being in its nature fiduciary, and not beneficial; therefore the executor ought to take no more than is given him, and be a trustee for the residue:—Whilst others lament that ever the rule of equity was introduced, and will not interfere with the executor's itle, but upon the most irresistible proof appearing in the will of an intention to exclude him. 2 Bac. 423, to 426. Brown 330.

Sometimes a distinction is made between a specific and a pecuniary devise to the executor, Ch. Prec. 231, 316. This again is exploded in others Cas. Temp. Talb. 3 Atk. 226.

Sometimes the circumstance of the executor's being a near relation, or a stranger is thought important. In other instances that is denied, 1 P. Wms. 544.

And finally parol proof of the testator's intention is admitted in many cases and denied in others.

From hence it may be concluded; that an enquirer after principles can derive very little satisfaction from those cases: those who are curious, and have leisure, may recur to them. I shall pass them over, and confine myself to a few modern cases, where most of the others are brought into review.

Farrington v. Knightly 1 P. Wms. 544 was this, "the testator declared, as to his personal estate (if he should leave any) he gave £50 to his brother A, and £50 to his nephew B, whom he made executors; gave 20l. each to others of his relations, several of whom were his brothers, nephews and nieces, (and as such amongst his next of kin entitled to distribution under the statute,) and then abruptly broke off without the usual conclusion, In witness &c. or making any disposition of the surplus which was £1200."

On a question between the executors and next of kin, who should have the surplus, lord Parker takes notice of the cases on both sides, which he endeavors to reconcile with the principle he affirms, viz. that where there is an express legacy to the executor, or to the executors equally (if
66 as in that case there be *more than one) it shall exclude them from the surplus, even tho' there were legacies also to the next of kin.

As to the reason of the case he says: "It is most plain that making a person executor, ought not to amount to a gift of the personal estate; it is no more than making him a trustee; the very word executor importing ex vi termini, that he was only appointed to execute the will, and to have nothing but the management of the personal estate. That he is a trustee as well of the specific legacies, as of the surplus, since the former passes to the legatee by his assent only."

He concludes for the equitable principle pari rationi, and decrees a distribution independant of the circumstance (which no doubt was weighty) of the will being unfinished, and a devise of the surplus, probably prevented. Except the labour of the case, it was plainly within the rule of equity, being a pecuniary legacy of equal sums to each of two executors, which in every instance since Foster and Munt, deprived the executor of the surplus, except when in the will itself, or from parol proof, it appears the testator intended to give it him, the contrary of which appeared in this case.

A distinction between equal and unequal bequests to a plurality of executors, was taken in Bachellor v. Searle 2 Vern. 736; affirmed in Brasbridge v. Woodroffe 2 Atk. 68. and seems established in Bowker and al. v. Hunter and Eaton Browns Chan. Rep. 328, first decreed by lord Thurlow, and on rehearing, that decree affirmed by lord Loughborough. The case was this, viz:

The testatrix devised £200 to Mr. Hunter, and after many intervening legacies to other persons, amongst whom were some (but not all) of her next of kin, she gave £50 to Mr. Eaton, added some charitable legacies, and made Hunter and Eaton executors, but made no disposition of the surplus.

Here was a case divested of all influence from parol proof, or the relation which subsisted between the testatrix and the executors on the one side, and the next of kin on the other: in short, no favorite wife to claim the assistance of the court: but it depended simply on the will, and whether the testator's intention to deprive the executors of the surplus, was to be presumed from his having devised them pecuniary legacies.

It is obvious that lord Thurlow's general reasoning is opposed to lord Parker's in making the legal the general rule, and the equitable principle, only an exception
67 from it. The consequence *each draws from thence, is materially different. Lord Thurlow's is "that the rule 'that the executor shall take the residue,' must prevail, unless there be an irresistible inference to the contrary." Lord Parker's is "that the next of kin have the apparent right, and there must be a devise of the surplus to the executors either expressly or unavoidably implied, to exclude the next of kin."

Lord Loughborough reasons with less appearance of bias than either; confesses there is great difficulty in the cases, but as neither the legal rule "that the appointment of an executor is a gift to him of the whole," nor the equitable one "that a legacy given to him excludes him from the surplus," can be shaken; he thinks a more certain principle cannot be laid down in the application of the equitable rule to particular wills, than was mentioned by lord Mansfield in Lawson v. Lawson in the house of lords. 7 Brown's par. cases 511. "That where the legacies to executors are consistent with their taking the residue, there is no implication to exclude them,"

"tho' he confessed there was great latitude in it." On that ground was the decree in the case then before the court made, because the devise to one of the executors being of £200, and to the other of £50, it was not inconsistent with their taking the surplus, since the latter was to be equally divided, and the former taken out in unequal portions. This being a very late case, and agreeable to those in 2 Vern. and 2 Atk. seems to give some rule by which to conduct ourselves in examining what was the testator's intention in the present will, and whether the bequests to the executors, be consistent with their taking the surplus?

The devise of lands to them separately, if equal would be unimportant, because with that species of property, executors have nothing to do, as executors.

The devise of the slaves I take to be on the same ground of reasoning as to the present question, since if undisposed of, they descend to the heir, and do not go into the surplus either for the executors or next of kin.

The excluding legacy must be of a personal thing, which if not devised would belong to the surplus, to bring it within the ground of objection that the testator did not intend to give all and some.

The bequests of personal things to the three brothers therefore are only to be viewed, laying aside the devises to them of the lands and slaves.

68 *To his brother David he gives "all his horses, cows, hogs and utensils, on his Goochland plantation."

To Samuel "all his horses, cows, hogs and utensils, at Licking Hole."

To William "all his horses, cows, hogs and utensils, at the home plantation, and half his household furniture, to be divided between him and his nephew William."

And having created cross remainders between his nephews William and John, directs "that if both die unmarried, or without issue, the legacy to them should be equally divided between the three brothers.

I think the testator so far from intending to exclude his executors by these legacies from the surplus, plainly intended it for them.

Having disposed of his visible property which he contemplated and described, he proceeds to give pecuniary legacies to the amount of £330, without making any provision for raising or directing who should pay either those or his debts which he had said should be paid, or the expences of his funeral and administration. These he knew must be defrayed by his executors out of his money, certificates, and other things which constitute the surplus; and not having made an exact estimate of the fund or the charges, he intended the brothers should take the one to answer the other without account to any person.

His having given all his slaves to his three brothers, and giving them all that was devised to his only other relations of his name, his nephews William and John, upon their dying without issue, creates a strong presumption that if he had made a residuary clause, it would have been in their favor.

Then to take it upon the rule laid down by lord Mansfield, affirmed by lord Thurlow, and which lord Loughborough considers as the best general one which can be adopted: I do not consider these devises as at all inconsistent with their taking the surplus as executors.

1st. It is not a devise to them jointly by the description of executors, but a separate devise to each as brothers, without mentioning the office or making any allusion to it.

2d. But the principle point, is, that the legacies are unequal; and if any point on this loose question can be said to be uniformly decided, this is, viz. that unequal legacies do not exclude the executors jointly from the surplus; we are therefore of opinion that the surplus goes to the executors.

69 *The decree must be reversed. The plaintiff is entitled to the £200 devised to William with interest from a year after the testator's death, and to 16 slaves, undisposed of, and their profits. The crops made the year the testator died, did not pass to the devisees of the plantations by the word "appurtenances," but after paying the several charges directed by the act of Assembly, the balance is to go into the surplus of the personal estate: and that surplus, after payment of debts, legacies, funeral and charges of administration, and the costs of this suit on both sides, belongs to the executors.

As to all other matters; the bill is to be dismissed, and the costs of both courts must be paid by the executors out of the surplus.

APRIL TERM, 1792.

Wood v. Davis.

Forthcoming Bonds*—Validity—Case at Bar.—In a bond for the forthcoming of property taken under execution, it is not necessary that the time appointed for the delivery of the property should be stated to be that at which the sale is to take place.

This was an appeal from a judgment of the District Court, obtained by the appellee against the appellant, upon a forthcoming bond, the condition of which is as follows, to wit: "The condition &c. is such, that whereas Matt. Rhodes deputy sheriff for Michael Thomas sheriff for Albemarle county, hath this day levied an execution on Fanny &c. negroes, the property of the said David and John Wood, taken at the suit of J. Davis by a judgment of the District Court of Charlottesville; for the sum of 16,164lb of tobacco, &c. now if the said D. and J. Wood, and Josiah Wood shall

70 deliver, *or cause to be delivered, the aforesaid property, at David

*The principal case is cited in Irvine v. Eldridge, 1 Wash. 162. See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Woods barn, at his quarter, on the 14th of April next, then &c."

The objection to the judgment was, that the condition does not state that the 14th of April was the day appointed for the sale of the property.

By the Court. It is not necessary that the time appointed for the delivery of the property should be stated to be that at which the sale is to take place. The law does not require it, nor can it produce any benefit whatever to the obligors, that it should be so stated.

Judgment affirmed.

Hubbard v. Blow & Barksdale.

April Term, 1792.

Debt on Note—Failure of Declaration to Claim Interest—Effect.*—Debt upon a note for a certain sum of money, with interest from the date. If the declaration do not claim interest, judgment upon non sum informatus, must be entered for the principal only.

This was an action of debt, brought in the County Court, by the present appellees, upon a promissory note given for the payment of £319: 8: 7: with interest from the date. The declaration states the principal sum right, but takes no notice of the interest.

The defendant, without oyer, pleaded payment: afterwards withdrew the plea and suffered judgment by non sum informatus, which was entered for the principal and interest as expressed in the note. The defendant appealed to the district court, where the judgment was affirmed; and on appeal to this court, both judgments were reversed, and judgment entered according to the demand in the declaration, without interest.

Hudson v. Morris.

April Term, 1792.

Replevy Bond†—Judgment—Case at Bar.—Conditional judgment against A., and his appearance bail B., and writ of enquiry executed against A. only, fi. fa. against A. and B., and replevy bond taken from both. Ca. sa. afterwards sued out against A. only, on whom it was executed, and he was imprisoned. Judgment was correctly entered against B. on the replevy bond.

This was a motion made by the appellee against the appellant, and P. D. and I. L. in the County Court, for judgment on a replevy bond, given by the said Hudson P. D. and I. L. to Morris.

The court gave judgment for the plaintiff, and Hudson having filed a bill of exceptions, appealed to the District
71 Court *of Charlottesville. The bill states "that the original suit was commenced against P. D. for whom the said Hudson became appearance bail, but gave no bonds; and a conditional judgment was entered and writ of enquiry thereupon executed against P. D. only. That a fi. fa. issued against the said P. D. and the said Hudson upon which this replevy bond was taken.—that P. D. afterwards obtained an injunction, which was dissolved for part of the sum, on which Morris afterwards sued out a ca. sa. against the body of P. D. only, which was returned "executed and imprisoned—the defendant Hudson therefore objected to a judgment being rendered against him on this motion, it appearing from the replevy bond that the fi. fa. issued against him, as well as P. D. though he, the said defendant, was no party to the original suit; and because it appeared by the return of the ca. sa. against P. D. that he was in custody."

The District Court affirmed the judgment of the County Court, from which an appeal was granted to this Court.

The appellant did not appear at the trial in this Court, and the Court having considered the record, affirmed the judgment.

Hunter v. Haynes' Lessee.

April Term, 1792.

Wills*—Entails—Statute Abolishing—Effect.—Devise in 1764 to A. for life, and after her decease, to the testator's nephew, and the heirs of her body lawfully begotten, for ever; but in case he die without such issue, then to T. H., the testator's brother, in fee.—The nephew died in 1780, (after the law destroying intails,) under age, intestate, and without issue. A died in 1786. The remainder over cannot take effect, but the estate will descend to the heir at law of the first remainder-man.

This was an ejectment, brought in the District Court of Suffolk by the lessee of the appellees against the appellants.

The parties agreed the following case, to wit.

"That William Hunter, the former proprietor of the land in question, by his will dated in 1764, devised the same to Elizabeth, his widow, during her natural life; and after her decease to his nephew, Thomas Haynes, and the heirs of his body lawfully begotten for ever; but in case his said nephew should die without such issue, then to Thomas Hunter brother of the testator, and his heirs for ever."

"That the said Thomas Haynes died in June 1780, under age, intestate and without issue."

"That Elizabeth the widow died on the 14th December 1786."

72 *"That the defendants are the widow and children of the said Thomas Hunter, the last remainder-man."

"That the lessor of the plaintiff is the cousin of the whole blood, and heir at law to the said Thomas Haynes, the first remainder-man," and if &c.

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*See Brooke v. Gordon, 2 Call 212; monographic *note* on "Debt, The Action of" appended to Davis v. Mead, 13 Gratt. 118.

†See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

*See Carter v. Tyler, 1 Call 185; Timberlake v. Graves, 6 Munf. 174; 4 Va. Law Reg. 658.

The District Court gave judgment, upon this agreed case for the lessor of the plaintiff from which the defendants appealed to this Court.

The appellants being called, and not appearing the Court upon inspecting the record,

Affirmed the judgment.

Evans v. Smith.

April Term, 1792.

Pleading and Practice—Declaration—Variance—When Immaterial.*—It is not a material variance to omit to state in the declaration the words "of the County of Essex," the place of the obligor's residence, which is stated in the bond.

This was an action of debt, upon a bond brought by the appellee, in the District Court of King and Queen. A conditional judgment was obtained at rules; and set aside in Court, the defendant pleading payment. An objection was taken, at the trial, to the giving of the bond in evidence, on account of a variance between it and the declaration in this, that the defendants are in the bond said to be "of the County of Essex" which is omitted in the declaration; the objection being over-ruled by the court, the defendants excepted and appealed to this court where the judgment below was affirmed.

Asberry, &c. v. Calloway &c.

April Term, 1792.

Pleading and Practice—Action against Deputy Sheriff and Sureties—Non Est Factum.—Upon a motion against a deputy sheriff and his sureties upon a joint bond, if the principal plead non est factum, this must be first tried, and decided against the plea, before judgment can be rendered against the sureties.

Same—Same—Judgment†—Interest.— What interest judgment shall be given for, on a motion by the sheriff, against his deputy, where a judgment has been obtained by the Commonwealth against him for taxes. The judgment must be entered for the principal sum, and the interest, and not for the penalty, to be discharged by that sum and interest.

The defendants in error gave a notice in writing, to O. Trent and George Asberry, late deputy sheriffs under G. Scruggs, the administrator of the said defendant and to three others their securities, that a motion would be made against them in the County Court of Bedford in November 1790, for the amount of the revenue tax, due for the year 1783, and the costs and damages, which had been recovered by the commonwealth against the said Scruggs, in his life-time. O. Trent being served with a copy of the notice, appeared and put in a plea in writing, denying that the sheriff's bond, upon which the motion was made, was his deed; which he swore to in court.

73 *The court, on hearing the evidence, gave judgment, that the plaintiffs have execution against the said Trent, Asberry, and two of the securities, upon whom the notice was served, for the penalty of the bond, but to be discharged by the payment of £651: 8: 3½, with interest thereon, at the rate of 20 per cent. per annum from the first of November 1784, till payment and the costs.

From this judgment the two securities appealed, having filed a bill of exceptions to the opinion of the court, stating the reasons for which they appealed; which were: 1st, Because the bond upon which the judgment was given was joint, and that no testimony was adduced, on the part of the plaintiffs, to disprove the plea of O. Trent, except his acknowledgment in court that he had subscribed his name to the bond, and delivered it to the other defendant George Asberry, as a form, by which to draw such bond; but that he never acknowledged the same, or delivered it as obligatory upon him.

2d, Because the interlineations in the bond were not proved to have been made at the time of executing it.‡

The District Court affirmed the judgment, as to George Asberry and the two securities; awarded severance as to O. Trent, and reversed the judgment against him: The court being of opinion, that the plea put in by him ought to have been tried by a jury; for which purpose they remanded the case to the County Court.

The defendants George Asberry and the two securities, obtained a supersedeas to the judgment of the District Court from one of the judges of this court.

The PRESIDENT.—The judgment of the District Court is erroneous and must be reversed, as must also that of the County Court. The errors in the latter judgment are:

1st, The evidence stated in the exceptions, is wholly insufficient to prove, that the writing obligatory, denied by the plea of Trent to be his act and deed, was such his deed; a fact which ought to be decided, prior to any judgment against the other obligors.

2d, The court erred, in awarding interest at the rate of twenty per centum per annum from the 1st of November 1784,

74 *till payment upon the principal sum; because the act passed in 1780, which authorises judgments on motions by sheriffs against their deputies, justifies only a gross sum of damages, although called interest on the principal sum (stated in the act to be twenty per cent. the damages to

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***Bonds.**—See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

†**Judgments.**—The principal case is cited in Cooke v. Wise, 3 Hen. & M. 493; Mayor v. Chapman, 4 Hen. & M. 276; Greenhow v. Barton, 1 Munf. 593; Lewis v. Long, 3 Munf. 158; Penn v. Hamlett, 27 Gratt. 341.

See monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

‡This bill of exceptions is not sealed by the justices of the Court, but appears in the record, and none of the defendants appealed but the two securities.—Note in Original Edition.

which the sheriff was then liable, but which the court are of opinion ought to be changed to the damages to which the sheriff himself was liable according to the laws subsisting at the time of the transaction, and which in 1783 and ever since, were a gross sum of fifteen per cent. on the principal sum, and both sums to bear interest at five per cent. per annum till paid, with a power to the court to remit all or any part of the damages,) provided it appear that judgment has been obtained by the commonwealth against the sheriff for such damages.

3d, The law directs the judgment to be entered, for the principal sum with which the under sheriff is chargeable, and the damages; and not for the penalty, to be discharged by such payment; and this being a new law, introducing a new remedy contrary to the course of the common law, ought to be strictly pursued.

And as the record does not enable this court to determine what judgment the County Court ought to have given, the cause must be remanded to that court for further proceedings from the notice.

Hudson v. Ross & Co.

April Term, 1792.

Executors*—Liability for Deficiency in Estate of Testator.—The appellant dies, and the appeal being revived against his executor, the judgment is affirmed. Damages ought not to be awarded against the proper estate of the executor, in case of deficiency of that of the testator.

The appellees brought an action of debt, in the County Court, against Christopher Hudson, who confessed a judgment, and then appealed. In November 1789, the death of the appellant being suggested upon the record, a sci. fa. issued, upon the motion of Charles Hudson the executor, to revive the appeal, and hear errors.

In April 1790, a sci. fa. to revive and hear errors, was awarded on the motion of the appellees, which was returned, executed.

In April 1791 the District Court affirmed the judgment, and awarded the damages and costs of the appeal, against the appellant. From which judgment he appealed to this court.

The PRESIDENT delivered the opinion of the Court.

There is no error in the proceedings in this cause, until we come to the judgment of the District Court, which is en-
75 tered *as if Christopher Hudson had been then living. The entry is: "that the judgment of the County Court be affirmed, and that the appellee recover, against the appellant, damages according to law &c. and costs &c."

The court take no notice of the death of Christopher, and yet that event had been regularly suggested upon the record, and the executor made a party by the service of the sci. fa.

In the case of Gordon v. Bates where the executor was there stated as a party, this Court affirmed the judgment with damages and costs to be levied of the estate of the testator in the hands of the executor if so much he had, if not, then the damages and costs of the executor's proper goods.

The damages in that case being only one penny, they were not worth the attention of the court. On reviewing that subject we disapprove of that decision in awarding the damages against the proper estate of the executor, in case of deficiency in that of the testator, since the executor, in pursuit of his duty, only prosecuted an appeal entered by the testator himself.

The judgment of the District Court must be reversed, and that of the County Court affirmed, with damages from the time of entering the judgment in the County Court, to that of the affirmance in the District Court, and the costs in the latter Court, to be levied of the estate of the testator in the hands of the executor; &c.†

Turpin v. Turpin.

April Term, 1792.

Wills‡—Devise of After-Acquired Land—Statute.—A will made since the 20th of January, 1787, may pass lands afterwards acquired.

The only question in this case was, whether since the act respecting wills, (passed in 1785,) was in force; a man may devise lands which he should afterwards acquire?

76 *The court were of opinion he might; as that law in express terms permits the disposition, by last will, "of lands which the testator then hath, or may have at the time of his death." In this respect it is different from the law of England.

Butler v. Parks.

April Term, 1792.

Slaves—Detinue—Verdict—Validity—Case at Bar.—In detinue to five slaves, if the jury find for the plaintiff as to four of them, without also finding for the plaintiff or defendant, as to the fifth, the verdict will be set aside, and a Venire facias de novo awarded.

This was an action of detinue, in the County Court, for five negroes; and a verdict was rendered for four, without finding, either for plaintiff or defendant, as to the fifth. The judgment of the County Court

*See *foot-note* to Taylor v. McClean, 3 Call 557, citing principal case; also, monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

†A Motion was made, that the Clerk might be permitted to give a certificate of the above judgment, to be entered in the District Court now sitting:—By the Court. This is a motion, which is never granted without strong reasons. In general it is not permitted, as we may change our opinions during the term. It is often granted, if the delay would endanger the debt. No sufficient reason appearing in this case, the motion is over-ruled.—Note in Original Edition.

‡See Wythe 137, also *foot-note* to Harrison v. Allen, 3 Call 289, citing the principal case.

was reversed in the District Court; from which the plaintiff below appealed to this court.

Marshall for the appellee contended, that only part of the issue having been found, the whole verdict must be set aside. He cited Co. Lit. 227. 3 Leo. 83. Hard. 166.

By the Court. The judgment of the County Court is certainly erroneous, in not finding the whole issue. The jury should have found that the defendant did, or did not, detain the fifth slave. This is exactly like the case of Custice and Posey in the old General Court; which was an action of detinue for three cows, and the jury having only found a verdict as to two, the verdict was set aside. But the judgment of the District Court, in this case is also erroneous, in not awarding a Venire facias de novo.

Both judgments therefore must be reversed, and the cause remanded to the County Court, to be tried anew.

Lewis, Executor of Thruston, v. Norton.

April Term, 1792.

Evidence—Entries in Books—Admissibility.*—A book of accounts, in the hand-writing of, and kept by, a clerk, who is since dead, is proper evidence, upon those facts being proved.

This was an action on the case, brought by the appellee against the appellant in the District Court of Williamsburg, upon an asumpsit. On the general issue, the
77 counsel for *the appellee offered in evidence to prove his claim, his store books, which were proved to be in the hand writing of one of the appellee's book keepers, then dead. This was objected to by the appellant's counsel: but the court permitting it to go to the jury as evidence, connected with other testimony, such as a bill of exchange drawn by Thruston on the appellee, which they paid, as well as sundry letters from Thruston to the appellee, and invoices of goods in the hand writing of Thruston;—a bill of exceptions was filed by the appellant's counsel, and an appeal prayed and granted to this court. The letters, bill, invoices, and a note of hand given by Thruston to the appellee, are spread upon the record, which also states, that it was proved by a witness, that the books of the appellee were in general regularly kept.

The PRESIDENT delivered the opinion of the Court.

Ever since the decision in lord Torrington case, the law has been settled, that a book of accounts in the hand writing of, and kept by, a clerk who is since dead, is proper evidence upon those facts being proved.

The District Court therefore did right in admitting those books, with the other evidence, to go to the jury, for them to weigh, and to produce on their minds such conviction, as such evidence might in their opinion deserve.

*Evidence—Entries in Books—Admissibility.—On this question, see the principal case cited in Wells v. Ayers, 84 Va. 344, 5 S. E. Rep. 21; Barley v. Byrd, 95 Va. 321, 28 S. E. Rep. 329; Vinal v. Gilman, 21 W. Va. 309; *foot-note* to Downer v. Morrison, 2 Gratt. 250; Owens v. Adams, 18 Fed. Cas. 926.

Scott v. Alexander & Peterfield Trent.*

Partnership—Individual Debt—Right to Set Off against Social Demands.†—A debt due from an individual partner cannot be set off against a partnership demand. But a payment to one partner is a payment to all unless, perhaps, where it is forbidden by the company.

The appellees brought an action on the case, against the appellant in the District Court of Charlottesville; the declaration contains three counts; the first and second upon an indebitatus assumpsit & quantum valebant for goods sold and delivered, and the third for money lent. Plea non asumpsit.

At the trial, the defendant offered in evidence four receipts, signed by Peterfield Trent, as offsetts against the plaintiffs demand. One of the receipts is in the
78 following words, to wit: *"Received of John Scott, per the hands of James Scott, £43: 14: which I shall return, when demanded—(Signed) Peterfield Trent"—The others are general and not differing essentially from the following viz: "Received of John Scott, thirty-five bushels of wheat—(Signed) Peterfield Trent." He also offered in evidence a receipt, signed by John Osborn, collector for Peterfield Trent, in the following words, to wit: "Received of John Scott, thirty-five bushels of wheat, on account of Peterfield Trent, (John Osborn)." He also produced testimony, to prove, that before the commencement of this action, he paid to said P. Trent, twenty barrels of corn—and further offered to prove, that he presented to Peterfield Trent, the following account, to wit: "List of money &c. paid to P. Trent for payments of my debts, which you promised to pay, and the balance to my account that may arise with you, and your brother's stores." After which follows a number of items of payments &c.

The court refusing to admit the above receipts and list, as evidence of offsetts against the demand of the plaintiffs, the defendant filed a bill of exceptions, stating the above facts; and further, that it was proved, that when the said list of money &c. paid to P. Trent, was presented to him,

*For monographic note on Partnership, see end of case.

†Partnership—Individual Debts—Right to Set Off against Social Demands.—For the proposition that, a debt due from an individual partner cannot be set off against a partnership demand, the principal case is cited in Porter v. Nekervis, 4 Rand. 363; Gilliat v. Lynch, 2 Leigh 505; Rose v. Murchie, 2 Call 414, and *foot-note*; Choen v. Guthrie, 15 W. Va. 102.

he admitted all the items in it to be just, except one; and also that the said Trent had said, that the items, except the one objected to, had been taken from an account formerly rendered to the said Scott by him, but the defendant did not prove what the balance was after the payment of the said defendants debts, and it was admitted by the defendant, that the 35 bushels of wheat mentioned in one of the receipts was the same as charged in the list, and that the flour mentioned in another of the receipts, was only stored by the said P. Trent, for the defendant, and to be sent to Baker and Blowe for his use. The bill further states, that the defendant did not prove any otherwise, than as above mentioned, that the said payments were made to P. Trent, on account of the demand for which the present action was brought, and that it appeared, that a considerable private account subsisted between the said P. Trent, and the defendant; on which account the said P. Trent acknowledged himself to be the debtor of the defendant.

The jury found a verdict for the plaintiffs, and the defendant appealed.

The PRESIDENT delivered the opinion of the court.

79 *It is undoubtedly true, that a debt due from an individual partner cannot be set off against a partnership demand. A payment indeed, to one partner, will be a payment to the company, and his receipt (unless perhaps, where such payment is forbidden by the company) will bind the whole. But in this case, the receipts do not specify, that the payments were made for the use of the company. The list does; but in that, the balance is not stated, and therefore being entirely unsettled, the court did right, in refusing to let it go in evidence to the jury.

If indeed, P. Trent has received the balance, and should be unable to pay it, Scott may obtain relief against the company by getting an injunction for so such.

Judgment affirmed.

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Cross References to Monographic Notes.

Abatement, Pleas in, appended to Warren v. Saunders, 27 Gratt. 259.

Agencies, appended to Silliman v. Fredericksburg, etc., R. R. Co., 27 Gratt. 119.

Appeal and Error, appended to Hill v. Turnpike Co., 1 Rob. 263.

Assignments, appended to Ragsdale v. Hagy, 9 Gratt. 409.

Assignments for the Benefit of Creditors, appended to French v. Townes, 10 Gratt. 513.

Bills, Notes and Checks, appended to Archer v. Ward, 9 Gratt. 622.

Contracts, appended to Enders v. The Board of Public Works, 1 Gratt. 364.

Debts of Decedents, appended to Shores v. Wares, 1 Rob. 1.

Deeds, appended to Flott v. Com., 12 Gratt. 564.

Deeds of Trust, appended to Cadwallader v. Mason, Wythe 188.

Executors and Administrators, appended to Rosser v. Depriest, 5 Gratt. 6.

Frauds, Statute of, appended to Beale v. Digges, 6 Gratt. 582.

Husband and Wife, appended to Cleland v. Watson, 10 Gratt. 159.

Joint Tenants and Tenants in Common, appended to Ambler v. Wyld, Wythe 235.

Jurisdiction, appended to Phippen v. Durham, 8 Gratt. 457.

Laches, appended to Peers v. Barnett, 12 Gratt. 410.

Limitation of Actions, appended to Herrington v. Harkins, 1 Rob. 591.

Marshaling Assets, appended to Carrington v. Didier, 8 Gratt. 260.

Specific Performance, appended to Hanna v. Wilson, 3 Gratt. 243.

Subrogation, appended to Janney v. Stephen, 2 Pat. & H. 11.

I. WHAT CONSTITUTES.

1. DEFINITIONS.

Partnership.—A partnership, as between the parties, is a voluntary contract between two or more persons for joining together their money, goods, labor or any or all of them, under an understanding or agreement that there shall be a communion of profit and loss between them in carrying on a lawful business. Dils v. Bridge, 23 W. Va. 20; Bank v. Smith, 26 W. Va. 551; Setzer v. Beale, 19 W. Va. 274; Brown v. Higginbotham, 5 Leigh 583.

Nominal Partner.—A nominal partner is one who, without an interest in the concern, allows his name to be used, and holds himself out to the world as having an interest. Brown v. Higginbotham, 5 Leigh 583. See Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835; Bank v. Smith, 26 W. Va. 552.

2. INTENTION OF PARTIES.

As to Third Persons.—A partnership, so far as third persons are concerned, may exist without any agreement between the parties thereto, and even contrary to their intention. Bank v. Smith, 26 W. Va. 552; Setzer v. Beale, 19 W. Va. 274. See "Dormant and Nominal Partners," *infra*.

An agreement between two firms to do a "joint account" business together in the purchase, preparation and sale of tobacco for a certain term, agreeing that the costs and expenses of the business are to be borne in equal shares, and the profits or losses equally divided, constitutes the parties in such business a partnership, regardless of what their intentions were. Commercial Bank v. Miller, 96 Va. 357, 31 S. E. Rep. 812.

As between the Parties.—A partnership in fact, that is a partnership as between the parties, results from the intention of the parties to be gathered from their contract, if there be one, or if not, from their relations and dealings with the property of each other. Setzer v. Beale, 19 W. Va. 274. And when the parties intend to create a partnership, they are clearly liable to third persons. Bank v. Smith, 26 W. Va. 552.

Executory Contract.—An executory contract or agreement to form a partnership, to go into effect at a future day, does not constitute a partnership. Bank v. Cringan, 91 Va. 347, 21 S. E. Rep. 820. See *infra*, "Contract of Partnership."

3. DELECTUS PERSONARUM.—If a stranger contracts with one of several partners to share in his profits, such a contract does not render the stranger so contracting a partner in the concern, as it is well settled that a stranger cannot be introduced into a firm as a partner without the consent of every member of the firm. Setzer v. Beale, 19 W. Va. 274.

Where it is agreed by the members of a partnership to take in a stranger, and thereafter a member of the firm agrees to share his profits with him, and the remaining members are advised of this agreement, and make no objection thereto, such stranger will nevertheless continue to be a member of the firm. And he will not cease to be such, unless it appears expressly or impliedly from the conduct of the members of the firm, that after such contract there was a mutual understanding that such stranger was to be no longer a member of the firm. Setzer v. Beale, 19 W. Va. 274.

4. JOINT OWNERSHIP OF LAND.

Where land is conveyed to two grantees, and the language of the deed is such as is usually employed to create a joint ownership, in the absence of any words to indicate that the parties occupied or intended to assume the relation of partners, this does not constitute them partners, it not appearing that a partnership of any kind existed between them either before or after the date of the deed. Houck v. Kerfoot, 99 Va. 658, 39 S. E. Rep. 590. See "c. Joint Purchase," *infra*.

Where the parties to an agreement subscribe certain amounts for the purpose of forming a syndicate to purchase certain lands, this is simply a contract between them and does not make them partners. Ferguson v. Gooch, 94 Va. 1, 26 S. E. Rep. 397.

5. PAYMENT OF SERVICES WITH PROFITS.

Collection of Claims by Attorney.—An attorney agreed by written contract to pay a person, on every claim against the United States, which the latter procured any person to put into the hands of the attorney for collection, two-fifths of the net amounts which the attorney should receive as compensation, for collecting the claims. The payment on each claim was to be made as soon as it was collected from the government. This agreement was held not to create any partnership between the parties, but was simply a method of compensation for securing such claims for the attorney to collect. Logie v. Black, 24 W. Va. 1.

For Carrying Mail.—A contractor for carrying the mail agrees with a subcontractor, that he shall have one-half of the compensation if he shall perform one-half of the service. Such agreement does not constitute a partnership between the parties. Wilkinson v. Jett, 7 Leigh 115, 30 Am. Dec. 493.

For Operating Grist Mill.—An agreement by which the defendant was to furnish the grist mill then owned by him and put the same in repair at his own expense, and the plaintiff was to run and operate the mill, the funds for carrying on the business and keeping the mill in repair to be furnished by the parties in equal portions, and the profits to be shared equally between them, did not make the parties partners, but simply provided a method of payment and measure of compensation to the plaintiff for his services. Sodiker v. Applegate, 24 W. Va. 411.

Working Farm on Shares.—In every partnership there is a community of interest, but every community of interest does not create a partnership. There must be a joint ownership of the partnership funds, or a right of control over them and also an agreement to share the profits and losses arising therefrom. Thus an agreement between two parties that one shall work the other's farm upon shares, and divide the produce does not constitute them partners between themselves, or as to third persons. Sodiker v. Applegate, 24 W. Va. 411.

Procurement of Better Services.—Sometimes a person may receive a portion of the profits of a business without becoming a legal partner, as by way of rent or for wages, when it appears that this mode of payment is intended to secure better services, and is not understood to be an interest in the profits, as such, and there is no mutuality between the parties. Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835.

Payment of Agents.—In all cases of partnership there must be a participation in the profits as principal. And if the persons merely occupy the relation of principal and agent, no partnership can be predicated upon the fact that such agent receives a part or share of the profits for his services or other benefits conferred. Sodiker v. Applegate, 24 W. Va. 411, *citing* Bowyer v. Anderson, 2 Leigh 550; Chapline v. Conant, 3 W. Va. 507; Dils v. Bridge, 23 W. Va. 20.

To constitute a partnership between the parties who share in the profits, the interest in the profits must be mutual; that is, each person must have an interest in the profits as principal, and not as agent receiving such as compensation for his services. Sodiker v. Applegate, 24 W. Va. 411.

6. SHARING PROFITS.

Communion of Profits Defined.—By communion of profits is meant a joint and mutual interest in the profits, not simply a joint interest in the property; for persons may be jointly concerned in a purchase of goods, yet if they are not jointly concerned in the profits arising from the goods after their purchase, they are not partners as between themselves. Setzer v. Beale, 19 W. Va. 274.

True Test of Partnership—Lien on Profits.—In construing whether an agreement is a partnership, considering all the words used, and all the parts and provisions, as well as the general character and relation to each other, the true test is, did the supposed partner acquire by his bargain any property in or control over, or specific lien upon, the profits while they remained unascertained and undivided, in preference to other creditors? If so he is liable to third persons; otherwise he is not liable. Chapline v. Conant, 3 W. Va. 507.

***Same*—Presumption.**—In Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835, it was said that the true rule in reference to what constitutes a partnership was that all persons who share the profits of the concern are *prima facie* partners as to third persons, but that this presumption could be repelled by showing that the legal relation of partnership *inter se* did not exist.

Leading Characteristic and Distinct Feature.—In order that persons may be partners in the legal acceptation of the word, it is necessary that something shall be shared by reason of an agreement to that effect, which something shall be the profits arising from some predetermined business engaged in for their common benefit. An agreement to share profits is the leading characteristic of partnership, and is the distinct feature in nearly all definitions of the term. And it seems to be unnecessary that by the agreement the parties are to share in the losses of the business. Jones v. Murphy, 93 Va. 214, 24 S. E. Rep. 825.

Payment of Specific Sum Out of Profits.—A mere payment, or promise to pay, out of the profits a sum of money as a specific proportion of the profits does not necessarily constitute the payee a partner, and gives him no interest in the profits, and no right to the profits, but only a personal claim for such share of the profits, after they are ascertained, and may be divided. Chapline v. Conant, 3 W. Va. 507.

Contract with State—Commission in Expenditures.—Where two parties jointly undertook to perform a contract with the state, which involved heavy expenditures, although the state defrayed these expenses, and the partners were to be compensated by a commission on the amount, yet the commission constituted profits in which they were jointly interested, and this community of interest in the profits of the partnership, will suffice to constitute a partnership. Kelly v. Largney, 1 Va. Dec. 72.

Contract to Carry Mail.—A purchaser of a contract to carry the United States mail sold a half interest in the contract, with the agreement that they should share equally in the profits and losses. This created a partnership between the parties. Cole v. Moxley, 12 W. Va. 730.

Milling Business.—By articles between two persons they agree to unite in the purchase of mills and two hundred acres of adjoining land, that one shall keep the mills at a salary to be paid out of the joint concern, and that "the improvements, privileges, expenses and profits, shall in all respects be equal to both parties." This was held to constitute the parties partners in the milling business, but that the real estate was purchased by them individually, of which each was tenant in common with the other of an undivided moiety. Wheatley v. Calhoun, 12 Leigh 264.

Purchase of Land.—An agreement between two parties to pay equally for a tract of land, and one of them to sell it, and the net profits to be divided between them, makes them partners in the speculation. Canada v. Barksdale, 76 Va. 899. See "4. Joint Ownership of Land," *supra*.

Conducting Boating Business.—Two persons entered into an agreement to conduct a boating business, by the terms of which one was to furnish the boats and loading, and the other was to superintend the business and furnish the hands, the profits resulting therefrom to be equally divided. This constitutes them partners, as a participation in the profits and losses made them general partners, and subjected each to all the liabilities of such general partnership, whatever may have been the agreement *inter se*. Weaver v. Tapscott, 9 Leigh 424.

Purchase of Sheep.—Where one person gave

another $300 with which to buy sheep, agreeing to divide the profits, if any, and not to charge interest if any loss resulted from the purchase and sale, and was frequently heard to refer to his agreement as a "partnership," this was held to constitute such persons partners. Newbrau v. Snider, 1 W. Va. 153.

Cultivation of Land.—An agreement between the lessee of a farm with another, by which the latter puts laborers thereon under the management of the former, with the understanding that the net profits should be divided between them, after deducting all expenses, constitutes a partnership and both are liable for the debts contracted for the concern, as the rent of the farm and the wages of the overseer. Brown v. Higginbotham, 5 Leigh 583.

Rent of Ferry.—The owner of a ferry, agreeing to provide at his own expense sufficient boats, a hand on extraordinary occasions, and board for a ferryman, leased it for two years, in a consideration of $1,000 in cash, to a lessee who was to employ a ferryman and to superintend the ferry himself. It was agreed that if the profits did not yield the lessee $2,000 within the two years, the latter should hold over until the profits amounted to that sum. And if they amounted to more than $2,000 in the two years, the surplus was to be equally divided between them. This contract did not constitute a partnership in the ferry. Bowyer v. Anderson, 2 Leigh 550.

No Commission of Profit and Loss.—An agreement between B. and D. by which B. was to furnish the means to stock a saw mill with lumber, keep it in order and help to run it, and aid D. to support his family, and the latter and his boys were to go to work and run the mill with the assistance of the former; the sawed lumber to be sold by B., and after deducting the cost and expenses of stocking the mill, the services of B. and whatever he might pay for the support of D. and his family, the residue of the proceeds of the sales of lumber to be credited to D. on the purchase money due from him on the mill, was held not to constitute a partnership between the parties thereto. Dils v. Bridge, 23 W. Va. 20.

Option to Share Profits or Take per Cent. of Cost.—In an action of assumpsit against three persons as a partnership for goods sold, the question being whether there was really a partnership between two and the other, an instruction to the following effect was held to correctly state the law: If the jury shall believe from the evidence that one of the three bought of the other two a stock of goods to commence merchandising with, and that the purchaser must pay the sellers for said goods 20 per cent. upon the cost thereof, or a portion of the profits of the same, to be left to the election of the sellers, and that subsequently and before all the stock of goods had been received by the purchaser, the sellers elected to take the 20 per cent. and that when the goods were sold and delivered, they were charged by the sellers to the purchaser, and the business was conducted, not only at the time of the election, but afterwards, in the name of the purchaser, then said contract was not in law a partnership. Chapman v. Wilson, 1 Rob. 267.

The following instruction in an action against three persons as partners for goods sold, the question at issue being whether two of them were partners of the third, was held to correctly expound the law of the case stated therein: If the jury shall believe from the evidence that in June one bought of the other two a stock of goods with which to commence merchandising, and that the purchaser was to pay the sellers for said goods 20 per cent. upon the cost thereof, or a portion of the profits of the same, at the election of the sellers, and that this election under this contract was made in September thereafter, and was to take 20 per cent., and that the same was previous to the purchase of goods by the purchaser of the plaintiffs in the action, and that the plaintiffs at the time of giving him credit did not know of the contract made in June, then they ought to find for the defendants. Chapman v. Wilson, 1 Rob. 267.

Same—Partnership Prior to Election—Limited.—In an action against three persons as partners for goods sold, where the question at issue was as to whether two of them were really partners of the third, the following instruction was given: If the jury shall believe from the evidence that the two entered into a contract with the third, by which they agreed to furnish him $1,000 worth of goods for the purpose of merchandising, for which by said contract they were entitled to demand from him either an advance of 20 per cent. or to take a portion of the profits arising from the sale thereof, and that the said goods or a portion thereof were furnished him and were traded thereon previous to the said election being made, it constituted the two partners of the third until such period as they have made their said election and given notice thereof to the world, and responsible for his contracts in relation to the business. The instruction was held erroneous to this extent, that although the case stated might have created a temporary partnership until the election, it was limited to the sale of the goods furnished and to the profits thereof, and did not extend to purchases and sales of other goods, and the dissolution of such partnership was effectual in respect to all who may have had actual notice, though such notice may not have been given to the world, or even publicly. Chapman v. Wilson, 1 Rob. 267.

7. EVIDENCE OF PARTNERSHIP.

Community of Interest—Agreement to Share Profits and Losses.—The existence of a partnership was established by proof of an actual community of interest, accompanied by an agreement to participate in the profits and contribute to the losses of the concern. Brown v. Higginbotham, 5 Leigh 583.

Averment of Party.—The partnership relation is precluded where a party avers that he had no part or parcel in the profits of the business, and acted only as salesman and servant. Artrip v. Rasnake, 96 Va. 277, 31 S. E. Rep. 4.

Contract to Build Bridge—Assignment.—A contract to build a bridge for a city was assigned, and the assignment was ratified by the city. The assignor then contracted with the assignee, as general contractor, to do a portion of the work, for which the assignee agreed to pay according to monthly estimates made by the city as the work progressed. This is sufficient evidence to show that no partnership existed between the assignor and assignee of the contract. Engleby v. Harvey, 93 Va. 440, 25 S. E. Rep. 225.

II. CONTRACT OF PARTNERSHIP.

No Particular Form Necessary.—No particular form or solemnities are required to constitute a partnership between parties. It is sufficient that it is formed by voluntary consent of the parties, whether it be express or implied, by written articles or unsolemn writings, by tacit approbation, or by parol

contract, or even by mere acts. Story on Partnerships (7th Ed.) § 86; Deering v. Coberly, 44 W. Va. 606, 29 S. E. Rep. 512.

Agreement to Take Shares, Valid Consideration.—An agreement to take shares in a partnership is signed by the parties. In effect each promised to the others to pay for the benefit of all the sum opposite his name. These mutual promises constituted a valid consideration and the contract is binding both at law and in equity. Kimmins v. Wilson, 8 W. Va. 584.

Parol Contract—Statute of Frauds.—Where a parol contract of the partnership has no determinate time for its completion, and may be completed within a year, it is not void as coming within the statute of frauds. Jordan v. Miller, 75 Va. 442. See monographic *note* on "Frauds, Statute of" appended to Beale v. Digges, 6 Gratt. 582.

By Parol.—A contract of partnership may be made by parol. Jordan v. Miller, 75 Va. 442; Michael v. Workman, 5 W. Va. 391.

Contract of Infant Voidable.—An infant may become a member of a partnership, and his contract is merely voidable and not void, which if he affirms it upon arrival at age, will be binding upon him. Penn v. Whitehead, 17 Gratt. 503.

Contract of Married Woman—Common-Law Rule—Exceptions.—At common law a married woman had no capacity to enter into any contract, and such were absolutely null and void in a court of law, hence, she could not have entered into any partnership, which such court would recognize. To this rule there were two exceptions, first, when her husband was civilly dead, and secondly by the custom of London. Carey v. Burruss, 20 W. Va. 571.

Same—Same—West Virginia Rule.—The common-law incapacity of a married woman, living with her husband, to contract to form a partnership, on which she will be held liable *at law*, is unchanged in West Virginia. No portion of the Married Woman's Act, p. 447, ch. 66, Code 1868, can be construed to remove this incapacity either expressly or by necessary implication. Carey v. Burruss, 20 W. Va. 571, citing Stockton v. Farley, 10 W. Va. 171; Radford v. Carwile, 13 W. Va. 572.

Same—Same—Other Partner Liable.—Although a married woman, living with her husband, is not liable *at law* in West Virginia on her contract of partnership, still the person with whom she contracted is so liable. Carey v. Burruss, 20 W. Va. 571.

Same—Consent of Husband—Liability of Separate Estate.—A married woman with the consent of her husband may engage in trade on her separate account, and may enter into a partnership for the purpose, and her separate estate will be liable for the debts incurred in conducting the business. Penn v. Whitehead, 17 Gratt. 503.

Specific Performance of.—An agreement to build a tavern in partnership, at the joint expense and risk, and for the joint benefit, of the contracting parties, to be held by them in fee simple, is decreed to be specifically performed, at the instance of a partner, who furnished the ground for the purpose, and had fully performed the contract on his part; notwithstanding many of the partners were unwilling to carry it into effect, because, in their opinion, a change of circumstances had rendered the scheme unprofitable. Birchett v. Bolling, 5 Munf. 442. See generally, monographic *note* on "Specific Performance" appended to Hanna v. Wilson, 3 Gratt. 243.

It was said in Cross v. Hopkins, 6 W. Va. 323, that whether a court will undertake to coerce parties actually to commence or continue a partnership business for a series of years, is a question very difficult of solution.

III. FIRM NAME.

Disclosure of Partners' Names.—There is no statute in Virginia requiring a firm of general partners to disclose their names on a sign at the door and by advertisement, although such is required of limited partnerships. Nat. Bank v. Cringan, 91 Va. 347, 21 S. E. Rep. 820.

Statutory Provisions—Use of "Agent," "and Co." etc.—Section 2877 of the Code of 1887 provides: "If any person transact business as a trader, with the addition of the words 'factor,' 'agent,' 'and company,' or 'and co.,' and fail to disclose the name of his principal or partner, by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town, or county wherein the same is transacted; or if any person transact such business in his own name, without any such addition; all the property, stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person." This statute was construed to apply only to the case of a person trading in his own name, either with the addition of words which indicate that he is an agent or has a partner, but which do not disclose the name of his principal or partner, or else without any such words, and not where there was an avowed partnership of two or more persons under a firm name, which disclosed that fact and some of the partners. Bank v. Cringan, 91 Va. 347, 21 S. E. Rep. 820.

IV. PARTNERSHIP PROPERTY.

1. WHAT CONSTITUTES.

Good Will and Trade Marks.—It is the settled law that the good will and trade marks of a business are partnership property, and must be accounted for by the surviving partner the same as the other assets of the firm. Tennant v. Dunlop, 97 Va. 234, 33 S. E. Rep. 620.

One Partner Furnishing Capital Stock.—By articles of partnership, for the manufacture of carriages, it was agreed that the entire capital stock should be purchased by one partner; that the other was to have no interest or ownership in the capital stock, he giving his personal attention exclusively to the business, the net profits and losses were to be equally divided between the partners. *Held*, that the goods, stock, material and tools of the carriage factory, manufactured by the partnership or purchased by it, in its business, does not become the property of the partner furnishing the capital, but is partnership property. Snyder v. Lunsford, 9 W. Va. 223.

2. PARTNERSHIP REAL ESTATE.

a. INTENTION GOVERNS.

Shown by Parol.—Whether real estate held by persons who are partners is to be considered and treated as partnership property, depends upon the real intention of the vendee at the time the property is acquired or appropriated, and such intent may be shown by parol. Hancock v. Talley, 1 Va. Dec. 433.

b. PRESUMPTION.

Joint Tenants or Tenants in Common.—Where real estate is held in the names of two or more persons, in the absence of proof that it was purchased with partnership funds and for partnership purposes, it will be presumed to be held by them as joint ten-

ants or tenants in common. If it was not purchased for partnership purposes, even though paid for with partnership funds, and is appropriated to partnership purposes, it will not be presumed to belong to the firm, but such fact may be proved. Hancock v. Talley, 1 Va. Dec. 433.

c. JOINT PURCHASE.

Not for Partnership Purposes.--Where by an agreement two parties enter into a partnership in the milling business, and for this purpose purchase mills and two hundred acres of adjoining land, the land is not social property or stock, but merely individual property held by them as tenants in common. Wheatley v. Calhoun, 12 Leigh 264. See "4. Joint Ownership of Land," *supra*.

Same—Instalment Paid Out of Firm Funds.—The purchase of real estate by two partners jointly being on their individual responsibility, the payment of one of the instalments out of the partnership funds does not convert the real estate into partnership property. Wheatley v. Calhoun, 12 Leigh 264.

Purchase from Survivor—Rights of Purchaser from Heir of Deceased Partner—Notice.—Prior to the act of 1786, concerning partitions and joint rights and obligations, two men, who were partners in a drove of cattle, applied part thereof to a joint purchase of a settlement right to land; and one of them died; the survivor had the land surveyed by virtue of a land office treasury warrant, and sold it to a third person, who, having notice of the partnership right, obtained a grant of the whole from the commonwealth; a purchaser from the heir of the deceased partner was, nevertheless, entitled, in equity, to his share of the land. Edgar v. Donnally, 2 Munf. 387.

d. TITLE.

Who May Hold—Rule in Equity.—While a partnership, as such cannot hold the legal title to real estate, which can only be conveyed to a natural person, or an artificial one, as a corporation, yet a partnership may in equity own real estate, without reference to who holds the legal title, and a trust for its benefit may be established by showing the intention of the grantees by parol evidence. Hancock v. Talley, 1 Va. Dec. 433.

Conveyance to Firm in Firm Name—Effect.—Where real estate is purchased for partnership purposes and a conveyance is made to the partners in the name of the firm, they are tenants in common of the estate, and hold the legal estate subject to the equities of the partnership. Jones v. Neale, 2 Pat. & H. 339.

Realty Held in Firm Name—Conveyance by One Partner—Effect.—A conveyance by one partner of real estate purchased for partnership purposes in the firm name, passes to the grantee the legal title to an undivided moiety, subject to a trust in favor of the partnership creditors upon a settlement of the partnership accounts and is void as to the residue. Jones v. Neale, 2 Pat. & H. 339.

Conveyance to One—Trust Results.— Where the funds of a partnership, by consent of the partners, are invested in real estate, and a conveyance is taken in the name of one partner only, a trust results in behalf of the other partner to the extent of his interest of the funds invested. McCully v. McCully, 78 Va. 159.

Death of Partner—Legal Title—Beneficial Interest.—Where land has been purchased for partnership purposes with partnership funds and a conveyance made to both partners, on the death of one a legal title will pass to his heirs, yet the whole beneficial interest devolves upon the survivor, and he may sue the heirs, compel a sale, and dispose of the proceeds as he would dispose of the personal estate of the firm. Pierce v. Trigg, 10 Leigh 406.

Conveyance by Partner of Undivided Moiety.—A conveyance by one partner of an undivided moiety of real estate owned by the partnership, in trust to secure a creditor of the partnership, passes a good title both at law and in equity to such moiety, and such creditor is entitled to priority over all the other creditors of the firm; but, when such property is conveyed by one partner in trust to secure his individual creditors, the property remains subject to the payment of the partnership debts. Jones v. Neale, 2 Pat. & H. 339.

e. CONVERSION INTO PERSONALTY.

General Rule.—Real estate purchased with partnership funds and for partnership purposes is partnership property, and treated as personalty. Pierce v. Trigg, 10 Leigh 406; Wheatley v. Calhoun, 12 Leigh 264.

So where a partnership was composed of two active partners and two dormant partners, and the active partners purchased land in their own name for partnership purposes, and the payment thereon was made out of the partnership effects, the land was partnership property and the dormant partners were liable on the purchase. Brooke v. Washington, 8 Gratt. 248.

For Payment of Debts and Adjustment of Accounts.—It is well settled that real estate bought with partnership funds for partnership purposes, is converted into personalty to the extent that may be necessary for the purpose of paying the debts of the firm and adjusting the accounts of the partners *inter se*, though it be conveyed to the partners in their individual names as joint tenants, and though there be no express agreement between them as to conversion. Davis v. Christian, 15 Gratt. 11.

In equity real estate purchased with partnership funds for partnership purposes is treated as personalty, and is liable to the satisfaction of the firm debts, including those due to the other members of the firm, in preference to the individual debts of the partners, and it matters not in whose name the property may stand as the owner of the legal title, as he is treated as a trustee of the partnership and accountable accordingly. Diggs v. Brown, 78 Va. 292; Hardy v. Norfolk Mfg. Co., 80 Va. 404.

Dower and Curtesy Rights.—Real estate purchased with partnership funds for partnership purposes is so far considered as personalty as not to be subject to dower or curtesy. Parrish v. Parrish, 88 Va. 529, 14 S. E. Rep. 325; Deering v. Kerfoot, 89 Va. 491, 16 S. E. Rep. 671.

3. CONVERSION INTO SEPARATE PROPERTY.

Every Requisite Must Be Complied with.—In order to convert partnership property into separate property, every requisite of transfer must be complied with according to the nature of the property assigned. Jones v. Neale, 2 Pat. & H. 339.

V. RIGHTS AND LIABILITIES INTER SE.

1. ARTICLES OF PARTNERSHIP.

Provision to Share Profits and Losses No Covenant.—A provision in the partnership contract that each shall share the profits and losses equally is not a covenant, which will entitle the surviving partner to claim as a specialty creditor for losses which he has been compelled to pay. Morris v. Morris, 4 Gratt. 298.

Provision to Put in Capital a Covenant.—The contract of partnership covenants that a certain amount of

capital is to be paid by each partner, and a partner, now deceased, failed to contribute. The concern having proved a failure, and the surviving partner having paid its debts, he is a creditor by specialty of the deceased partner, and entitled to share in the separate estate. Morris v. Morris, 4 Gratt. 293.

2. DUTY TO OBSERVE GOOD FAITH.—A partner cannot use his confidential relation for his own benefit but it is for the benefit of all. Lamar v. Hale, 79 Va. 147.

Purchase by Survivor—Disclosure of Information.—Having generally a superior knowledge of the assets and their value, it is the surviving partner's bounden duty, in purchasing the interest of the deceased partner, to acquaint his representative with full information as to the assets, and the facts from which their value may be estimated or inferred. It is not sufficient that he does not withhold or conceal such information, but it is incumbent on him to disclose voluntarily all within his possession or knowledge from which a sound judgment as to the value of the interest may be formed. He cannot remain passive, but must make a frank and honest disclosure. Tennant v. Dunlop, 97 Va. 234, 33 S. E. Rep. 620.

Where one partner sells his interest in the firm to another partner utmost good faith is required of him, and he is bound to disclose accurately any information he may possess that is called for, and also if he perceives that the other is laboring under a misapprehension as to the financial situation of the firm, it is his duty to correct the error. Sexton v. Sexton, 9 Gratt. 204.

Same—Erroneous Statements.—The statement by a surviving partner to the executrix of the deceased partner, in negotiating for the purchase of the latter's interest in the firm, that the good will and trade marks belonged to him as surviving partner, and that they were steadily decreasing in value, was an erroneous statement both of the law and the facts, and the burden is on him to show that the price paid was adequate. Tennant v. Dunlop, 97 Va. 234, 33 S. E. Rep. 620.

Act of One for Benefit of All.—Every partner who engages in transactions relative to the partnership must act expressly for the benefit of the partnership. McMahon v. McClernan, 10 W. Va. 419.

Same—Secret Arrangements for Private Benefit.—It is a well-settled principle of partnership law that social property and contracts should be managed for the mutual benefit of all the members of the firm according to their respective interest, and any secret arrangement with a third person by which a private and selfish advantage and benefit may be secured to himself to the exclusion of the remaining members, is a violation of the good faith required of him and equity will compel a division of such ill-gotten gains with his copartners. McMahon v. McClernan, 10 W. Va. 419.

Same—Purchase of Part Interest in Firm Realty.—Partners buy a tract of land for partnership purposes, and it is conveyed to them. After the death of one of them, it is ascertained that the title to one third of the land is defective, and the surviving partner purchases this third interest and takes the conveyance to himself. He has purchased for the joint benefit of himself and the heirs of the deceased partner, and they are entitled to claim it upon paying their share of the expense of the purchase. Forrer v. Forrer, 29 Gratt. 134.

3. COMPENSATION FOR PERSONAL SERVICES.

No Right in Absence of Agreement.—It is well settled that one partner is not entitled to claim compensation from the partnership for his services in the business in the absence of a special contract for such compensation, even though one partner may have attended almost exclusively to a large business for a long period of time. Forrer v. Forrer, 29 Gratt. 134; Roots v. Salt Co., 27 W. Va. 484; Taylor v. Dorr, 43 W. Va. 351, 27 S. E. Rep. 317; Frazier v. Frazier, 77 Va. 775.

Managing or Acting Partner.—Under ordinary circumstances and in the absence of an agreement to that effect, one partner cannot charge his copartners with any sum for compensation, whether in shape of salary, commission or otherwise, on account of his own troubles in conducting the partnership business, and in this respect a managing or acting partner is in no different position from any other partner. Smith v. Brown, 44 W. Va. 342, 30 S. E. Rep. 160; Hyre v. Lambert, 37 W. Va. 26, 16 S. E. Rep. 446.

Survivor Not Entitled to Compensation for Settling Business.—A surviving partner is not allowed compensation for carrying on the business after the death of his partner, or for settling up a business of the concern. Patton v. Calhoun, 4 Gratt. 138.

4. LIABILITY FOR COLLECTIONS.

By Attorney for Administrator of Deceased Partner—The administrator of a purchasing partner is liable to the selling partner for all moneys of the partnership collected by his attorney at law, and for all payments made by such attorney by his direction or approval. Shackelford v. Shackelford, 32 Gratt. 481.

Failure to Collect—No Negligence or Fraud.—A partner is not liable to his other partners where in the authorized sale of social property he failed to collect the price thereof, which failure is not due to negligence or fraud on his part. Peters v. McWilliams, 78 Va. 567.

5. RIGHT TO CONTRIBUTION.

Must Have Settlement of Accounts.—The active partner of a firm having left the state, the other partners took possession of the business, and attempted to close up and settle the same. He is not entitled to contribution from the other for firm debts paid by him, in the absence of a settlement of the partnership accounts. Compton v. Thorn, 90 Va. 653, 19 S. E. Rep. 451.

Capital Borrowed on Individual Credit.—In a contract of partnership it was agreed that one should furnish the required capital, and the other should contribute as his share only his time, labor and skill in running the business. The latter, without the knowledge of the former, borrows money on his individual credit and puts it in the business. Although the firm receives the benefit of the loan, it is not liable therefor, and in a suit between the partners this sum cannot be charged against the partner who was to furnish the capital. Lovett v. Perry, 98 Va. 604, 37 S. E. Rep. 33.

6. PARTICIPATION IN MANAGEMENT.

Wrongful Exclusion—Right to Profits.—Where a partner, erroneously supposing the partnership to be at will, excludes the other partners, during the term, from participation in the business, although the latter was ready and willing to perform his part, until the partnership expired by limitation, the excluded partner is entitled to one-half of the profits. Cole v. Moxley, 12 W. Va. 730.

7. RIGHT TO SUBROGATION.

Where One Fund Firm, Other Individual Assets.—In order for a creditor who had a lien upon one fund to be entitled to substitution to the right of a creditor who had a lien upon that and another fund, it was a necessary condition, among other things, that both funds upon which the prior creditor's claim was secured should be the property of the same debtor, and that this condition does not exist where the assets of a partnership constitute one of the funds, and the individual property of a member of the partnership constitutes the other fund, unless that partner has in equity become entitled to the partnership assets and become primarily liable for the partnership debts. Guggenheimer v. Martin, 93 Va. 634, 25 S. E. Rep. 881; Rixey v. Pearre, etc., Co., 89 Va. 113, 15 S. E. Rep. 498.

Judgment against Firm—Payment Out of Individual Assets.—Where a partnership has been dissolved, and the social assets exhausted, and judgments subsequently recovered against the members of the firm on partnership debts have been paid by one of the partners, who is not in arrears to the firm, out of his individual means, and this is shown by a settlement of the partnership accounts, the partner who has paid the judgment is entitled to be subrogated to the rights of the creditors whose judgments he has satisfied against the real estate of his copartner, in the hands of a subsequent purchaser, to the extent to which his payment exceeded his proportional part of the liability. Sands v. Durham, 99 Va. 263, 38 S. E. Rep. 145, overruling Sands v. Durham, 98 Va. 392, 36 S. E. Rep. 472. See *foot-note* to Buchanan v. Clark, 10 Gratt. 164, and monographic *note* on "Subrogation" appended to Janney v. Stephen, 2 Pat. & H. 11.

Payment of Share of One Partner by Another.—Between partners each is primarily, not equally, liable for his own share, and secondarily liable for the share of the other, and where one partner pays the share of the other, all the conditions essential for the application of the doctrine of subrogation arise. Sands v. Durham, 99 Va. 263, 38 S. E. Rep. 145, overruling Sands v. Durham, 98 Va. 392, 36 S. E. Rep. 472. See *foot-note* to Buchanan v. Clark, 10 Gratt. 164, and monographic *note* on "Subrogation" appended to Janney v. Stephen, 2 Pat. & H. 11.

Payment by Surviving Partner.—A surviving partner, having paid the partnership debts of a losing concern, is entitled to be substituted for the amount that the estate of a deceased partner is indebted to him on that account, to the rights of the creditors of the firm whose debts he has paid. Morris v. Morris, 4 Gratt. 293.

VI. RIGHTS AND LIABILITIES TO THIRD PERSONS.

1. AUTHORITY AND POWER OF PARTNERS.—See section "Conveyances by Partners."

To Discharge Firm Liability.—As an entire firm may be bound by the acts of one of its members, so likewise may a liability of the firm be discharged by the act of one of its members. Hardy v. Norfolk Mfg. Co., 80 Va. 404.

Generally, each partner has the right to apply any of the partnership money in his hands to the satisfaction of the partnership debts. But the court may, in a proper case, direct a partner who has partnership moneys in his hands to pay the same into court to be applied to the payment of the debts, and in his relief or otherwise, as may be just. Carper v. Hawkins, 8 W. Va. 291.

Disposal of Property Limited to Firm Business.—The authority of each partner to dispose of partnership property extends only to the business and transactions of the partnership. And any disposition of the property beyond such purposes, without the consent of his copartner, is an excess of authority. So one partner cannot pledge or sell the partnership property in payment of his individual debts, without the consent of his copartner; and title is not divested of such sale or pledge in favor of a separate creditor, even though the latter may not know that it was partnership property. Liberty Savings Bank v. Campbell, 75 Va. 534.

It was said in Binns v. Waddill, 32 Gratt. 588, that the rule seems well settled that the authority of the partner to dispose of partnership property extends only to the business and transactions of the partnership, and any disposition for other purposes without the consent of the copartner is in excess of his authority. So one cannot pledge the social property for the payment of individual debts, without the consent of his copartner, and the title is not divested by such pledge though the creditor may not know it was partnership property.

Prior to Firm's Existence.—Prior to the existence of a firm, a partner has no power to bind the firm, for this agency only arises when the partnership actually exists, and then only in matters necessary to the business in the ordinary way. Thus, where a member of a prospective firm applies to a bank for a loan to make up his input in the capital stock, the credit of the firm is not pledged therefor, unless he was specially authorized to bind the firm, or unless the action was subsequently ratified by them. Bank v. Cringan, 91 Va. 347, 21 S. E. Rep. 820.

Same—By Bond as Individuals—Partnership Debt.—If partners give a bond, each signing only as individuals, but it is in fact for a partnership debt, though at law it is an individual debt, yet in equity it is treated as a partnership debt. McCoy v. Jack, 47 W. Va. 201, 34 S. E. Rep. 991.

Individual Bond Given under General Authority.—Where a partner gives his bond to a person with whom he had made a contract, which under his general authority as a partner he was authorized to make, the debt is still a partnership debt and binding upon those partners who did not make the contract or unite in the bond. Jordan v. Miller, 75 Va. 442.

To Bind Firm for Share of Capital Stock.—It is not an implied power of a partner to bind the partnership for his share of the capital stock. Bank v. Cringan, 91 Va. 351, 21 S. E. Rep. 822; Lovett v. Perry, 98 Va. 604, 37 S. E. Rep. 33.

To Submit Claims to Arbitration.—A partner has no authority, by virtue of the partnership relation, to bind his copartners by an agreement to submit claims arising from the business to arbitration, as such is apparently not connected with the ordinary business of the firm. Wood v. Shepherd, 2 Pat. & H. 442.

Although a partner, without the consent of his copartners, cannot bind the firm by an agreement to submit claims against them to arbitration, still such an agreement is valid and binding on the parties thereto. Wood v. Shepherd, 2 Pat. & H. 442.

Endorsement of Negotiable Paper—Not for Firm Purposes.—Where a partner endorses the firm name upon negotiable paper, which does not belong to the firm, it is in effect the lending of the credit of the firm and carries with it the presumption that the partner making it was not authorized so to do, because such transactions do not constitute any part of the general and regular business of the

partnership. Tompkins v. Woodyard, 5 W. Va. 216.

"The indorsement of the partnership name on a negotiable note given for a debt for which the partnership is in nowise liable, does not create any liability on the partner who neither made the indorsement nor in any wise authorized it." Frank v. Pringle, 96 Va. 456, 31 S. E. Rep. 605.

To Bind Firm on Individual Transaction.—A third party taking from a partner the signature of his firm upon his own private individual transaction cannot hold the firm without proof of authority, adoption or ratification of the act. And the taker of the note under such circumstances must prove the assent of the other partners, for *prima facie* such a transaction is a fraud, both on the part of the debtor and the creditor. Tompkins v. Woodyard, 5 W. Va. 216.

Where one of two partners gives the firm note for his private debt, without the consent of his copartner, the latter is not bound thereby, even though the debt be for goods which have been subsequently applied to the use of the firm. Poindexter v. Waddy, 6 Munf. 418.

To Borrow Money.—One member of a commercial firm may borrow money in the name of the firm, and bind the firm, unless restricted by the partnership agreement of which the lender had notice. Meriweather v. Shifflett, 1 Va. Dec. 385.

Same—Note in Firm Name.—When a copartner borrows money ostensibly for the partnership, giving therefor a negotiable note in the firm name, it is binding upon all the partners, whether the money was borrowed for the firm or not, or whether the borrower misapplied it, provided the lender is ignorant of the intended fraud. Commercial Bank v. Miller, 96 Va. 357, 31 S. E. Rep. 812.

Same—Individual Note.—Where money is borrowed in good faith by one of two partners for the benefit of the partnership on his individual note, and was invested in goods which actually went into the firm, and was loaned on the credit of the firm, there can be no doubt that the other partner is liable for the debt thus contracted. Micheal v. Workman, 5 W. Va. 391.

Pledge of Securities for Loan.—It is clear that during the active existence of the partnership and before its dissolution any member is authorized to do any act affecting the business or its property, which could be done by all the partners, because he is the legally authorized agent of the partnership for the conduct of the business. Therefore one partner can pledge the securities of the partnership for the loan of money from a third person, or for the security of a debt due from it to a third person. Roots v. Salt Co., 27 W. Va. 484.

To Execute Deed of Trust.—One member of a firm may execute a deed of trust on personal property to secure the creditors generally of the partnership. Carey v. Burruss, 25 W. Va. 670.

One partner has the power to convey the partnership effects, other than real estate, to a trustee to secure the creditors of the partnership, in the absence of his copartners. But when all of the partners are present, they have the right to be consulted; but if some of them are out of the state, then the managing partner can convey the trust property to secure one or more of the firm creditors, and thus give them a preference. Williams v. Gillespie, 30 W. Va. 586, 5 S. E. Rep. 210.

To Make General Assignment.—It is settled law that one partner has no implied authority to make a general assignment of the effects of the partnership, unless his copartner is absent so that he cannot be consulted, or is incapable of giving his assent or dissent. Hill v. Postley, 90 Va. 200, 17 S. E. Rep. 946.

Though one partner cannot in general bind his copartner by deed, so as to make it operative at law as a deed, yet an assignment by one partner of the effects of the firm, which would be lawful if there were no seal, will not be allowed in equity to be defeated by the circumstance of a seal being annexed to the instrument. M'Cullough v. Sommerville, 8 Leigh 415.

To Assign Debt for Benefit of Another Partner.—An assignment by one partner of a debt, due to the partnership, to another partner for his individual benefit, is not binding on the other partners who have not authorized or assented to it. Wood v. Shepherd, 2 Pat. & H. 442.

To Assign Choses in Action.—One of several partners may assign choses in action due the firm. Clarke v. Hogeman, 13 W. Va. 718.

Transfer by Member of Insolvent Firm to Private Creditor Void.—A transfer of partnership property by a member of an insolvent firm to a private creditor, with full knowledge, to satisfy an individual obligation, is fraudulent and void as to the social creditors. Kurner v. O'Neil, 39 W. Va. 515, 20 S. E. Rep. 589. See "VII. Conveyances by Partners," *infra*.

To Contract for Liquidated Damages, Penalties or Forfeitures.—The implied authority of a general partner does not extend to contracts for liquidated damages, penalties or forfeitures, as such contracts do not belong to the ordinary usages of mercantile law. In such cases, to bind the noncontracting members of a firm, there must be either express authority prior thereto, or ratification thereafter, or they must in some manner inure to the benefit of the firm. Waldron v. Hughes, 44 W. Va. 126, 29 S. E. Rep. 505.

Authority to Make Settlement Implied.—An authority by one partner to another to make a settlement with the third, who had been the acting partner, of the partnership accounts, may be implied from the relations and previous dealings of the parties, especially in reference to the subject of the settlement. Foster v. Rison, 17 Gratt. 321.

To Engage Firm in Another Partnership.—The rest of the members of a copartnery, cannot engage the firm in another partnership, so as to bind a member, who was not privy, or consenting to it. But his privity may be presumed from circumstances; and, at any rate, his remaining silent and not dissenting, after he knows of the new establishment, will be considered as acquiescence. Tabb v. Gist, 6 Call 279.

Married Woman—To Charge Separate Estate.—Where a married woman possessing property for her separate use for life, with the consent of her husband enters into partnership, she has the power to charge such life estate with the payment of the debts of the partnership, and she is entitled to have the debts of such business discharged out of the firm assets in exoneration of her separate life estate. Penn v. Whitehead, 17 Gratt. 503. See monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

Power of Attorney—Confession of Judgment.—It is a general rule that one partner cannot bind his copartners by an instrument under seal, but a sealed power of attorney to confess judgment, executed by one partner in behalf of the firm is binding when the judgment is collaterally assailed,

there being no proof that its execution was not consented to, as it is not essential that such power should be under seal. Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335.

Of Managing Partner When Other Partner Nonresident.—It is competent for the resident and sole managing partner of a firm (the other partner being a resident of another state) to sell and dispose of the partnership effects, or give a lien on them to the *bona fide* creditors of the firm. M'Cullough v. Sommerville, 8 Leigh 415.

To Sell Partnership Property to Pay Pressing Debt of Absent Partner.—One partner, in the absence and without authority from his copartner, sells partnership property, and executes a bill of sale under seal, in the name of both, to the purchaser. The sale is made to pay a pressing debt of the absent partner, and is *bona fide* and for full value, and the money is applied to pay the debt. *Held*, that the partner having authority by law as partner, to sell partnership effects, his sale thereof is obligatory upon and passed the title of the firm. Forkner v. Stuart, 6 Gratt. 197.

Sale of Cattle with Guarantee of Profits to Purchaser.—A parol contract was made between four persons to form a partnership for the purchase of cattle in the west and to bring them to Virginia and sell them. On bringing the cattle to Virginia they find the market poor and pasturage scarce. Under those circumstances some of the partners sell portions of the cattle under contracts guarantying certain profits to the purchasers at the end of the next year. This guarantee was not in excess of the powers of the partners, and all are bound by the contract. Jordan v. Miller, 75 Va. 442.

Acts and Declarations of Partner.—It is an elementary principle that the acts and declarations of each member of a partnership, in furtherance of the common object of the association, are binding on the firm; and so it has been held that admissions made by one partner after the dissolution, in regard to the business of the firm, previously transacted, are likewise binding on the firm. Wilson v. McCormick, 86 Va. 995, 11 S. E. Rep. 976. See "VIII. Dissolutions," *infra*.

To Receive Payment.—A payment to one partner is a payment to all, unless, perhaps, where it is forbidden by the company. Scott v. Trent, 1 Wash. 77.

2. DORMANT AND NOMINAL PARTNERS.

Dormant Partners.—Dormant partners are liable as general partners for the firm debts. Bank v. Cringan, 91 Va. 347, 21 S. E. Rep. 820.

A dormant partner is liable to the whole extent of engagements in matters which, according to the usual course or dealing, have reference to the business transacted by the firm, although the creditor extended no credit to him, and his responsibilities constituted no part of the consideration for the sale. Brooke v. Washington, 8 Gratt. 248; Weaver v. Tapscott, 9 Leigh 424.

A firm of tobacco dealers in Virginia had as dormant partners for a certain period a firm in England. Subsequent to the dissolution of the partnership by mutual consent, the active partners gave in settlement of prior obligations, their note to a bank. There was no proof that the bank had any knowledge of the dormant partners, and no credit was given on that account. It also appeared that the dormant partners derived no benefit from these loans. It was held that the dormant partners were liable for the payment of the note, as it is well settled that dormant partners are not liable for debts contracted after retiring from a firm. Commercial Bank v. Miller, 96 Va. 357, 31 S. E. Rep. 812. See *note* in 56 Am. Dec. 147.

Nominal Partners.—If a person holds himself out as a partner, and thereby lends to the partnership the sanction of his credit, he renders himself liable to third persons as a partner, no matter what the agreement between the parties themselves may be. Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835; Bank v. Smith, 26 W. Va. 552.

But a person cannot be held liable for holding himself out as a member of a firm, unless the liability sought to be enforced was incurred through reliance on the credit of such person. Waldron v. Hughes, 44 W. Va. 126, 29 S. E. Rep. 505.

So, it may be stated as a general rule, that whenever a person, by his conduct, conversation, admissions or otherwise, allows himself to be held out as a member of a prospective firm, and thereby a third party is induced to credit such firm, such person, to the extent of the liability thus incurred, is estopped from denying the existence of such firm. Moore v. Harper, 42 W. Va. 39, 24 S. E. Rep. 633.

3. NEW AND RETIRING PARTNERS.—See "Dissolution," *infra*.

New Partner—Old Debts.—One who buys out the interest of one of the members of a partnership, and forms a new partnership with the remaining members, is not liable at law or in equity for debts previously contracted, unless he agrees to pay them, even though such debts be for goods forming part of the stock of the new partnership, the creditor having no lien upon the goods. Poindexter v. Waddy, 6 Munf. 418.

When one partner sells out to another the former's interest in the partnership, the question, whether the former has a right after the sale to require the partnership estate to be applied to the partnership debts in his exoneration, depends upon the true meaning of the contract of sale in this respect. Shackelford v. Shackelford, 32 Gratt. 481.

Where new partners are admitted into a firm they do not become *ipso facto* liable for the firm debts already contracted, and such liability cannot only be created by virtue to a special contract. Peters v. McWilliams, 78 Va. 567.

Same—Same—Creation of Corporation.—Where a partnership was created by express agreement, and from time to time some of the partners withdrew, and by consent others took their places, the firm still continuing to transact the same character of business, the members are liable as partners for the firm debts. And the subsequent creation of a corporation by the members, with a worthless capital stock, will not release this personal responsibility. Bank v. Smith, 26 W. Va. 552.

Retiring Partner—Implied Promise.—Where no express contract exists, the law raises an implied promise on the part of the remaining partners, to pay the debts of the firm, and save the retiring partner harmless to the extent of the assets received, but no further. Hobbs v. Wilson, 1 W. Va. 50.

Same—Renewal of Accommodation Indorsement.—A note was made by a firm for the purpose of securing the benefit of the accommodation indorsement of the payee. The note was renewed, but prior thereto and without the knowledge of the accommodation indorser, one of the members of the firm withdrew. The accommodation indorser paid the note. In an action against the original members

of the firm it was held that they were all liable to him, as the renewal note was not a new debt and was not taken in satisfaction of the old debt, but that the plaintiff had the right to suppose that all the parties to the original note were parties to the last note. All things and persons connected with the original debt were intended by him to remain as before, except the time of payment. He had the right to suppose and believe that there was no change in the firm, and having acted on that supposition is entitled to recover. Miller v. Miller, 8 W. Va. 542.

Same—Assumption of Debts—Right of Creditor.—Though partners dissolve, one of them assuming the debts, and this is known to the creditor, yet the creditor retains still the right to treat all the partners as principals, not as sureties, unless such creditor agrees to look only to the one assuming the debts. McCoy v. Jack, 47 W. Va. 201, 34 S. E. Rep. 991.

Two partners made a promissory note and subsequently dissolved, and the retiring partner agreed with his late associate that the latter should retain the partnership property, and pay the debts of the firm, and duly notified the common creditor of this agreement, and required him to bring suit as provided in sections 1, 2, of ch. 101, of the Code. But the creditor did not agree to the arrangement, and did not bring suit until after the remaining partner had become insolvent. The agreement between the partners, so far as the creditor was concerned, was *res inter alios acta* and he retained unimpaired all his rights and remedies against both partners as principals, and the said provisions in the Code for the relief of sureties do not apply to such a case. Barnes v. Boyers, 34 W. Va. 308, 12 S. E. Rep. 708 (1890).

4. TERMINATION OF LIABILITY.

Bond of One Partner.—Where the creditor of a firm takes the specialty of the active partner for his debt, action against an after-discovered dormant partner is extinguished by the specialty. Ward v. Motter, 2 Rob. 536. See Brown v. Johnson, 13 Gratt. 651.

Whether a bond, given by one partner after dissolution, for a simple contract debt of the partnership, releases the other partner in equity, depends upon the intention of the parties, which may be ascertained from the attendant circumstances. Niday v. Harvey, 9 Gratt. 454. See Karn v. Blackford, 1 Va. Dec. 845; McArthur v. Chase, 13 Gratt. 704; Meade v. Grigsby, 26 Gratt. 616, and *note*; *footnote* to Steptoe v. Pollard, 30 Gratt. 689. See "Dissolution," *infra*.

Note of Partners.—An agreement between a firm creditor and a member of the firm, whereby the former agrees to take, and does take, the individual note of the partner in discharge of the firm debt, is supported by a valuable consideration, and discharges the firm debt. Boyer v. Knapp, 15 W. Va. 277.

But in equity it is competent for a creditor to prove that his claim was due from a partnership, although he may have taken a note from one of the partners in his individual name. Williams v. Donaghe, 1 Rand. 300.

"Where, in settlement of the debts of an insolvent firm, a creditor accepts the individual note of the partner appointed to wind up its affairs, and the firm debts are secured by a trust deed to him of the assets, there is not a novation so as to release the firm assets from the debt evidenced by the note." Karn v. Blackford, 1 Va. Dec. 841.

Note of Partner and Wife.—Where there is an express agreement between a firm creditor and a member of the partnership, by which the former agrees to take and does take the joint and several note of the latter and his wife in discharge of the partnership debt, such note is founded upon a valid consideration and is binding upon the wife's separate estate. Dages v. Lee, 20 W. Va. 584.

Where a creditor of a partnership accepts the note of a partner and his wife with the agreement to surrender the evidence of a partnership debt, this operates as a discharge of the partnership debt, and the neglect of the creditor to surrender the evidence of said debt as her agreement, does not constitute a failure of consideration of the note, or a release of the makers. Dages v. Lee, 20 W. Va. 584.

Surviving Partner Accepted as Sole Debtor—Presumption—As a general rule the estate of a deceased partner remains liable for the debts which affected him at the time of his death. It may be exonerated from this liability, if the subsequent dealings of the creditors with the surviving partner have been such as to show that they have consented to shift the obligation to pay from the estate of the deceased partner, and to accept the surviving partner for their sole debtor. But this inference will not be lightly made, and certainly not from the mere circumstance that the creditor has continued a loan, or an account with the surviving partner. Glazebrook v. Harveys, 1 Va. Dec. 265.

Credit Given to One Partner—Election.—If credit is given to one member of a known firm, although the firm gets the benefit of it, the firm is not liable for the debt, as the creditor has made his election to credit the individual partner. Bank v. Cringan, 91 Va. 347, 21 S. E. Rep. 820.

5. SET-OFFS.—A debt due from an individual partner cannot be set off against a partnership demand. Scott v. Trent, 1 Wash. 77; Porter v. Nekervis, 4 Rand. 368; Gilliat v. Lynch, 2 Leigh 505; Rose v. Murchie, 2 Call 414; Choen v. Guthrie, 15 W. Va. 102.

A firm, though indebted to one, can offer against the debt a note held by it against him, as against a claim of a third person against him. Beale v. Hall, 97 Va. 383, 34 S. E. Rep. 53.

6. APPLICATION OF ASSETS TO LIABILITIES.

a. APPLICATION BY PARTNERS.—See "1. Authority and Power of Partners," *supra*.

Order Varied by Consent.—The right of partners to have the social assets first applied to the social debts may be varied by their consent. Shackelford v. Shackelford, 32 Gratt. 481.

Application to Individual Debt.—Partnership effects may be applied, by the concurrence of the partners, to pay an individual debt of one of them, if the other receives a sufficient consideration therefor, though they may be unable to pay all their partnership debts. Marks v. Hill, 15 Gratt. 400.

b. APPLICATION BY COURT.

(1) *Assets of Firm.*

(a) Order of Application.—In a suit between partners for the settlement of the partnership business the assets of the firm are to be applied in the following order: First, to the payment of the debts and liabilities of the firm to persons who are not partners; Second, to the payment of each partner ratably for what is due from the firm to him for advances, as distinguished from capital; Third, to the payment of each partner ratably for what is

due from the firm to him in respect of capital; Fourth, the residue, if any, should be divided among the partners in the proportion in which profits are divisible under the partnership contract. Hyre v. Lambert, 37 W. Va. 26, 16 S. E. Rep. 446.

(b) Priority of Social Creditors.

General Rule.—Where the assets of a partnership are in the hands of a court of equity for proper distribution, the doctrine is well settled that the claims of social creditors are entitled to priority over those of the individual partners or their creditors. Maddock v. Skinker, 93 Va. 479, 25 S. E. Rep. 535; Christian v. Ellis, 1 Gratt. 396; Conaway v. Stealey, 44 W. Va. 163, 28 S. E. Rep. 793; Hart v. Hart, 31 W. Va. 688, 8 S. E. Rep. 562; Kenneweg v. Schilansky, 45 W. Va. 521, 31 S. E. Rep. 949; Cunningham v. Ward, 30 W. Va. 572, 5 S. E. Rep. 646; Moore v. Wheeler, 10 W. Va. 36; Carper v. Hawkins, 8 W. Va. 291; Penn v. Whitehead, 17 Gratt. 503; Lewis v. Crane, 50 W. Va. 239, 40 S. E. Rep. 347; Maxwell v. Wheeling, 9 W. Va. 206.

In Maddock v. Skinker, 93 Va. 479, 25 S. E. Rep. 535, RIELY, J., said: "Partners are joint tenants of the property of the partnership. Neither partner has an exclusive right to any part of the property until all of the debts of the partnership are paid, including the debts which may be due from the partnership to either of the partners. The interest of each partner in the property of the partnership is his share of the surplus after all the firm debts are paid and a balance of accounts is struck between the partners. It is thus that his interest is ascertained. And it is only this interest, so ascertained, that is subject to the lien of the execution or attachment of an individual creditor. The law does not permit the separate creditor to obtain more than the partner, who is his debtor, is entitled to. Christian v. Ellis, 1 Gratt. 396; Diggs v. Brown, 78 Va. 295; Shackelford v. Shackelford, 32 Gratt. 481; Maxwell v. Wheeling, 9 W. Va. 206."

Release of Lien.—The creditors of a partnership have no right to priority over the separate creditors of the partners otherwise than by substitution to the rights of the partners *inter se* to apply the partnership property to the payment of the firm debts in preference to the individual debts of the partners. Hence partners may release this right, and if they do so in good faith, the creditors cannot complain. Millhiser v. McKinley, 98 Va. 207, 35 S. E. Rep. 446; Frank v. Pringle, 96 Va. 456, 31 S. E. Rep. 605; Shackelford v. Shackelford, 32 Gratt. 481.

Partner's Lien Lost by Fraud.—It is competent for the members of the firm to acquire property jointly as individuals, and the lien of a partner upon the social assets to have such applied to the settlement of the partnership accounts in preference to individual debts, may be lost by acts tending to mislead or deceive creditors or purchasers in this regard, as where the deed does not describe the parties purchasing as partners, and does not state that the purchase was made for the use of the firm, but merely purports to be a conveyance to them as individuals. Forde v. Herron, 4 Munf. 316.

No Surrender after Proceedings to Liquidate.—Although it is true that the right of simple contract creditors of a partnership to have the social assets specifically appropriated in equity to the payment of their debts, in preference to the creditors of an individual partner, is a derivative one, yet unless this equity of a partner to have the property so applied is *bona fide* transferred or parted with before proceedings by the partnership creditors to liquidate the affairs of the partnership are commenced, it cannot afterwards be surrendered to the prejudice of the partnership creditors without their consent. Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835.

Denial of Partnership No Waiver.—In a suit to subject the assets of a firm to the payment of its debts, the answer of a defendant, alleged to be a surviving partner, which simply denies that the partnership exists is not a waiver on his part of all claim to have the partnership effects applied to the payment of the partnership debts. Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835.

Report of Commissioner Necessary.—Where debts due by a partnership are entitled to be first paid out of the partnership property, it is error for a court to direct the receiver to pay them, before having a report upon them by a commissioner of the court. Penn v. Whiteheads, 12 Gratt. 74.

Assignment to Secure Firm Debt Valid.—An assignee of a partner's individual interest in an insolvent firm cannot successfully attack an alleged partnership assignment, made to secure a just partnership debt, as the latter is a lien on the social assets superior to the claims of the individual partners, or their creditors. Kenneweg v. Schilansky, 45 W. Va. 521, 31 S. E. Rep. 949.

Partnership Property Held Jointly — Trust. — When real estate is purchased with partnership funds for partnership purposes, and is so used, and the conveyance is made to the partners individually as tenants in common, or joint tenants, but it appears on the face of the deed that they are partners, and as such they bought the property, the individual partners hold the legal estate subject to the debts and equities of the partnership. Cunningham v. Ward, 30 W. Va. 572, 5 S. E. Rep. 646.

Conveyance by Partner—Trust.—Subsequent to the purchase of real estate with partnership funds for partnership purposes, a conveyance by one partner of an undivided moiety to a trustee to secure his individual creditors, passes the legal title to one undivided moiety of such real estate, but subject to the prior implied trust in favor of partnership creditors, or the balance due another partner upon a settlement of the partnership accounts. Cunningham v. Ward, 30 W. Va. 572, 5 S. E. Rep. 646.

Composition—Expenses of Carrying on Business.—"Where, in a composition of the creditors of a firm, one of the members is appointed to carry on the business, and to pay the creditors out of the proceeds, the expenses of carrying on the business should be paid before the creditors are entitled to receive any part of the proceeds." Karn v. Blackford, 1 Va. Dec. 841.

Conveyance by Partner to Secure Individual Creditor.—In Maxwell v. City of Wheeling, 9 W. Va. 206, one partner conveyed his share in the firm property in trust to secure an individual creditor. At the sale the other partner became the purchaser. In a contest between the individual creditor and the social creditors over the fund in the hands of the trustee, it was held that the individual creditor was entitled to preference, and that the social creditors would not be injured, as the property in the hands of the partner could be subjected to their debts.

Deed to Secure Social and Individual Debts—Reformation.—By deed executed in the individual name of the maker, and purporting on its face to convey his *individual* property, for the payment of *individual* creditors named in the deed, in two classes, according to a certain order and preference therein established, a considerable amount of property, real and

personal, is conveyed and assigned to trustees; that property, however, includes not only the whole individual property of the grantor, but also the whole partnership effects of a mercantile firm, of which he is the managing partner (the other partner being a nonresident) and some of the creditors of each class provided for in the deed are in fact creditors of the firm, and not of the grantor individually, though all the creditors provided for have debts justly due them, either from the firm or the individual. *Held*, though the deed neither mentions the partnership, nor distinguishes the social effects and social creditors from the individual property and individual creditors of the grantor, a court of chancery will reform the deed, according to the probable intent of the grantor, and the justice of the case, and apply the partnership fund in payment of the partnership creditors, and the individual fund in payment of the individual creditors, observing the order and preference established by the deed. M'Cullough v. Sommerville, 8 Leigh 415.

Limited Partnership—Debt Due Firm of Which Special Partner is Member—Pro Rata.—In the distribution of the assets of a limited partnership among its creditors, a debt due to a firm of which the special partner is a member, is to be paid ratably with the debts due to other creditors. McArthur v. Chase, 13 Gratt. 683.

Debts Due Partners—Priority over Individual Debts.—Property purchased with the effects of a partnership and used for its purposes, is liable to discharge the balance due from the company to any partner, in preference to private and individual debts of any other partner. Forde v. Herron, 4 Munf. 316.

Married Woman in Business—Rights of Husband's Creditors.—Where the wife of an insolvent man, with his consent, engages in a partnership business for her separate use with her separate estate, her stock will be liable for the firm debts, in preference to the individual debts of her husband, even though the labor and skill in conducting such business was furnished by him and his minor sons. Penn v. Whitehead, 17 Gratt. 503.

Same—Husband Furnishing Services—Compensation of Wife.—Where in a partnership between a married woman and another person, her husband furnishes a portion of the labor, capital or credit used in such business, as against his creditors, she will be entitled to such portion of the profits as will compensate her for what she may have contributed to the business, if an apportionment of such profits can be made. Penn v. Whitehead, 17 Gratt. 503.

Where a married woman with the consent of her husband engages in a partnership on her separate account, as against her husband she will be entitled to the profits of the business, also against her husband's creditors, at least, to the extent which such profits may not be due to the labor or capital furnished by him. Penn v. Whitehead, 17 Gratt. 503.

Dower Rights.—A widow is not entitled to dower in lands purchased with partnership money for a partnership purpose until the partnership debts are paid. Martin v. Smith, 25 W. Va. 579.

(2) *Individual Assets.*

After Exhausting Social Assets Social Creditors Share Pari Passu with Individual Creditors in Individual Assets.—Independently of statute law, the legal effect of a partnership is to set apart the social assets as a fund for the payment of the partnership debts, for the protection of the partners *inter se*. For unpaid balance due the social creditors, they come in as general creditors, *pari passu*, with the separate creditors of the same class, upon the separate estate of a deceased partner. Pettyjohn v. Woodruff, 86 Va. 478, 10 S. E. Rep. 715; Ashby v. Porter, 26 Gratt. 465; Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835; sec. 2855, Code 1887; Freeport Stone Co. v. Carey, 42 W. Va. 276, 26 S. E. Rep. 183. See Morris v. Morris, 4 Gratt, 298, and sec. 13, ch. 99, W. Va. Code 1899.

Settlement of Estate—Priority of Fiduciary Debts.—Where the assets of the estate of a deceased partner are not sufficient to pay all the debts in full, the statute (Va. Code. sec. 2855) which makes the representative of a deceased partner liable for the partnership debts in the same manner as he would have been bound if the debts had been contracted by the members of the concern severally as well as jointly, otherwise than as partners, does not change or affect the order in which the assets of the decedent are to be applied in the payment of debts as prescribed by the statute (Va. Code, sec. 2660) upon that subject. Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835.

Lien by Partnership Creditor.—Where a partnership creditor has acquired a lien upon the separate assets of a deceased partner, he is entitled to priority to this extent over the separate creditors. Straus v. Kerngood, 21 Gratt. 584.

Same—Assets Marshaled.—In a controversy between a judgment creditor of a partnership and an unsecured separate creditor of one partner in a suit for the administration of his estate, there being no partnership assets, the former having a lien on the estates of the surviving partner and of the deceased partner, and the latter having no resource but the last fund, the assets will be marshaled, and the judgment creditor must first exhaust his remedy against the estate of the surviving partner. Pitts v. Spotts, 86 Va. 71, 9 S. E. Rep. 501.

Same—Claims of Separate Creditors Unsecured.—A judgment creditor of a partnership is entitled to priority, in the administration of the assets of the estate of a deceased partner, over the unsecured claims of the separate creditors of the said partners. Pitts v. Spotts, 86 Va. 71, 9 S. E. Rep. 501.

Same—Lands of Partners Primarily Liable to Pro Rata Share in Judgment.—In a chancery suit brought by a firm creditor against the firm to enforce the lien of a judgment, obtained against it on an accepted order, and known to the partners to include a debt due from an individual partner, as well as the one due from the firm, to the creditor, the lands of each partner ought to be held primarily responsible for the portion of the creditor's judgment, which corresponds with his interest in the profits and losses of the partnership under the articles of copartnership. Kent v. Chapman, 18 W. Va. 485.

Same—Individual Debt Included—Equity Practice.—In a chancery suit brought by a firm creditor against the firm to enforce the lien of a judgment, obtained against them in an accepted order, known to the partners to include an amount due from the firm to the creditor and an amount due from one of the partners, the court ought not to decree the lands of the single partner liable for so much of the judgment, as was based on his individual account with the creditor, as a settlement of the partnership accounts might show the other partners indebted to him in a still greater amount, and the equities between the codefendants ought not, in such a suit, to be inquired into by the court. Kent v. Chapman, 18 W. Va. 485.

Real Estate of Deceased Partner.—Although one member of a partnership is dead, and he is largely indebted individually as well as a member of the firm, his real estate is equally liable for the partnership debt, as for his individual debts. See sec. 13, ch. 144, Code 1849; Ashby v. Porter, 26 Gratt. 455.

Real Estate Subjected by Will for Payment of Debts.—Where a deceased partner by his will subjected his real estate to the payment of his debts, a partnership creditor was held entitled to share with the separate creditors in that fund. Morris v. Morris, 4 Gratt. 293.

Joint and Several Bond for Firm Debt.—Two partners gave their joint and several bond to a creditor for a firm debt. The creditor was held entitled to share with the separate creditors, the separate estate of the deceased partner. Morris v. Morris, 4 Gratt. 293.

Surviving Partner Insolvent.—Although *at law* a surviving partner is alone liable for the partnership debts, still if he is insolvent the estate of the deceased partner is liable in equity for these debts. Sale v. Dishman, 3 Leigh 548.

Laches of Firm Creditor.—It was said in Sale v. Dishman, 3 Leigh 548, that it seemed that mere delay on the part of a firm creditor to assert and prosecute his demand against a surviving partner would not exonerate the estate of the deceased partner. See generally, monographic *note* on "Laches" appended to Peers v. Barnett, 12 Gratt. 410.

Estate of Dead Partner—Insolvency of Survivors—Firm Assets Exhausted.—A sum of money is lent to a firm, and the firm is charged with it on the partnership books, but the partner with whom the transaction occurs, executes by mistake a penal obligation, in the name of the firm, under seal, instead of giving merely a promissory note; one of the partners dying, those who survived him, and the executors of the decedent, convey all the effects of, and debts due to, the firm, in trust to pay the debts due from the firm; then the creditor who lent the money files a bill in equity against the surviving partners, the executors of the decedent, and the trustee. It was held, that, regarding the debt as a simple contract debt of the firm, the estate of the deceased partner cannot be charged, until the insolvency of the surviving partners and the deficiency of the trust subject are first established. Galt v. Calland, 7 Leigh 594.

Same—Settlement of Partnership Accounts Necessary.—In a suit to subject the real estate of a deceased partner to the payment of his debts, as the devisees or heirs are entitled to have his distributive share in the assets of the firm applied to the relief of the land from a judgment, and as the responsibility of the surviving partner to these representatives of the deceased exist only after the partnership affairs are settled, and the right of participation is only in the balance after payment of all social debts, therefore there should be an account and audit of the debts and credits of the firm, and a settlement of the partnership accounts *inter sese*, before a decree of sale of land of a deceased partner. Kilbreth v. Roots, 33 W. Va. 600, 11 S. E. Rep. 21.

Same—Retainer by Administrator.—Where a surviving partner is the administrator of a deceased partner, he is entitled to retain out of the separate assets in his hands, against separate claims of no higher dignity, an account of all debts for which he is entitled to share the separate estate with the separate creditors. Morris v. Morris, 4 Gratt. 293.

VII. CONVEYANCES BY PARTNERS

See section "Authority and Power of Partners."

Assignment for Benefit of Creditors—Preferences.—The surviving partners of an insolvent firm may make a general assignment of partnership property for the partnership creditors, giving preferences. Patton v. Leftwich, 86 Va. 421, 10 S. E. Rep. 686.

Same—Same—By Sole Manager to Secure Individual Creditors.—Where one partner alone manages the business, and a creditor knows that he is advertised as the sole proprietor, he can assign the property of the firm to pay his individual creditors, preferring them to the social creditors. Motley v. Frank, 87 Va. 482, 13 S. E. Rep. 26.

Same—Omission of Individual Estate—Presumption.—In an assignment by partners for the benefit of creditors the failure to include individual estate in the conveyance will not raise the presumption that all of the individual property of the grantors had been intentionally omitted. Long v. Meriden Brittania Co., 94 Va. 594, 27 S. E. Rep. 499. See monographic *note* on "Assignments for the Benefit of Creditors" appended to French v. Townes, 10 Gratt. 513.

Unrecorded Executory Assignment to Secure Advances by Partner Fraudulent.—An unrecorded executory assignment of partnership property to secure advances by a member of a firm, where the property remains in the possession of the partnership and does not pass to the separate possession of the partners secured, is fraudulent as to creditors of the firm without notice. Grasswitt v. Connally, 27 Gratt. 19.

Deeds of Trust—Preferences—Release.—A partnership in failing circumstances may convey its whole property for the payment of its debts, giving preference among its creditors, and requiring a release from such as accept it. And if two of three partners convey all the effects of the firm and their individual property, and the third has none, they may require a release both of the firm and all the members, by the creditors who accept the deed. Gordon v. Cannon, 18 Gratt. 387.

If unaffected by the bankrupt law, partners have the right to convey the partnership property to secure the firm creditors, and in doing so may make preferences among them. Millhiser v. McKinley, 98 Va. 207, 35 S. E. Rep. 446, citing Patton v. Leftwich, 86 Va. 421, 10 S. E. Rep. 686.

Same—By One Partner without Consent of Others.—A deed of trust executed by one partner upon the firm property, without the knowledge or consent of the other partner is fraudulent and void, and the creditors therein secured can only share *pro rata* with the other creditors of the firm. Moss v. Davis, 1 Va. Dec. 340.

Same—Continuing Stock of Goods.—A deed of trust by insolvent partners conveying their stock on hand and that which they might thereafter purchase to secure certain debts, and making no provision as to the possession of said stock, but simply providing that if the debts were not paid within 30 days the property conveyed, after being advertised for 30 days might be sold by the trustee for cash, is *per se* fraudulent on its face and void as to all the creditors of the grantors. Shattuck v. Knight, 25 W. Va. 590. See monographic *note* on "Deeds of Trust" appended to Cadwallader v. Mason, Wythe 188.

Same—By Limited Partnership—Firm Insolvent.—A deed made by a limited partnership conveying all its property in trust to pay a debt to a firm of which the special partner is a member, at a time when the

debts of the partnership exceeded the value of its property, and when the acting partners knew that the partnership must stop business unless the special partner or his firm would advance money to enable them to carry on the business, and without an undertaking on his part to make such advances, though they may have had some expectations that he would do it, is void as to the other creditors of the partnership. McArthur v. Chase, 13 Gratt. 683.

Same—Fraudulent as to Creditors—Knowledge.—A partnership owns certain real estate, to which it has an equitable title; one of the partners, who put in all the capital stock, sells said real estate, without the knowledge of the other, to a purchaser, who had loaned him all the money which he had put in as capital stock, and agreed to take therefor the partner's individual notes, which had been given to the purchaser for the money so borrowed, and certain notes of the partnership held by the purchaser; and such contract of sale of such real estate, having been entered into, this partner, without the knowledge of his copartner, induces the holder of the legal title of such real estate, to convey to the purchaser, who knew that enough assets of the partnership would not be left to satisfy the creditors of the partnership, and also that each of the partners was insolvent. *Held*, that this deed is null and void, as against the creditors of the partnership, and, being fraudulent, it cannot be held as a security for the debt of the partnership, due to the purchaser. Snyder v. Lunsford, 9 W. Va. 223.

Same—Consideration—Firm Insolvent.—Where one member of a partnership purchased the other partner's share, assuming the payment of the firm debts in consideration thereof, the firm and both members being at the time insolvent, or on the eve of insolvency, and shortly thereafter the purchaser, without having paid any of the debts, conveys all the assets of the late firm to a trustee, so as to devote the whole thereof to the payment of his individual debts, the sale being without any valuable consideration is ineffectual to convert the social assets into individual property, and the trust deed is fraudulent and void as to the firm creditors. Darby v. Gilligan, 33 W. Va. 246, 10 S. E. Rep. 400; Baer v. Wilkinson, 35 W. Va. 422, 14 S. E. Rep. 1.

Same—Benefit of Creditors Generally—Attachment Levy.—Where a deed of trust has been executed on personal property of a partnership by a member of a firm for the benefit of its creditors generally, and two of the firm creditors without notice of such deed have attachments sued out and levied on the interest of one member of the firm in the partnership property, such levy does not give such creditors priority over the other partnership creditors secured in the deed. Carey v. Burruss, 25 W. Va. 670.

Sale to Partner—Payment of Firm Debt, Not Valuable Consideration.—A sale to a partner of the partnership effects in consideration of the payment of the partnership indebtedness is on consideration not deemed valuable in law, and is invalid to give a purchasing partner any separate leviable interest therein to the injury or detriment of the partnership creditors. Conaway v. Stealey, 44 W. Va. 163, 28 S. E. Rep. 798.

VIII. DISSOLUTION.

1. NOTICE OF DISSOLUTION.

Only Necessary When Dissolved by Act of Parties.—The rules as to notice of dissolution apply only when the dissolution is by act of the parties. Thus, when a firm is dissolved by death or bankruptcy of a partner no notice is necessary. The reason seems to be that the latter cases occur by operation of law. Dickinson v. Dickinson, 25 Gratt. 321.

The only difference between a dissolution of a partnership by death, and by a partner retiring, is that in the latter case the retiring partner must give notice of the dissolution to former customers to free himself from liability to them, while in the latter case no notice is necessary to free his estate from such liability. Glazebrook v. Harveys, 1 Va. Dec. 265.

No Notice to Parties with Whom No Dealings Had.—A distinction is made, in regard to notice of a dissolution, between persons who have had dealings with the firm, and those who have had no dealings. In the first case actual notice is indispensable, but special notice need not be given, if actual knowledge is had by the customer. Dickinson v. Dickinson, 25 Gratt. 321.

Note Indorsed by Firm Name—"In Liquidation."—It was said in Woodson v. Wood, 84 Va. 478, 5 S. E. Rep. 277, that the indorsement of a note in the firm name, followed by the words "in liquidation," had often been held to give notice of the dissolution of the partnership.

Contract after Dissolution—Notice.—If a partner contracts in the name of the firm with a third person after the partnership is dissolved, but that fact is not made public, or known by such third person, the law considers the contract as being made with the firm and upon their credit. Dickinson v. Dickinson, 25 Gratt. 321.

2. BY OPERATION OF LAW.

a. DEATH OF PARTNER.—A partnership, whether of definite or indefinite duration by the terms of its creation, is dissolved by the death of one of the partners. Davis v. Christian, 15 Gratt. 11; Peyton v. Stratton, 7 Gratt. 380; First Nat. Bank v. Payne, 85 Va. 890, 9 S. E. Rep. 158.

Continuance by Agreement on Provisions in Will.—Although as a general rule a partnership is dissolved by the death of a partner, still it may be continued longer by express agreement between the partners, or by provisions of the will of a deceased partner, and with the consent of the survivors. Davis v. Christian, 15 Gratt. 11.

If a deceased partner by his will merely direct that the partnership be continued after his death, his responsibility will be limited to the funds already embarked in the trade. But he may extend his responsibility further and make it cover his whole estate. Davis v. Christian, 15 Gratt. 11.

b. EXISTENCE OF WAR.—The existence of a public war between the countries of which the partners are respectively subjects operates *ipso facto* to dissolve the partnership. Taylor v. Hutchison, 25 Gratt. 536, 18 Am. Rep. 699; Booker v. Kirkpatrick, 26 Gratt. 145.

3. BY ACT OF PARTIES.

Admission of New Members.—A partnership is dissolved *ipso facto* by the admission of new members in the firm. Peters v. McWilliams, 78 Va. 567.

Assignment and Sale by Partner.—The legal effect of a sale by a member of a firm of his interest therein to a third person is *ipso facto* to dissolve the partnership. Ballard v. Callison, 4 W. Va. 326.

An assignment by one partner of all his interest in the firm and its assets operates *ipso facto* to dissolve the firm. Conrad v. Buck, 21 W. Va. 396; Hill v. Postley, 90 Va. 200, 17 S. E. Rep. 946.

Withdrawal of Partner.—In a partnership at will any partner may withdraw whenever he pleases

and so dissolve the partnership, but such withdrawal must be made in good faith. McMahon v. McClernan, 10 W. Va. 419.

Fixed Term—Only for Good Cause.—A partnership organized for a definite term cannot be dissolved at the pleasure of one of the partners, but it may be so dissolved for reasonable cause shown. McMahon v. McClernan, 10 W. Va. 419; Cole v. Moxley, 12 W. Va. 730.

Between Father and Son—Refusal to Recognize Son.—Where, subsequent to the formation of a partnership between a father and son, the father refused to recognize the son as a partner to the extent of permitting him to be threatened with criminal prosecution for using his name in a business transaction, it was a distinct and positive abrogation of the partnership relation and a declaration that the dissolution had already taken place. Ryman v. Ryman (Va.), 40 S. E. Rep. 96.

4. BY DECREE OF COURT.

Members Discordant—Not Prosperous—Receiver.—When cause is shown for dissolution of a partnership, and the members are discordant and at ill will, and the partnership hopeless of prosperity, it should be dissolved, and a receiver and manager appointed, instead of leaving its assets and business wholly in the possession and control of one member, excluding the other. Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828.

Decree for Dissolution and Account.—If a bill is filed by a member of a copartnership for dissolution and account, and cause is shown for dissolution, there should be a decree of dissolution and full account, not one allowing the partnership to continue its business, and making only a partial account and decreeing on its basis in favor of one against another member for a balance on such partial account, leaving assets untouched by the account. Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828.

Same—Receiver.—Where a partnership has been dissolved an account will be decreed, and if necessary a receiver will be appointed to take charge of the business, to make sale of the property and make a final distribution of the effects. McMahon v. McClernan, 10 W. Va. 419.

5. POWERS AND LIABILITY AFTER DISSOLUTION.

a. GENERALLY.

General Statement of Survivor's Duties, etc.—"Upon the death of a member of a partnership, the entire legal title to all the partnership property passes to the surviving partner, and he becomes invested with the exclusive right to its possession, control, and disposition, but for certain purposes. His obligations with respect thereto are threefold: (1) to convert the same into money; (2) to pay the debts of the partnership; and (3) to distribute the surplus between himself and the estate of the deceased partner. In the discharge of these obligations, the decided cases and text-writers generally maintain that, while he is not a trustee properly so called, he is nevertheless a trustee in a certain sense, and is subject to the rules and principles of equity which pertain to persons who sustain a fiduciary relation; that the creditors and the representative of the deceased partner have the right to go into a court of equity and ask for the proper fulfilment of these obligations; and that while the surviving partner and the representative of the deceased partner are not interdicted from contracting with each other with respect to the partnership estate, yet their contracts—and especially the purchase by the surviving partner of the interest of the deceased partner, on account of the generally 'dangerous inequality of knowledge with respect to the subject-matter of the sale'—are regarded with suspicion, will be jealously scrutinized, and only be allowed to stand, if assailed, where they appear to have been reasonable, fair, and just." Tennant v. Dunlop, 97 Va. 234, 33 S. E. Rep. 620.

To Insure Firm Property.—The managing partner of a dissolved partnership has authority to insure the firm property if done in good faith, and having such authority he may charge the firm assets to refund premiums paid for such insurance by a third party at his request. The premiums so paid are part of the expenses incurred in managing the property, and as such are entitled to be paid as preferred claims against the firm assets, and are not effected by the statute of limitations until a settlement of the partnership accounts has been made. Conrad v. Buck, 21 W. Va. 396.

To Retain Attorney to Defend Other Members.—One member of a dissolved partnership has no authority, unless specially given, to retain an attorney to defend the other members of the late firm in an action brought against them. Such authority does not result from the partnership itself. Bowler v. Huston, 30 Gratt. 266.

To Control Business as Survivor.—When a partnership has been dissolved by one partner selling his interest in the firm, this does not invest the other partner with the control of the business as surviving partner. An order enjoining him from such management, and appointing a receiver, is not erroneous. Ballard v. Callison, 4 W. Va. 326.

b. ADMISSIONS OF PARTNERS AS EVIDENCE.—After the dissolution of a partnership, the admission or declaration of one partner cannot be received as the only evidence of the existence of a debt against the partnership. It must be first proved or established by other testimony, or admitted by the pleadings. Davis v. Poland, 92 Va. 225, 23 S. E. Rep. 292, *citing* Shelton v. Cocke, 3 Munf. 191; Rootes v. Wellford, 4 Munf. 215; Brockenbrough v. Hackley, 6 Call 51.

c. NEW LIABILITY.—See "d. Settlement of Business," *infra*.

Consent of Copartners Necessary.—One partner, by his own act, after the dissolution of the partnership, cannot bind his copartner, against the consent of the latter, so as to impose on him a fresh liability. Davis v. Poland, 92 Va. 225, 23 S. E. Rep. 292, *citing* Woodson v. Wood, 84 Va. 478, 5 S. E. Rep. 277.

Same—Necessary for Settlement of Business.—Nothing is better settled than that the power of a partner ceases upon the dissolution of the firm, and in the absence of authority given him he cannot bind the partners by entering into new contracts, except such as are necessary and appropriate in settling the affairs of the concern. Woodson v. Wood, 84 Va. 478, 5 S. E. Rep. 277; Glazebrook v. Harveys, 1 Va. Dec. 265.

Agreement for One to Wind Up Business.—An agreement between partners on dissolution that one of their members shall wind up the business does not enlarge his powers so as to enable him to impose any new liability on the firm, and it would seem that he could not bind the firm by giving a note for a firm debt, nor by way of renewal. Conrad v. Buck, 21 W. Va. 396.

After the dissolution of the partnership the au-

thority of a partner to bind the partnership in reference to new contracts is revoked, even where it is agreed between them that one of their members shall wind up the business. So it was held that a partner could not, after the dissolution of the partnership, without the consent of the other, buy, sell or pledge goods or other property on account of the partnership; nor introduce or transfer partnership securities to third persons, even to secure a debt due from the partnership. Roots v. Salt Co., 27 W. Va. 484.

d. SETTLEMENT OF BUSINESS.—See "c. New Liability," *supra*; "XI. Settlement and Accounting," *supra*, and "4. Suits between Partners or Representatives."

Partnership Continued in Legal Contemplation.—Until the affairs of a partnership are settled, and outstanding engagements are made good, the partnership in legal contemplation has a continuance, so far at least as respects winding them up. Brown v. Higginbotham, 5 Leigh 583; Ruffner v. Hewett, 7 W. Va. 585; Smith v. Zumbro, 41 W. Va. 623, 24 S. E. Rep. 653.

Right to Bind Other Partner by Settling Account or Allowing Credits.—After the dissolution of a partnership, one of the partners cannot bind the others without their consent by settling accounts with, or allowing credits to, customers of the firm. Rootes v. Wellford, 4 Munf. 215, 6 Am. Dec. 510.

Dissolution by Death—Rights of Survivor.—On the dissolution of a firm by the death of one of its members, the survivor has the right to take possession of the firm assets and settle up the affairs of the concern. First Nat. Bank v. Payne, 85 Va. 890, 9 S. E. Rep. 153.

General Powers in Dissolution.—Although the dissolution of the partnership disables any one of the partners from contracting new debts, or buying, selling or pledging goods, on account of the firm in the course of the former trade thereof, yet, nevertheless, it leaves every partner in possession of the full power (unless, indeed upon the dissolution it has been exclusively confided and delegated to some other partner or person) to pay and collect debts due to the partnership; to apply the partnership funds and effects to the discharge of the partnership debts; to adjust and settle the unliquidated debts of the partnership; to receive any property belonging to the partnership; and to make due acquittances, discharges, receipts and acknowledgments of their acts in the premises. Ruffner v. Hewett, 7 W. Va. 585.

Powers to Contract after Dissolution.—The power of a partner to make a contract for the firm ceases upon the dissolution of the firm, and the surviving partners or ex-partners can enter into no contract which will bind the estate of the deceased partner, except such as is appropriate and necessary in settling the affairs of the concern. First Nat. Bank of Alexandria v. Payne, 85 Va. 890, 9 S. E. Rep. 153.

After the dissolution of a partnership the partners become tenants in common of the social property, and the right of one partner to dispose of the interest of his copartners in the property ceases, except so far as it is necessary to dispose of the social effects and pay the debts of the firm, and his authority to bind the partnership in reference to any new contract is absolutely revoked, and he can only act in settling and paying the debts of the concern. Conrad v. Buck, 21 W. Va. 396.

The liability of a retiring partner, and the estate of a deceased partner are identical, as to acts done and obligations already incurred, but neither is liable for the subsequent dealings of the remaining or surviving partner except so far as may be necessary for him to settle and liquidate existing demands or to complete some transaction commenced during the existence of the partnership. Neither can be bound by any new transaction of the remaining or surviving partner. Glazebrook v. Harveys, 1 Va. Dec. 265.

Account Rendered by Acting Partner Binding.—Though a partnership is dissolved, and one partner sells his interest to the other, who undertakes to pay the partnership debts, an account rendered by the acting partner, or his clerk, after the dissolution, showing a balance due from the partnership, is binding on the retiring partner. Garland v. Agee, 7 Leigh 362.

Transfer by Acting Partner of Debt Due Him to Firm Creditor.—A partnership was dissolved at a time when it was largely indebted to its acting member for advances made by him, who was also indebted to the commission merchant of the firm. In discharge of his indebtedness to the commission merchant the acting partner transferred to him the debt due from the firm, and credits it by that amount. The firm was bound by this, as the acting partner was authorized to make the transfer. Peyton v. Stratton, 7 Gratt. 380.

Disposal of Stock at Auction—Stock Taken by Continuing Partner at Valuation.—Although it is customary to dispose of the stock of a dissolved partnership by public auction, yet it is not always necessary that it should be done. And when, on a dissolution, the withdrawing partner had no interest in the firm property by reason of withdrawal of his input of capital, and the liabilities of the concern were in excess of the assets, it was proper for the continuing partners to take the stock at valuation. Taylor v. Hutchison, 25 Gratt. 536, 18 Am. Rep. 699.

Liability of Continuing to Outgoing Partner.—It is a general rule that whenever the continuing partner, after dissolution, carries on the business with the partnership stock, he is liable to the outgoing partner for his full share of the profits. But this rule does not apply when the outgoing partner has no interest in the concern. Taylor v. Hutchison, 25 Gratt. 536, 18 Am. Rep. 699.

Partners Authorized to Use Firm Name in Liquidation—Indorsement of Note—Burden of Proof.— A partnership was dissolved, and by the published notice thereof either partner was empowered to use the firm name in liquidation. Subsequently one partner took from a firm debtor a note in settlement of his debt, payable to the firm "in liquidation." By a similar indorsement it came in the plaintiff's hands. An instruction that it devolved upon the other partner, who denied being liable therein, to show that it was not used for partnership purposes, was erroneous. Woodson v. Wood, 84 Va. 478, 5 S. E. Rep. 277.

Partner Settling Business Not Entitled to Contribution in Absence of Settlement of Accounts.—A partner who takes exclusive possession and control of the assets of the firm on its dissolution, and undertakes to close up the business, is not entitled to contribution from a partner for firm debts paid by him, without making a settlement of the partnership accounts. Smith v. Zumbro, 41 W. Va. 623, 24 S. E. Rep. 653.

Removal of Goods.—On the dissolution of a partnership one of the partners, after twice inviting the other to be present at the taking of the inventory,

removed the goods to the store of a firm which had purchased them. This removal was held not to be for the purpose of preventing a fair estimate of their value. Stinson v. Barley, 1 Va. Dec. 745.

Of Foreign Receiver—Removal of Funds.—A foreign receiver of a dissolved partnership will not be permitted to remove the funds of such partnership out of the state, to the detriment of its resident creditors, nor as against the *bona fide* claims of the separate creditors of the members of the firm, unless he first shows that the firm is insolvent, and that such funds are necessary to satisfy the demands against the same, independent of any claim thereto of the debtor partner. Grogan v. Egbert, 44 W. Va. 75, 28 S. E. Rep. 714.

Payment of Firm Debts by Partner with Another's Money.—Payment by one partner of debts of the partnership with money held by him as agent of another, makes all the members of the partnership liable to the latter for the amount so paid, although such payment was made after the partnership had been dissolved. Brown v. Higginbotham, 5 Leigh 583.

e. AS TO NEGOTIABLE PAPER.

Renewal in Firm Name.—The renewal of a partnership note in the firm name, after the dissolution of the firm, by the partner authorized to close the business, will not bind the other partner, and it will not discharge him from liability on the first note, although it was surrendered when the new note was given. Parker v. Cousins, 2 Gratt. 372, 44 Am. Dec. 388.

Same—Presumption.—After the dissolution of a partnership, the renewal of a note in the firm name, by the partner authorized to settle the partnership business, raises a strong presumption that the creditor did not intend to release the other partner. Parker v. Cousins, 2 Gratt. 372, 44 Am. Dec. 388.

Note Payable to Partner Not Delivered—Possession after Dissolution.—About the time a firm failed, the partnership made a note payable to their own order secured by a deed of trust on the firm property, to secure one of the member's advances, but the note was not endorsed or delivered to him. Although he took possession of it after the dissolution, he is not entitled to it, and the deed made to secure it is a nullity. Grasswitt v. Connally, 27 Gratt. 19.

For Hire of Slave—Subsequent War.—In 1861 a resident of Virginia and a resident of Missouri were engaged in a partnership in the latter state. They hired in that year several slaves for the partnership, giving their note for the hire. Although the war dissolved the partnership, yet the partners were liable on their note, the slaves working all that year. Booker v. Kirkpatrick, 26 Gratt. 145.

IX. MINING PARTNERSHIPS.

What Constitutes.—Where tenants in common or joint tenants of an oil lease or mine unite and cooperate in working it, they constitute a mining partnership. Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828. See Graham v. Pierce, 19 Gratt. 28.

No Dilectus Personarum—Transfer of Shares.—The distinction between a mining partnership and an ordinary trading partnership is that in the former there is no "*dilectus personarum*," and each member may transfer his share at will without dissolving the partnership. By this transfer the transferee becomes *ipso facto* a member of the company and occupies the same relation thereto that the original member occupied. Lamar v. Hale, 79 Va. 147. See Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828.

Power of Majority.—If the members of a mining partnership cannot agree as to its management, those having a majority interest may control its management in all things necessary and proper for its operation. Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828.

Sale of Interest.—A sale of his interest by a member of a mining partnership to another member or to a stranger does not dissolve the partnership, as in ordinary partnerships. Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828.

Liability of Member for Negligence or Breach of Duty.—If loss comes to a mining partnership by the culpable negligence or breach of duty or wrongful conduct or diversion of the social property from the firm's business to other business by one member, he is personally liable therefor in an accounting between the members. Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828.

Lien of Partners on Social Property.—The members of a mining partnership have a lien on the social property for advances or balance due them, after debts; but if they have divided the property or product of the business, giving each his share in severalty, and separating it from the balance, no such lien exists on the property or product so actually divided. Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828.

X. SPECIAL AND LIMITED PARTNERSHIPS.

Liability of Special Partner to Creditors.—The share of the special partner in the debt due to the firm of which he is a member, will be retained under the control of the court, having jurisdiction of a suit by creditors to set aside a deed as giving preferences, and applied to the satisfaction of the creditors of the partnership. McArthur v. Chase, 13 Gratt. 683.

A court of equity having obtained jurisdiction of a suit by creditors to set aside a deed improperly made to give preference to a certain creditor of the partnership, and to have a distribution of the assets of the partnership among all creditors, may proceed to do complete justice in the cause, and to make a personal decree against the special partner who has made himself liable as a general partner, in favor of the creditors, for the balance due them respectively after distributing the assets of the partnership ratably among them. McArthur v. Chase, 13 Gratt. 683.

Share of Special Partner—How Ascertained.—To ascertain what is a share of the special partner an enquiry will be directed into the ability of the firm of which he is a member, to pay their debts, independent of their claim upon the partnership, and into the interest of the special partner in said firm. If no evidence is offered the presumption is that the firm is able to pay its debts, and that the special partner has an equal interest in the concern. McArthur v. Chase, 13 Gratt. 683.

Deed of Trust to Special Partner from Insolvent Limited Partnership—Liability.—A special partner taking a deed of trust to secure a debt due to a firm of which he is a member, when the limited partnership from which the deed is taken has more debts than property, makes himself liable as a general partner to the creditors of the limited partnership. McArthur v. Chase, 13 Gratt. 683.

Judgment against General Partners—Effect on Special Partner.—The fact that creditors have recovered judgment at law against the general partners in a limited partnership, will not defeat their remedy

against the special partner. McArthur v. Chase, 13 Gratt. 683.

When Confessed Judgments Void.—When the debts of a limited partnership exceed the value of its property, confessions of judgment in favor of some creditors in order to give them a preference, are void as to the other creditors. McArthur v. Chase, 13 Gratt. 683.

Meaning of "Insolvency."—In the Act of March 29, 1837, Sess. Acts 1836-7, p. 41, in relation to limited partnerships, the word "insolvency" means that the partnership has not sufficient property and effects to pay all its debts. McArthur v Chase, 13 Gratt. 683; Wolf v. McGugin, 37 W. Va. 557, 16 S. E. Rep. 798.

XI. SETTLEMENT AND ACCOUNTING.

1. WHO ENTITLED.

Proposed Partnership.—When a proposed partnership was never formed, but advances of labor, material and money were made for its benefit, it is proper to order an accounting so as to put the parties *in statu quo*. Stringfellow v. Wise, 2 Va. Dec. 490.

No Evidence of Condition of Firm Assets.—In a suit for the settlement of the accounts of a dissolved partnership, the commissioner is unable to report any evidence as to the condition of the firm's assets, etc. In such case the parties will be left in the same position they were in prior to the suit. Slater v. Arnett, 81 Va. 432.

Duty of Plaintiff to Keep Accounts—Negligence.—Where a father and son were in partnership, in a suit for an accounting after the death of the father, the son proved that he had exclusive and absolute control of the partnership transactions, and was charged with the duty of receiving and disbursing the firm receipts and profits. It appeared that the plaintiff, notwithstanding this agreement, had kept no books, and rendered no account of any description. On account of his negligence, he was not entitled to an accounting. Ryman v. Ryman (Va.), 40 S. E. Rep. 96.

Selling Partners—Agreement of Purchasing Partner to Pay Debts.—One partner purchased the other partner's interest in the firm, bound himself to pay the firm debts, and died, leaving the debts unpaid. The assets of the former firm went into the hands of his administrator *c. t. a.* who filed a bill against the widow and children, asking that the will be construed, and that the estate be administered upon under the control of the court. The selling partner may come in the suit by petition, to have the firm's assets applied to the payment of the firm debts, and for this purpose have an account of the firm assets. Shackelford v. Shackelford, 32 Gratt. 481.

2. BETWEEN THE PARTIES.

Valid Settlement Binding.—Partners having made a valid settlement of the partnership transactions, are concluded by the settlement as to any matters embraced therein. Foster v. Rison, 17 Gratt. 321.

Partial Settlement Conclusive as Far as it Goes.—A partial settlement, to which there is no valid objection, is conclusive upon the parties to it as far as it goes, and leaves open only the unsettled portion of the account. Foster v. Rison, 17 Gratt. 321.

Effect of Unauthorized Deed.—If a settlement is made by one partner acting for himself and another with the third, it is not invalidated by the fact that it is accompanied by a deed which he was not authorized to execute for the other partner. The instrument may be void as a deed, and still be good evidence of the terms of the settlement. Foster v. Rison, 17 Gratt. 321.

What Constitutes Final Settlement.—Under a contract of partnership between the plaintiff and the defendant's decedent, the former furnished $10,000 to build a mill, and $8,000 to carry on the business, and the decedent was to furnish his time, labor, and skill. It was agreed that if the plaintiff's share of the profits amounted to less than 8 per cent. on his investment, she could terminate the contract and withdraw the money advanced. In consideration of the $10,000 debt, and $2,000 in addition, the decedent sold and conveyed to the plaintiff the mill. This was not a final settlement of all antecedent transactions, and was not a bar to a suit for the $8,000. Lovett v. Perry, 98 Va. 604, 37 S. E. Rep. 33.

Agreement to Arbitration—Finality.—If, pending a suit in chancery brought by one of three partners against the other two for a settlement of their accounts, the plaintiff and one of the defendants agreed to arbitrate all matters in difference between them, the award of the arbitrators to be the decree of the court, according to which agreement an order of reference is made, and the arbitrators report that they examined the books and awarded the payment of certain sums by the other defendant as the *only debtor* to the plaintiff and to the defendant, who agreed to the reference, and state that the payments already made by that defendant discharged him from any further claim of the plaintiff on account of the partnership, such report should be considered as an award, and sufficiently final and good between the parties who agreed to the reference. Fletcher v. Pollard, 2 Hen. & M. 544.

Binding in Absence of Fraud or Mistake.—On the dissolution of a partnership the parties enter into a written contract partly settling the partnership affairs, and fixing a basis for future settlement. In the absence of fraud or mistake, such contract must furnish the basis of a settlement of the estate, which is sought by heirs of a deceased partner. Holt v. Holt, 46 W. Va. 397, 35 S. E. Rep. 19. Unless the partners have stipulated otherwise, or having stipulated, have abandoned their agreement, in a suit to settle their accounts, a court of equity will commence with the last stated account between them, which will be held conclusive of their dealings up to that time, in the absence of gross error or fraud. Moore v. Wheeler, 10 W. Va. 35.

Same—Effect of Note.—If upon a settlement a note or obligation be executed by one of the parties to the other, for the balance found due on such settlement, such note will be held conclusive upon all the items of the accounts so settled, unless it be clearly shown that there was in such settlement some mistake or fraud. Mahnke v. Neale, 23 W. Va. 57.

Same—Suit to Reopen—Allegation and Proof.—A member of a partnership seeking to reopen a settlement, on the ground of accident, mistake or fraud therein, must allege and prove the particular facts wherein such accident, mistake or fraud consists, and failing to do so, his bill will be dismissed at the hearing. Mahnke v. Neale, 23 W. Va. 57.

Same—Purchase of Good Will and Trade Mark—Inadequacy of Price.—If a surviving partner, without fraud, purchases the trade mark and good will of a firm for an inadequate price, erroneously supposing that they survived to him, the sale will not be set aside and an accounting of profits decreed, but the purchaser will be required to pay the real value of the property acquired, with interest from the sale. Tennant v. Dunlop, 97 Va. 334, 33 S. E. Rep. 620.

3. APPOINTMENT OF RECEIVER.

When Appointed—Loss or Misappropriation of Property.—In a suit to dissolve a partnership and settle its accounts, where the defendant in possession denies the partnership, a receiver should not be appointed unless the fact of partnership is clearly proven in the cause and there is danger of the loss or misappropriation of the property of the firm, or a material part thereof. Wood v. Wood, 50 W. Va. 570, 40 S. E. Rep. 416.

Same—Business Successful.—In a suit between partners for the purpose of establishing a partnership, and having the same dissolved and the accounts settled, an amended and supplemental bill praying for a receiver having been filed, where the defendant is in possession, and conducting a successful and prosperous business, who denies the partnership, and is solvent, and able to respond in damages, the court will not appoint a receiver. Wood v. Wood, 50 W. Va. 570, 40 S. E. Rep. 416.

Only for Winding Up of Business.—The principle upon which a court of equity interferes between partners by appointing a receiver is merely with a view to relief by winding up and disposing of the concern and dividing the profits, and not for the purpose of carrying on the partnership; and therefore a receiver will not generally be appointed unless it appears that the plaintiff will be entitled to a dissolution at the hearing. Satterlee v. Cameron, 1 Va. Dec. 517.

Question as to Existence of Partnership or Share of Profits—Issue—In cases of partnership, where there is an application for a receiver, and upon the evidence there is doubt whether there was a partnership between the parties, or as to the share of the profits to which the plaintiff is entitled, or as to the dissolution of the partnership by mutual consent at a particular time, the court should direct an issue to determine these questions. Satterlee v. Cameron, 1 Va. Dec. 517.

4. APPLICATION OF ASSETS.

Dissolution and Assumption of Debts by One.—In ascertaining the state of the accounts between the partners, where the firm is composed of but two members, and one has taken all the assets and assumed the payment of all the debts, each should be credited with what the firm owes him, if anything, and with whatever assets of the firm he has taken by the dissolution agreement, if any. The balance then struck will show what is due to and from the copartners, respectively. Koelz v. Brinkman, 50 W. Va. 270, 40 S. E. Rep. 578.

By Commissioner—According to Agreement.—In the settlement of a partnership, the commissioner having settled the accounts between the firm and its members, the net assets should then be ascertained by deducting from the total assets the total liabilities, after which the total capital contributed by the members of the firm should be deducted, and the remainder divided as profits, according to the agreement of the parties. Koelz v. Brinkman, 50 W. Va. 270, 40 S. E. Rep. 578.

Same—Accounts between Firm and Members.—In the settlement of the accounts of a solvent partnership on dissolution, the commissioner, before undertaking to ascertain the net assets and profits and distribute the same, should find the true state of the accounts between the firm and each of its members as separate and distinct settlements, after which sums due the firm from its individual members, however incurred, are to be treated as assets, and sums due from the firm to its members as liabilities. Koelz v. Brinkman, 50 W. Va. 270, 40 S. E. Rep. 578.

Rights and Liabilities as to Advancements—Withdrawals.—Subject to the rights of joint creditors, where an account is taken at the winding up of a partnership between partners, each partner is entitled to be allowed against the other, every thing he has advanced or brought in as a partnership transaction, and to charge his copartner in the account with what he has failed to bring in, and with what he has abstracted from the joint funds, beyond his just proportion, and nothing will be considered as the share of any of them, but that proportion of the residue, to which each, on a balance of the account so taken may be ascertained to be entitled. Moore v. Wheeler, 10 W. Va. 35.

Sale of Partnership Property.—The surviving partner of a partnership, having qualified as administrator with the will annexed upon the estate, brings his bill against the devisee and legatee, charging that his testator was largely indebted to him, asking among other things to have his claim established. He then offers for sale his testator's undivided half of the property owned by them jointly. The whole and not a half of the personal property belonging to the partnership must be sold, and the proceeds divided between the living partner and the estate of the deceased partner. Watson v. Fletcher, 7 Gratt. 1.

Partner a Creditor—Transfer of Firm Debts—Credits.—M., A. and R., partners, dissolved their partnership; M. being a large creditor, to whom debts due to the concern were transferred in payment, with the agreement that if any of these debts could not be collected other debts were to be transferred in lieu of such. A. was the acting party and transferred debts to M. in lieu of such as could not be collected. In settling the account between M. and the partnership and A. and the partnership, M. is to be credited as of the date of the agreement, with a debt returned; and he is to be charged with the amount of the debt, principal and interest transferred, in lieu of the first, as of the date of the transfer; and A. is to be credited in his account with the same amount as of the same date, as if it had been paid in money. Robertson v. Read, 17 Gratt. 544.

XII. PLEADING AND PRACTICE.

1. ACTIONS IN FIRM NAME.

Common-Law Rule.—At common law, partners cannot be sued otherwise than in their individual names, and as the allegation of a partnership name is merely for the purpose of identification and description, it is immaterial, and need not be proven, and hence the unnecessary use of it may be regarded as merely surplusage. Courson v. Parker, 39 W. Va. 521, 20 S. E. Rep. 583.

Cured by Verdict.—In Totty v. Donald, 4 Munf. 430, it was said that it *seemed* that the declaration in behalf of a mercantile company, by the name of the firm, omitting to mention the names of the partners, was good after verdict.

No Objection on Trial.—In an action by a partnership, the suit is brought in the firm name. There are members of the firm whose names are not indicated in the firm name, but no objection is taken to the mode of naming the plaintiffs, on the pleadings. This is no ground for defeating the action on the trial of the cause. Downer v. Morrison, 2 Gratt. 250. See *infra*, "Actions between Partners and Third Persons."

2. ACTIONS BETWEEN PARTNERS AND THIRD PERSONS.

a. PARTIES.

Against Representative of Deceased Partner.—In Virginia, under sec. 14, ch. 144, Code 1860, an action at law upon an unsettled account with a partnership can be maintained against a personal representative of a deceased partner; but this statute is permissive and the creditor may still proceed in equity, which is generally a more complete and convenient remedy. Glazebrook v. Harveys, 1 Va. Dec. 265.

Contract between Firms with Common Member—Assignment.—Where both the creditor and debtor in a nonnegotiable chose in action is a partnership, in which there is a common member, the assignee cannot maintain an action therein, notwithstanding sec. 2860 of the Code. Aylett v. Walker, 92 Va. 540, 24 S. E. Rep. 226.

Infant Partner Omitted—Action Badly Brought.—A promissory note was executed by one of two partners in the firm name. One of the partners was an infant at the time an action was brought against the adult partner only. The action was badly brought, as the act of the infant was voidable and not void. Wamsley v. Lindenberger, 2 Rand. 478.

Firm Insolvent or Bankrupt—Assignee or Trustee Plaintiff.—Where a firm, as such, becomes insolvent or bankrupt, all actions thereafter brought upon a firm claim should be brought in the name of the assignee or trustee of the bankrupts. Cannon v. Wellford, 22 Gratt. 195.

Special Partner—No Interest in Claim.—When a sole general partner is doing business under a firm name in which business another person is interested as a special partner, and the general partner brings suit in the firm name on a claim in which the special partner has no interest, it is unnecessary to make such special partner a party. Wetherill v. McCloskey, 28 W. Va. 195.

Married Woman — Nonjoinder — Plea — Replication—Verdict.—In an action at law against a person, who had entered into a partnership with a married woman, living with her husband, if he plead in abatement that she should be joined with him, the plaintiff can traverse the plea, alleging that she was not a partner. On proof by defendant of her entering into the agreement, and by the plaintiff that she was a married woman, living with her husband when the debt was contracted, verdict should be for the plaintiff, as she could not be recognized as a partner in a court of law. Carey v. Burruss, 20 W. Va. 571.

b. DECLARATION.

Bond Payable to Certain Persons—Averments.—An action cannot be maintained by a mercantile company on a bond payable to a certain person without averring in the declaration the said bond to have been given to that person for their use, or to have been assigned to them by him or his legal representatives. Gordon v. Browne, 3 Hen. & M. 219.

A declaration in debt against two partners, charging that one of them executed the bond for himself and another, without any other averment, is too defective to support a judgment against such other partner, though he pleaded payment, and a verdict was found against him. Garland v. Davidson, 3 Munf. 189.

Assumpsit—Writing Signed by One Defendant—No Recovery.—In an action against a partnership, the declaration was in general *indebitatus assumpsit* for the hire of slaves, for which the defendant promised to pay a certain sum whenever required. No recovery could be had on a writing signed by one of the defendants, certifying that he had hired the slaves, and that this should entitle the plaintiff to the bond of the other defendants for the same. Wooddy v. Flournoy, 6 Munf. 506.

Debt—Averments.—In an action of debt against two partners, the declaration charging that one for himself, and the other by his certain bill penal bound himself and his heirs, etc. (the bill penal being in that form), without containing any farther averments, was adjudged to be insufficient in law to maintain the action. Shelton v. Pollock, 1 Hen. & M. 423.

c. PLEA.

In Abatement—Nonjoinder—Affidavit.—In Prunty v. Mitchell, 76 Va. 169, which was an action on a partnership transaction, it was held that the objection to the nonjoinder of a co-contractor as defendant could only be taken by plea in abatement, verified by affidavit, when the variance does not appear on the face of the declaration. Wilson v. McCormick, 86 Va. 995, 11 S. E. Rep. 976.

Same—Same—Filed at Rules.—In an action of assumpsit against a partnership, if the defendants claim that there has been a nonjoinder of proper defendants, such objection can only be raised by a plea in abatement and must be filed at rules. Rutter v. Sullivan, 25 W. Va. 427.

Same—Same—Misjoinder.—Where a part of copartners only are sued, or other parties improperly included, it is matter to be pleaded in abatement for nonjoinder or misjoinder, and if so pleaded will defeat a recovery against those only who are embraced in the action, or where improper parties are included as copartners, notwithstanding sec. 19, ch. 177, Code 1860. Urton v. Hunter, 2 W. Va. 83.

Same—Same—Joint Contract.—In an action against two partners to recover a partnership debt, the writ was executed on one only, and as to the other, was returned "no inhabitant of the city," and the suit was entered abated as to him. One partner may be sued alone for a partnership debt, and he can help himself only by a plea in abatement. Though the declaration state a joint contract, this does not vary the rule. The suit was properly abated, as to the partner not served with the process, under the act of assembly. Brown v. Belches, 1 Wash. 9.

d. REPLICATION.

Nonjoinder of Married Woman.—In an action against a person, who had formed a partnership with a married woman, living with her husband, if he pleaded in abatement that she should be joined with him, a replication that she was a married woman when the debt was contracted would be good. Carey v. Burruss, 20 W. Va. 571.

e. VERDICT.

Abatement by Death of Plaintiff—No Objection after Verdict.—Where a suit would have abated by the death of the plaintiff, and the defendants might have been permitted to plead *de novo*, if they omitted to avail themselves of the death of the plaintiff, but on the contrary admitted that certain persons are his surviving partners, and go to trial without asking permission to plead *de novo*, they are precluded from making the objection after verdict. Murdock v. Herndon, 4 Hen. & M. 200.

f. JUDGMENT.

Omission of Firm Name.—A judgment against the individual members of a firm on a firm liability is

not erroneous for failure to set out the firm name. Weimer v. Rector, 43 W. Va. 735, 28 S. E. Rep. 716.

Names of Partners Omitted in Writ and Declaration—Service of Writ on Wrong Party.—In a suit against a mercantile company, if the names of the partners be omitted in the writ and declaration, and the writ be served on the person not named in either, a judgment against the company, for that person's failing to appear, cannot be sustained. Scott v. Dunlop, 2 Munf. 349.

No Judgment against Persons Not Members.—A declaration in assumpsit against a firm alleged it to be composed of five persons, who were named. The evidence on trial proved that the debt was contracted by the firm, but that three of the named defendants did not belong to the firm. No judgment can be entered against said persons as such firm. Adams v. Powers, 82 Va. 612.

Judgment Taken against Part of Firm—Merger.—Where a creditor takes a judgment against one or more of the members of a general partnership, omitting others, he loses all recourse against the latter, although dormant partners and unknown at the time. The joint contract is held to be merged in the judgment as to the members against whom it is obtained; and being merged is equally barred as to the others, since no joint suit can be maintained upon it. McArthur v. Chase, 13 Gratt. 701. See Ward v. Motter, 2 Rob. 536.

Confession by One Partner—Merger.—In a joint action against partners, judgment was confessed by one, and afterwards, during the same term, judgment was rendered against the other. The confessed judgment did not merge the cause of action, and the subsequent judgment was valid and binding. Pitts v. Spotts, 86 Va. 71, 9 S. E. Rep. 501.

Service of Writ on One Partner by Plaintiff's Direction—Arrest of Judgment.—If, by direction of the plaintiff, the writ be served on one only of two partners in trade, when the declaration shows that the plaintiff knew the names of both, and he get a verdict upon the plea of *nonassumpsit*, pleaded by the partner, on whom the writ was served, judgment ought to be arrested. Shields v. Oney, 5 Munf. 550.

Judgment against Part of Firm Only Valid.—Where a judgment is rendered against two partners on a partnership debt, and one of the partners has not been served with process, nor appeared to answer the action, such judgment is valid as to the partner served with process; and an execution issued thereon should not be quashed, on his motion, on the sole ground that the process was not served on his copartner. Lee v. Hassett, 41 W. Va. 368, 23 S. E. Rep. 559.

Declaration against Barnett, Woolfolk & Co.; W. appears and pleads *nonassumpsit*; afterwards B. against whom the suit had been entered abated, entered himself a defendant, and without filing a plea, united in defending the action. Judgment against B. and W. only. The judgment is proper against those two, as they did not discover by a plea in abatement who were the other partners. B. by entering himself a defendant, and going to trial, bound himself to abide by the plea of his partner. Barnett v. Watson, 1 Wash. 372.

Judgment against Firm Invalid as to Partner Not Served with Process Nor Appearing.—A judgment rendered in another state against all the members of a partnership, after its dissolution, does not personally bind a member of the firm not served with process and not appearing in the case, although the other members were served, or appeared and caused an appearance to be entered for all. Bowler v. Huston, 30 Gratt. 266.

A judgment in New York, under the Code of Procedure of that state, against the members of a dissolved partnership, one of whom was not served with process and did not make any appearance in the suit, is not such a judgment as is contemplated by the constitution and act of congress, as to such person. Bowler v. Huston, 30 Gratt. 266.

g. SET-OFF.

Debt Due Individual Partner.—In an action against a mercantile company, a set-off of a debt, due to an individual partner, cannot be allowed. Ritchie v. Moore, 5 Munf. 388.

h. ATTACHMENT.

Nonresidence of Partner.—The nonresidence of one partner will not be ground for attachment against the firm, to the prejudice of social creditors. Goodman v. Henry, 42 W. Va. 526, 26 S. E. Rep. 528

May Be Sued Out by One Partner.—One member of a mercantile house with which a debt has been contracted, but has not yet fallen due, is competent to make complaint on oath and to sue out an attachment against the debtor, under the provisions of the statute, 1 Rev. Code, ch. 123, sec. 14. Kyle v. Connelly, 3 Leigh 719.

Same—Execution of Bond.—As one member of a mercantile house with which a debt has been contracted is competent to sue out an attachment for the house against the debtor, so that the member is the proper person to execute the attachment bond required by the statute, 1 Rev. Code, ch. 23, sec. 7. And the bond of the partner suing out the attachment, with surety, conditioned that that partner shall pay all costs, in case the house shall be cast in the suit, and all damages that shall be adjudged against *him* for suing out the attachment, is a good bond. Kyle v. Connelly, 3 Leigh 719.

Same—Same—Bond Invalid—Attachment Void.—An attachment against an absconding debtor was sued out in the name of a partnership for a debt due the partnership, and the bond was taken of one of the partners, reciting that *he* had obtained the attachment, and conditioned that if *he* shall be cast in the suit, *he* shall pay all costs and damages which shall be recovered against *him*. The bond was held to be naught, and the attachment illegal and void. Jones v. Anderson, 7 Leigh 308.

i. EVIDENCE.

Proof of Members Composing Firm—When Necessary.—When a warrant is issued against a firm, and the summons states the name of the firm, and also the names of the individual partners, before the trial, whether before the justice or before the circuit court on appeal, the plaintiff is not bound to prove who are the members of the firm, unless an affidavit be filed denying that those named in the summons constitute the firm. Hall v. Lyons, 29 W. Va. 410, 1 S. E. Rep. 582.

Proof of Partnership—When Necessary.—In an action against a partnership pleas were filed denying the partnership, but were withdrawn. This relieved the plaintiff from the necessity of proving the partnership, and any defense in that respect was cut off. Carlon v. Ruffner, 12 W. Va. 297. See Phaup v. Stratton, 9 Gratt. 615.

Of Existence of Partnership.—In an action against three persons as partners for goods sold, the question at issue being whether two of them were partners of the third, the plaintiffs asked a witness if he had heard the third say what representations

he had made to the plaintiffs at the time he purchased the goods from them, as to the existence of a partnership between himself and the other defendants. This evidence was properly admissible to prove that the plaintiffs intended to sell to, and that the third partner intended to purchase for, a partnership, but was no proof against the other two that they were the partners. This evidence, however, was not regularly admissible, even for this limited purpose, until the plaintiffs had offered evidence tending to show that there was a partnership between the three, which authorized one to purchase on the credit of all. Chapman v. Wilson, 1 Rob. 267.

In an action of assumpsit for the price of goods against three persons as partners under a firm name, the question at issue being whether two of them were partners of the third, by whom the goods were purchased, the two appearing to have had a store-house in another town, a witness was asked whether he saw boxes of goods in this store-house marked in the firm name. It was not error to permit this to go to the jury as a link in the chain of circumstances, as it has a connection with the matter in controversy, though very slight, and of very little weight. Chapman v. Wilson, 1 Rob. 267.

Note in Firm Name—Execution in Issue—Proof of Dissolution.—In debt on a note signed with a partnership name, the declaration charges that the defendants by their partnership name subscribed the note, and there was no affidavit putting the execution of the note in issue. They were precluded from showing that the partnership had been dissolved before the note was made, and that the person making it had no authority to execute it for the other partners. Phaup v. Stratton, 9 Gratt. 615.

Evidence of Set-Off.—In an action of assumpsit for a partnership demand, the defendant cannot give in evidence as a set-off the delivery of the goods to an individual partner, although by the direction of such partner, the partnership demand was entered as a credit against the goods. Armistead v. Butler, 1 H. & M. 176.

Proof of Handwriting—Instruments in Firm Name.—The act of February 5th, 1828 (Sup. Rev. Code, ch. 206, p. 265), dispensing with proof of handwriting in certain cases, applies to instruments signed with the name of a partnership, but only where the declaration alleges that the defendants subscribed their names thereto. Shepherd v. Frys, 3 Gratt. 442.

Admissibility — Bill of Exceptions—Connection between Evidence and Matter in Controversy.—In an action against three persons as partners for goods sold, the question at issue being whether two were partners of the third, the defendants asked a witness whether he was present at a settlement between the three, of their accounts relative to their mercantile transactions, after goods had been furnished the first by the last two; whether he knew for what certain bonds then executed by the one to the other two were given; and whether 20 per cent. on the amount stated to be due was not included in the said bond? On objection the evidence was properly rejected as the bill of exceptions did not show the time of the transaction between the defendants nor suggested any connection between the fact which the evidence was offered to prove, and the matter in controversy, nor stating anything from which such connection should be inferred. Chapman v. Wilson, 1 Rob. 267.

Surviving Partners — Sec. 23, ch. 130, W. Va. Code 1868.—Surviving partners are not assignees in law, of their deceased partners, and sec. 23, ch. 130, Code 1868, as to the competency of a party to testify in his own behalf in respect to personal transactions with deceased persons against parties who are executors, heirs, etc., of such deceased person, when they have acquired title to the cause of action through or from such deceased person, or have been sued as executor, heir, etc., does not apply to actions against such survivors, where a party defendant is a witness to prove payment to a deceased partner during his life. Carlton v. Mays, 8 W. Va. 245.

Competency of Surviving Partner in Action against—Competency of Plaintiff.—In an action against a surviving partner upon a transaction in which the deceased partner was the acting party, the plaintiff introduces the defendant as a witness. The defendant so introduced becomes a competent witness in the cause; but this does not render the plaintiff a competent witness. Terry v. Ragsdale, 33 Gratt. 342.

Avowry—Deed of Lease of One Partner—A deed of lease from one of two copartners, sealed with his seal, and in terms, binding himself only, is not admissible evidence in support of an avowry laying a demise by the copartners, notwithstanding the deed be expressed as "for himself and his partner," and it be proved that the other partner knew of the demise, and was satisfied with it. Tuttle v. Eskridge, 2 Munf. 330.

Admission of Partner after Dissolution.—Where a debt was created during the continuance of a partnership, and there is other evidence of its existence, or its existence is admitted by the pleadings, the admission or declaration of one partner as to the transaction, though made after the dissolution, is admissible as evidence in an action against the firm, with the limitation that such admission or declaration cannot impose a new obligation on his co-partner, or revive against him one that is barred. Davis v. Poland, 92 Va. 225, 23 S. E. Rep. 292. See section "Dissolution," subsection "Admission of Partner as Evidence."

Bond by One Partner and Third Person—Partner Not Signing—Competent Witness—Release.—A partner, without any authority from his co-partner, executed a note, under seal, in the partnership name for both, for money loaned the firm. There was also another obligor in the bond. In an action for debt against the latter, he pleaded *non est factum*. The partner who did not sign the bond was a competent witness, because his interest was equal between the plaintiff and defendant, the latter having by deed released him from liability for cost of the suit. Black v. Campbell, 6 W. Va. 51.

3. SUITS BETWEEN PARTNERS AND THIRD PERSONS.

a. JURISDICTION.

Nonresidence of Partner.—A suit in equity may be maintained against a partnership, if one of the partners resides out of the state, although the remedy would have been at law, if they had both been residents of this state. Williams v. Donaghe, 1 Rand. 300.

Execution of Bond by Mistake—Correction in Equity.—A sum of money is lent to a firm, and the firm is charged with it on the partnership books, but the partner with whom the transaction occurs, executes by mistake a penal obligation, in the name of the firm, under seal, instead of giving merely a promissory note; one of the partners dying, those who

survived him, and the executors of the decedent, convey all the effects belonging and debts due to the firm, in trust to pay the debts due from the firm; then the creditor who lent the money files a bill in equity against the surviving partners, the executors of the decedent, and the trustee. It was held that although at law there would be no remedy on the sealed obligation, except against the partner who executed it, yet equity has jurisdiction to correct the mistake, and hold all the partners as much bound as if there were no seal. Galt v. Calland, 7 Leigh 594.

Sale of Land Owned by Partner and Firm for Firm Debt—Parties.—The creditors of a firm obtain judgment against the surviving partner, who dies, and whose administrators exhaust the personal assets in paying other claims. Then the creditor files a bill in equity against those administrators and the heirs of the surviving partner, and the representatives of the deceased partner. The bill seeks a decree for the sale of land of which the surviving partner died possessed, some of which belonged to himself and some to the firm; and when the funds from this source shall be exhausted, then it seeks to charge the representatives of the deceased partner. *Held*, equity has jurisdiction of the case, and the representatives of the deceased partner are properly made defendants. Jackson v. King, 8 Leigh 689.

Partners Declared Bankrupts—Jurisdiction of State Court.—Where a partnership is dissolved, and the individual partners are declared bankrupts in different bankrupt courts, in different states, each with his own assignee, and in their schedules make no mention of partnership debts due to them or by them, a creditor of the partnership may proceed in a state court to subject the partnership effects to the payment of the partnership debts. Lindsey v. Corkery, 29 Gratt. 650.

When partners as such are declared bankrupt, their property, both partnership and individual, is to be administered under section 36 of the bankrupt act of 1867, in the bankrupt court; and every creditor, whether individual or social, must prosecute his claim in that court. Lindsey v. Corkery, 29 Gratt. 650.

To Subject Estate of Secret Partner.—It seems, that a bill in equity properly lies to subject the estate of a secret partner in trade, to the payment of a debt contracted by the ostensible members of the firm. Cocke v. Upshaw, 6 Munf. 464.

b. PARTIES.

Executors of Deceased Partners.—In a suit against a mercantile firm, after the death of part of the members, the executor of the deceased partners ought to be made parties. Carter v. Currie, 5 Call 158.

Who May Sue Survivor for Account.—Under ordinary circumstances, the personal representative of a deceased partner is the only person who has the right to sue the surviving partner for an account of partnership affairs; but under special circumstances, a distributee, legatee, or creditor of the decedent may file a bill against the personal representative of the decedent and the surviving partner. Conrad v. Fuller, 98 Va. 16, 34 S. E. Rep. 893.

Suit for Settlement—All Partners.—Although a person having a claim against a mercantile company, cannot set off such claim against a debt from himself to one of the partners, yet it is competent for him to charge that partner, in equity (in extinguishment of the said debt), for so much of the surplus of the partnership property as may be due to such partner on a settlement of the partnership accounts, for the purpose of which settlement, and also for that of ascertaining and adjusting his own claim against the company, all the partners should be made defendants to his bill. Dunbar v. Buck, 6 Munf. 34.

Death of Partner—Revival.—In a suit against two partners, one dies pending the suit—it is not necessary to revive the suit against the representative of the decedent, but the plaintiff may proceed against the survivor alone. Townes v. Birchett, 12 Leigh 173.

c. BILL.

Names of Partners—Demurrer.—When a bill in chancery makes the individuals composing a firm defendants, the bill ought to set out the full names of the members of the firm, or allege that their names in full are unknown, and could not be ascertained by the plaintiff after diligent inquiry; and, if it fails to do so, the defendant should be excused by the court from answering or demurring to such bill until proper insertions be made in the bill of the names of the individuals constituting the firm, or it be made to appear to the court that their names cannot be ascertained. But such defect is not a good ground for a general demurrer. Rogers v. Verlander, 30 W. Va. 619, 5 S. E. Rep. 847.

To Sell Real Estate—Multifarious.—A bill to subject the real estate of the three members of a firm to the payment of two judgments, one against the firm and the other against two members thereof, is not multifarious as to the third member, as he is interested in having the realty of his partners subjected to the payment of the firm debts rather than his own. Alexander v. Alexander, 85 Va. 358, 7 S. E. Rep. 335.

Firm Dissolved—Not Necessary to Use Firm Name.—When a firm has received money, and, after its dissolution, a chancery suit is brought against the persons who were members of the firm, to compel them to refund the money, it is not necessary, though it is usual, to describe these persons as lately doing business under a certain name, in the prayer of the bill, asking to make these parties defendants, but if the bill fails to do so, it is not on that account demurrable. Vance v. Kirk, 29 W. Va. 344, 1 S. E. Rep. 717.

d. ANSWER.

Of Joint Partners in Name of Both—Replication.—In Freelands v. Royall, 2 Hen. & M. 575, the answer of one joint partner, in the name of both, was deemed sufficient, the complainant having filed a general replication, and taken no steps to compel an answer from the other partner.

e. SET-OFFS.

Retiring Partner Indebted to New Firm—Payment of Old Firm's Debts.—One of the members of a partnership sells out to a third person, and the new firm assumes the obligations of the old. The retiring partner becomes indebted to the new firm, and executes his bond with security therefor, which bond is assigned for value. The new firm fails, and the partners are insolvent, leaving debts of the old firm unpaid to a larger amount than the bond of the retiring partner, who pays the debts of the old firm. The retiring partner is entitled in equity to set off against his bond in the hands of the assignee the debts of the old concern, which they were bound to pay, and which he had paid. Hupp v. Hupp, 6 Gratt. 310.

Sale of Debtor's Estate—Purchase by Acting Partner.—The obligor of a bond given to a partnership dies.

and at the sale of his estate the acting partner of the firm buys a slave, who is carried to his own plantation and kept there. The price paid for the slave is a good discount against the bond. Rose v. Murchie, 2 Call 409.

f. ATTACHMENTS IN EQUITY.

Partners Must Be before the Court.—In an attachment suit in equity against a partnership, where the attachment is levied on the social assets, it is necessary that the partners should both be before the court, either by actual or constructive notice, before any decree be made in relation to such property. Brown v. Gorsuch, 50 W. Va. 514, 40 S. E. Rep. 376.

Abatement—Service of Process on One Partner.—In an attachment suit in equity against a partnership, it is error for the court to abate such attachment and dismiss such suit, when one of the partners has been served with summons, because an order of publication has not been taken against the other; but the court should require the plaintiff to mature his suit within a reasonable time, fixed as to such absent partner, or suffer the abatement of the attachment and dismissal of the suit. Brown v. Gorsuch, 50 W. Va. 514, 40 S. E. Rep. 376.

Partners Bankrupts—Priority by Attachment.—Where a partnership is dissolved, and the individual partners are declared bankrupts, one creditor of the partnership cannot attach the partnership effects so as to obtain a preference over the other partnership creditors. But his bill, though proceeding only for his own debt, may be treated as for the benefit of all the partnership creditors, and an account of the creditor's debts and of the partnership effects may be taken, and the effects distributed among the creditors who establish their debts. Lindsey v. Corkery, 29 Gratt. 650.

g. INJUNCTIONS.

By Proposed Partner—Use of Firm Name.—Where three persons proposed entering into a partnership, which was subsequently formed by two of them, the third is entitled to an injunction restraining the firm from using his name as a part of the firm name. Stringfellow v. Wise, 2 Va. Dec. 490.

Three persons form a partnership for the purpose of constructing a portion of a railroad. During the progress of the work one of the partners withdraws, and is subsequently enjoined by the other two from interfering with them in the prosecution of the work. Upon an application by the withdrawing member for a receiver, upon the grounds that he fears the improper use of the firm name by the remaining partners, and that they will remove the assets of the concern beyond the state, it was held that it was not a proper case for the appointment of a receiver and that the plaintiff's remedy was by injunction. Satterlee v. Cameron, 1 Va. Dec. 517.

h. EVIDENCE.

Proof of Partnership—Question Not in Issue.—Where the pleadings do not put in issue the question of partnership as to defendants, it is not necessary to consider any evidence of the existence of such partnership, as the question is not properly before the court. Ruffner v. Hewitt, 14 W. Va. 737.

Proof of Component Members—Plea—Affidavit.—The act of March 19, 1839, Sess. Acts 1839, ch. 66, § 4, p. 43, only applies to actions brought by a partnership; and dispenses with proof of the component members of the firm, as described in the declaration, unless denied by plea, verified by affidavit. Shepherd v. Frys, 3 Gratt. 442.

Secret Partnership—Issue to Ascertain.—Where a bill was brought to subject the estate of a secret partner to the payment of a partnership debt, and the fact of the secret partnership be doubtful on the testimony, the court should direct an issue to ascertain it. Cocke v. Upshaw, 6 Munf. 464.

Variance Immaterial.—In a suit to recover a debt the bill avers that the defendant is indebted to the plaintiff "upon contract for merchandise furnished by the plaintiff to the defendant," but the evidence shows that the merchandise was furnished by the plaintiff and another as partners, and that before the suit began the other had retired from the firm, signing all his rights to the plaintiff. The variance between the pleadings and proof was not material. Wetherill v. McCloskey, 28 W. Va. 195.

When Vouchers Not Required.—In settling the accounts of a mercantile concern, in a controversy between the partners only, it is sufficient to examine and state the books of the partnership, without requiring vouchers in support of each specific item. Fletcher v. Pollard, 2 Hen. & M. 544.

4. SUITS BETWEEN PARTNERS OR REPRESENTATIVES.—See "Settlement and Accounting," *supra*.

a. JURISDICTION.

Accounting—No Adequate Remedy at Law.—In a controversy between partners, where there are partnership accounts, it is proper that they should be stated and settled by a court of equity, and for this purpose there is no adequate remedy at law. Jones v. Murphy, 93 Va. 214, 24 S. E. Rep. 825.

In Tillar v. Cook, 77 Va. 477, which was a chancery suit for a partnership accounting, the court said: "The partnership relations of parties, under their contract to engage in their joint venture, was plainly a ground for equity jurisdiction. The equity for winding up a partnership business originates in the peculiar character of that relationship, as involving not merely a community of interest, but the employment of a common stock, whether consisting of property or mere labor and skill, in a common undertaking with a view to a common profit. And before the interest of an individual partner can be known, an account must be taken of the business, the assets and the liabilities, so that the divisible surplus may be ascertained. The common-law courts cannot take this account; if a dissolution as well as an account be sought, the common-law jurisdiction is altogether excluded. The incapacity thus existing in the courts of law confers a jurisdiction on the court of chancery."

When one partner attempts to recover money advanced to another to be invested, with the understanding that the profits shall be divided equally, in the absence of proof that it was a loan, or that the partnership was limited, the proper remedy is a bill for an account on dissolution, and no action at law can be maintained. Newbran v. Snider, 1 W. Va. 153.

Same—Same—Gambling Partnerships.—For the settlement and adjustment of gambling partnerships no aid will be given in a court of equity, nor will relief of any kind be given to one partner against the other arising therefrom. Watson v. Fletcher, 7 Gratt. 1.

Settlement of Transactions.—A court of equity has jurisdiction to wind up partnership transactions. Kelly v. Largney, 1 Va. Dec. 72.

Same—Dissolution—Cause.—Equity as a general rule does not entertain a bill for account between partners unless a dissolution and winding up are asked, and cause therefor shown. Then there

should be dissolution and full final account. Childers v. Neely, 47 W. Va. 70, 34 S. E. Rep. 828.

b. DURING EXISTENCE OF PARTNERSHIP.

General Rule—Necessary Prayer.—The general rule is, that a court of equity will not entertain a bill for the settlement of partnership accounts, while the partnership is still existing, and the bill on its face shows that no dissolution is contemplated. Ordinarily such a bill, filed pending the partnership, must either directly pray the dissolution of the partnership, or show that it is contemplated, so that the general prayer for relief may be interpreted to include a prayer for dissolution. Coville v. Gilman, 13 W. Va. 314.

Individual Contract of Partners in Individual Names.—If a contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, is the individual contract of the partners who are parties to it, and if it is made by them, in their own name, and not in the name of the firm, an action may be maintained thereon by one against the other, during the continuance of the partnership. Wright v. Michie, 6 Gratt. 354.

c. PARTIES.

All Partners Necessary Parties.—In suits for the settlement of a partnership every partner should be made a party. Waggoner v. Gray, 2 Hen. & M. 603.

Deceased Partner—Representative and Heir Necessary Parties.—In a suit by a partner against the estate of another to enforce contribution for firm debts paid, if there was a deceased third partner equally liable, his administrator and heirs are necessary parties. Compton v. Thorn, 90 Va. 653, 19 S. E. Rep. 451.

d. BILL.

Suits for Dissolution and Settlement—Sufficient Allegations.—A bill filed for the purpose of establishing the fact of a partnership between the plaintiff and defendant, and having same dissolved and the partnership accounts settled, which partnership is denied by the defendant, and the allegations of the bill are sufficiently definite to show an agreed partnership, and that the same went into actual operation, and prayer that the status of the parties, plaintiff and defendant, be ascertained and settled; a partnership decreed as existing between them; the interest of each partner be ascertained and declared; that an account be taken of all matters concerning the partnership, including the assets and liabilities of the concern and the individual accounts of the partner; that a decree be entered for the sale of the partnership; and that the defendant be required to discover the profits and earnings of the copartnership. *Held* sufficient on demurrer. Wood v. Wood, 50 W. Va. 570, 40 S. E. Rep. 416.

Contract—Suit to Cancel—Intoxication—Allegations.—In a suit by one partner against the other, where the bill alleges that a contract between them was signed by the plaintiff while in such a state of intoxication that he did not know the extent or meaning of it, and that the contract so obtained was in violation of the rights and good faith which should prevail between partners, and charges that the same was obtained through fraud, and for the purpose of delaying and defrauding the plaintiff from obtaining his full rights in said partnership, it is error to sustain a demurrer to such bill. Hunter v. Tolbard, 47 W. Va. 258, 34 S. E. Rep. 737.

e. PROCEEDINGS BEFORE COMMISSIONER.

Suit for Account—Necessity for Account before Commissioner.—In a suit in equity for an account, brought by one partner against the other after the termination of the partnership, both partners are regarded as actors, and the accounts must be stated by the commissioner, and the rights of each must be finally passed on by the court as if each partner were a plaintiff filing a bill against his copartner. Hyre v. Lambert, 37 W. Va. 26, 16 S. E. Rep. 446.

When Proper to Recommit Report.—Where a bill is filed by one partner against the other, after dissolution, for a settlement of the partnership and the partnership accounts, and an order is made in the cause for that purpose, and the commissioner makes his report, to which no exceptions are filed, and the court confirms the report and makes a personal decree in favor of one partner against the other for the payment of money, it is competent, upon a petition for a rehearing, filed by the partner against whom such decree is made, during the same term, upon a proper case made out, for the court to set aside such decree and recommit the report for further account, especially where the court sees that justice and equity, as between the parties, requires such proceedings. Carper v. Hawkins, 8 W. Va. 291.

Same—Gambling Partnership—Evidence of.—In a suit for the settlement and adjustment of a partnership, although the pleadings do not show that the transactions arose out of a partnership for gambling, yet if this appears in the evidence before a commissioner, the accounts should be recommitted and an enquiry directed as to the consideration on which the claims of the parties are founded. Watson v. Fletcher, 7 Gratt. 1.

Value of Goods Increased—Objection.—In a suit for the settlement of partnership accounts one partner cannot object to an order increasing the value by the commissioner of the partnership goods that were chargeable to the other partner. Stinson v. Barley, 1 Va. Dec. 745.

f. DECREE.

Suit for Settlement—Personal Decree Proper.—In a suit for the settlement of a partnership, where it appears that there is something due to one from the other, the proper proceeding is to first direct a sale of the partnership property and apply the proceeds to the payment of the debt; and if the proceeds are not sufficient a personal decree against the other partner should be entered for the balance due. Canada v. Barksdale, 76 Va. 899.

In a suit between parties for a settlement it is error to give a final decree for one partner against another for the payment of money when it appears that debts due from the firm remained unpaid or unprovided for, unless plaintiff will deduct the amount of such debts from the same which he seeks to recover, or unless some good reason be shown for a departure from the general rule. Hyre v. Lambert, 37 W. Va. 26, 16 S. E. Rep. 446.

Conclusiveness of Decree.—"If a chancery suit be brought in a court of competent jurisdiction in another state, by some members of a copartnership lately doing business therein, against all the other partners, some of whom were residents of this state, to settle all the transactions of the partnership, and to compel the several partners to account with each other, and such defendants appear and file their answers in said cause adopting the allegations of the bill, and joining with the plaintiffs in the prayer for relief in the bill, and a final decree is rendered therein decreeing to the several members of said copartnership the amounts due to each of them

respectively, the rights of the said parties in regard to the matters embraced in said suit are concluded by such decree." Hunter v. Stewart, 23 W. Va. 549.

Same—Offsets—Estoppel.—In a chancery suit brought in a court of competent jurisdiction in another state, by some members of a copartnership lately doing business therein, against all the other partners, some of whom were residents of this state, to settle all the transactions of the partnership, and to compel the several partners to account with each other, if one of said resident defendants collect the amount decreed to his codefendant, and he be sued by such codefendant in this state to recover the same, such defendant will not be permitted to set off against said demand any debt or claim held by him before such final decree arising out of such partnership, which was, or might have been settled thereby, and he will be estopped by such decree from alleging and proving that less was due to such codefendant when such decree was rendered, than the sum thereby decreed to him. Hunter v. Stewart, 23 W. Va. 549.

g. EVIDENCE.

Proof of Partnership—Amount Required.—Stronger evidence of the existence of a partnership is required between partners than by third persons Hinkson v. Ervin, 40 W. Va. 111, 20 S. E. Rep. 849.

Burden of Proof.—Under a bill for the settlement of a partnership account, the burden of proof is on plaintiff, and if he cannot furnish sufficient evidence to establish a partnership, and also to enable the commissioner to state partnership account, his suit necessarily fails. Hinkson v. Ervin, 40 W. Va. 111, 20 S. E. Rep. 849.

Books as Evidence.—The books of a partnership are competent evidence to show what are debts of the partnership as against the partner who, upon the dissolution of the partnership, has purchased the assets of the partnership, and has undertaken to pay its debt. Shackelford v. Shackelford, 32 Gratt. 481.

Same—Copies.—The books of a partnership being evidence in a controversy between partners and those claiming under them, an account purporting to be a copy from the books, exhibited with the answer of the executor of one of the partners, and not objected to, will be considered in this court as evidence. Kyle v. Kyle, 1 Gratt. 526.

Same—Vouchers.—In a settlement of accounts between copartners, the books of the copartnery are admissible evidence, and vouchers for every item need not be produced. Brickhouse v. Hunter, 4 Hen. & M. 363.

Same—Before Commissioner.—When partnership accounts are referred to a commissioner, the court will rule the party to produce before him any books or papers which may relate to the partnership, but will direct the commissioner to disregard such parts as relate to the private affairs of either party. Calloway v. Tate, 1 Hen. & M. 9.

Partners Incompetent.—In a suit for settling the affairs of a partnership, every partner should be a party, and one partner, though not a party to the suit, cannot be a witness for another to charge their companion in relation to the partnership. Waggoner v. Gray, 2 Hen. & M. 603.

Same—Survivor.—In a suit to settle the affairs of a partnership, when one of the partners is dead the surviving members are not competent witnesses in regard to such affairs under sec. 23, ch. 160, Acts 1882. Carskadon v. Minke, 26 W. Va. 729.

Cochran v. Street.

April Term, 1792.

Juries—Verdict—Impeachment by Jurors*—Case at Bar.—Some of the jury being persuaded by the others, that a majority agreeing to the verdict, it must prevail, do not object. This being proved by many of the jurors, a new trial ought to be granted; and a Court of Equity may set the verdict aside, and award a new trial, where the objection to the verdict comes to the knowledge of the party too late to enable him to move for a new trial.

This was an action of slander, brought by Street against Cochran, in the County Court; wherein a verdict was given in favor of the plaintiff for £150. Cochran having failed in a motion in arrest of judgment obtained an injunction on the chancery side of the same court, suggesting that the trial was unfair, and brought on by surprise, and also charging misbehaviour in the jury.

The cause coming on for a hearing, the court (without setting aside the former verdict,) directed a new trial, and the verdict thereon to be reported in order to a final decree. The material facts, proved by the depositions taken in the suit in chancery, are, that this cause, and another of Cochran v. Street, were taken by consent, out of course, to be tried at November court; but that the latter coming on first employed the whole of the term; so that this was necessarily continued over until the succeeding term, when it was tried, tho' much objected to by Cochran. Four of the jurymen declared on oath, that they were of opinion upon the evidence that no damages ought to have been given against Cochran; but that being unacquainted with the duties of jurymen, and the nature of their office, and being told by others who were more experienced, that they must agree in any verdict which the majority should approve, they did not object to it.

From the decree of the County Court, Street appealed to the High Court of Chancery where it was reversed; and from that decree of reversal, an appeal was prayed to this court.

80 *Marshall,—for appellant. The verdict in this case is the finding of only eight jurymen, and is in truth no verdict at all. If the circumstances, which attended it, had been known, it could not have been received by the County

*Juries—Verdicts—Impeachment by Jurors.—On the question as to when the evidence of jurors will be admitted to impeach their own verdict, the principal case is cited in *foot-note* to Com. v. McCaul, 1 Va. Cas. 271; *foot-note* to Carr v. Magruder, 2 Pat. & Hen. 107; *foot-note* to Steptoe v. Flood, 31 Gratt. 323; Branch v. Burnley, 1 Call 158; Foushee v. Lea, 4 Call 286; Terrell v. Dick, 1 Call 553; Shobe v. Bell, 1 Rand. 42, 43; Bull v. Com., 14 Gratt. 629, 633; Howard v. McCall, 21 Gratt. 212; State v. Cartright, 20 W. Va. 43; Probst v. Braeunlich, 24 W. Va. 358, 359. See Price v. Warren, 1 Hen. & M. 385; also, monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

Court. Being afterwards discovered, there was no remedy but by the equitable interference of the court.

There are no better reasons for setting aside a verdict, than its having been unfairly procured, whether by surprize on the parties, or mistake in the jury.

I would also observe that the appeal in this case from the decree of the County Court was premature; for the court not having set aside the first verdict, but merely directed a new trial, the decree was interlocutory only.

Duval for appellee. If the court should affirm the decree of the County Court, much injustice may flow from it, as after so long a time since the former trial, witnesses may have died, or removed, by which the parties may not have so fair a trial as the former was. Besides, a new trial cannot be obtained at law after a motion in arrest of judgment; and therefore it ought not to be directed by the Court of Equity —5 Bac. 239, 242, 243.

Nothing can be productive of so much mischief, as a practice, once introduced, of permitting jurymen, by their after affidavits, to set aside their own verdicts. They are liable to be tampered with out of court, to defeat the fairest verdicts, and thus to produce endless vexation, and real injustice to the parties; particularly, where one of the parties may in the meantime have lost his witnesses. The proof of misbehaviour should not come from the juryman but from some other person.—Durnf and East, Rep. 11.

This decree is as final, as one for negroes, where an account of the hires is directed; and yet there is no doubt but that an appeal may be taken from such a decree.

Marshall in reply. I grant that in the case stated by Mr. Duvall, it is the practice to appeal from such a decree; but the reason of it is, that as to the negroes it is final, and execution for them may issue immediately.

The PRESIDENT delivered the opinion of the court.

We do not take into consideration the depositions, touching the merits of the cause, before the jury. They were the proper judges upon that subject. As to the unfairness of the trial on the score of surprise, there is no doubt, but that if it were proved, it would afford good ground
81 for granting a new trial; *as if the cause were tried out of its turn, without the previous consent of the party. But the court think the proof too slender to establish the fact.

To meddle with the verdict of a jury, upon the evidence of some of the jurors, is a delicate business, and should be proceeded in with caution, to prevent the mischief of the jurymen being tampered with. Lord Mansfield very properly, in the case cited from Durnf & East, refused a new trial upon the affidavit of two of the jurors, that the cause was decided by cross and pile, because it went, not only to prove themselves guilty of misbehaviour, but also ten others of the jury. But here, ten of the jurors are examined, and eight of them agree in the fact, that part of their body were opposed to giving any damages at all, and that the verdict was found on the opinion of a majority. Four of them swear that they did not incline to give any damages; that they did not dissent from the verdict, in consequence of a misapprehension of the law, and a belief that the opinion of the majority was to prevail; that they did not previously agree to be bound, by the determination of a majority; and that, if they had known, that they could have prevented a verdict till their consciences were satisfied, they would not have agreed to the verdict. There does not appear to have been any tampering with the jurors by any person, in order to obtain this information. It comes out upon examination as other testimony does:—a great majority of the jury confirm the fact to which these four have sworn; and none of them contradict it. It is clear therefore that the verdict was found under a mistake, and that a new trial should be awarded.—The inconvenience which may happen from another trial, if real, is to be attributed to the party who complains of it.—It might, but for him, have been had at a much earlier day.

The decree of the chancellor must be reversed and that of the County Court affirmed.

Thornton v. Smith.

April Term. 1792.

Pleading and Practice—Declaration—Allegation of Jurisdiction of Corporate Court.*—Where a suit is brought in a Corporation Court, the declaration must lay the cause of action to have arisen, within the jurisdiction of the Court.

This was an action of slander brought by the plaintiff, in the Court of Hustings, for the city of Richmond. The declaration begins thus: "City of Richmond to wit:" It then proceeds to lay the words to have been spoken "in the city aforesaid." After an imparlance the plea of not guilty was
82 put *in. Verdict for £55, and judgment thereupon, from which an appeal was prayed to the District Court, where the judgment was reversed: The cause came up, by writ of error, to this court.

The PRESIDENT. The case of Medtard v. Skipwith, was three times argued. That was an action of debt on a bond in the Borough Court of Richmond, which was stated in the declaration, to have been executed in the city of Richmond; without al-

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***Jurisdiction—Corporation Courts—Declaration—Allegation.**—For the proposition that, in action in the corporation courts the declaration must allege that the cause of action arose *within the jurisdiction of the court*, the principal case is cited in Turberville v. Long, 3 Hen. & M. 313; *foot-note* to Hill v. Pride, 4 Call 107.

See monographic *note* on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

ledging it to be within the jurisdiction of the court. The judgment of the District Court, affirming that of the County Court rendered for the plaintiff, was affirmed in this.

There were various questions agitated by the court upon that occasion, and different opinions given upon them, most of which were by a bare majority. Among others was this: whether the words, within the jurisdiction of the court were indispensible in every declaration in a Corporation Court, or might be supplied by other words equivalent to them? That they might be so supplied, was the opinion of four judges. But a bare majority determined, that in that case, the words were not supplied, but that the omission was cured by the confession of judgment. The same majority also decided that the £5 damages laid in the declaration, were to be added to the £100 debt, which deprived that court of its jurisdiction. The judgment was at first reversed; but, on the third argument, a worthy judge changed his opinion, and it was finally affirmed.

At the time this writ of error was moved for, if that case remained as authority—the question would have been reduced to a single point, namely, whether a judgment upon a verdict were equal to one given upon the confession of the party?

But as there was a diversity of opinions, and various points agitated upon that occasion, the court were willing to hear the matter argued at large, as if that case had not been determined.

The case has been entered into much at length, and the subject having been maturely considered by the court, a bare majority are of opinion, that the judgment of the District Court is right in reversing that of the Borough Court, because the speaking of the words, tho' alledged to have been in the city, is not alledged to have been within the jurisdiction of the court. That according to uniform precedents, those precise words ought to be used, in all declarations in courts of inferior jurisdiction.

As the judgment of the court is founded upon precedents alone, and I feel a full conviction, that they if taken in a collect-
83 ive *view, prove the direct contrary, I am compelled, painful as it is, to differ in opinion from my worthy brethren, and to give my reasons for it.

Domestic precedents appear to me to stand thus:

It is said, that no case has been determined upon this point in the former General Court, nor do I recollect one.

In that court, since the revolution, one is mentioned; that of Pride v. Hill, which was an ejectment in the Borough Court of Petersburg; for a lot in that town. The demise was laid to be made in the town, of a lot of ground situated there.—The plaintiff had a verdict and judgment; but, upon an appeal to the General Court, it was reversed; because it was not alledged, to be within the jurisdiction. This was said to be a leading case, in consequence of which, other cases were uniformly decided the same way; but the names or number of them was not stated: and if there were error in that case, which was a local action for a house in town, perhaps within the view of the court or jury, when trying the cause, there could be little doubt in a transitory action, where those words were omitted.

In the District Courts, where the same judges act separately, we find they are not uniform in their decisions upon the point; The judgment in Medtard v. Skipwith being different. But how comes this court to be bound by precedents of the General Court, (however respectable they may be) whose judgments this court are authorised to control? If so, and they have erred but once, we may correct it; but if they have repeated it, shall it cease to be error?

In Picket v. Claiborn, this opinion did not prevail. The General Court reversed the judgment in that case, because there was no declaration, although there was a confession of judgment. This court, tho' forty similar precedents were mentioned, reversed their judgment.

This question is placed upon the authority of English precedents. I shall presently consider those cases at large, but let us first enquire how far we are bound by their authority. The ordinance of the convention in 1776, declares all the statutes of England prior to the 4th of James 1st, which were of a general nature, applicable to Virginia, and not local to that country, to be in force here.

Applying the principle of that ordinance to the force of precedents from thence, if it shall appear, that the rule now contended for (admit its existence) grew out of
84 the local situation *of the inferior courts in that country, and was grounded upon considerations in which ours totally differ from theirs, then the precedents cannot bind us.

The courts of inferior jurisdiction in that country are various, and differ much in the nature of their constitutions.

1st, The Spiritual Courts, limited by the subject in dispute, to matters of a spiritual nature.

2d, The Admiralty Courts, confined to cases arising upon the high seas—mariners may sue for their wages in the common law courts, their contracts being made on land; but they may and generally do sue in this court, because here they may all join, and charge the ship.

3d, The County and Sheriff's courts, limited to the county, and to suits of the value of 40s.

4th, The Marshalsea Court, limited to residence within twelve miles of the palace.

5th, Corporation Courts, Royal Franchises, and Courts of Manors, all confined to residence within the jurisdiction.

6th, The Pie Powder Courts, limited as to time; the persons and subject of dispute which must arise during the fair between parties attending there.

These courts and many others, which it would be too tedious to enumerate, derive

their existence from different sources—Prescription, Charters, and acts of Parliament, &c. Again, they differ as to the manner in which their judgments are controled, either before or after they are rendered.

Before:—As 1st by plea to the jurisdiction; or 2d, by a prohibition from a Superior Court.

After: 1st by writ of error; in cases where such writs lie:

2d By prohibition: where error does not lie, as to the admiralty and Ecclesiastical Courts.

3d By writ of false judgment to the Base Courts: but to what Courts they apply that base term, I cannot say with accuracy.

In this complex view of the inferior jurisdictions, it would have been difficult in declarations, to describe the various circumstances on which the jurisdiction depended. It therefore became a practice, founded in convenience and propriety, to alledge in the declaration, that the cause of action arose at such a place, within the jurisdiction of the court.

In Virginia, we have no Courts, deriving their origin from Prescription, or Charter. They are all created by the legislative acts, defining their powers, and their juris-
85 dictions. The *true criterion of distinction between our superior and inferior courts, seems to be appellate jurisdiction: placing the District Courts and all above them, in the first class; and in the latter the County and Corporation Courts; coupled together in principal; and referred to, as in the same predicament, in the laws allowing appeals, which sometimes use the expressions "from the County and Corporation Courts" at other times "the county and other inferior courts."

Their jurisdictions are described in the same words, as to limits, tho' not as to extent. These words "within the jurisdiction" have never been used, or considered as necessary, in the former.—It is sufficient to alledge the cause to have arisen in the county.—I cannot therefore conceive, why those words should be necessary, to bring the cause within the prescribed jurisdiction of the Corporation Courts.

But let us now suppose that these courts are like to inferior Courts in England:—it will be found (I conceive) that the precedents are misunderstood. I have said, that the form of the declarations there, were founded in convenience and propriety. But that ever a judgment was there reversed, because those precise words were omitted, if a place was alledged, remains I think not only to be proved, but the contrary is to my mind evinced by the cases produced, if the principle of them, instead of the sound of the reporters words be attended to.

I state this as a fact—that in all the cases relied upon, no place was laid at which the gist (as they call it) of the action arose. And from hence, I infer, that the decisions in those cases turned upon the want of a venue, which was not to be presumed in inferior courts, nor did the statute of Jeofails, which cures the want of it, extend to those courts. But do not those statutes extend to Corporation Courts here?

1 Sand. 73 is referred to as a leading case. But the error in that was, that no place was laid for the delivery of the goods. In 2 Lev. 87. no place was alledged as to the sale and delivery, and the decision clearly turned upon the want of Venue. 1 Ventr. 2, is liable to the same observation—no place was laid—for tho' the demise was laid at Middle-row, the declaration did not state, where Middle-row was. Ib. 72. Bernard and Bernard—it did not appear where Hull Bridge was. 2 Ld. Ray, 1310, the declaration does not alledge where the pond was. Durn. and East. 151. It is not stated that the money was had and received there. In 2 Wils. 16, if it had been stated that the goods had been delivered at Aylesbury, the judgment I think
86 *would have been different. But as to these cases my position that they turned upon the want of venue, is deduced by inference only.

Other cases plainly prove to my mind the solidity of the distinction.

Bernard v. Bernard 1 Vent. 72, is no authority either way, as the cause finally went off, the court being divided. Waldock v. Cooper, 2 Wils. 16 before mentioned, produces in my mind irresistible conviction, that if the declaration had alledged the goods to have been delivered at Aylesbury, it would have been good, without expressly laying it, to have been within the jurisdiction of the court.

Lancaster v. Lovelace 12 Mod. 536, is directly in point, the declaration alledged the cause of action to have arisen at Canterbury.—On a writ of error it was objected, that it did not appear, that the jurisdiction was co-extensive with the city: an objection which could not be made here. But it was said, the defendant by coming in, and answering, had waived the advantage. This proves the principle I am endeavouring to support; that if a place be laid, and there be no plea to the jurisdiction, it is too late after judgment, to question the jurisdiction. In Hardwicks cases 116 there is one, in which the question was, whether the residence of the party, on which depended the jurisdiction, was defectively alledged (which is the most that can be urged in this case) so as to have been good on a demurrer. Yet after verdict, it was presumed to have been proved. Mr. Marshall in this case distinguished between the original judgment of amercement, and the action of debt upon the judgment. At the time, I thought there might be some weight in this argument, but it does not now appear to me a sound one. The words, good on demurrer and the proof presumed, must respect the new action, and not the amercement; from the conclusion of the judges, that without such proof, the amercement would have been coram non judice, and void: therefore no debt.

It is laid down in 2 Ventr. 333, that a party shall never be allowed to assign for

error, that which he might have taken advantage of by pleading.

The modern cases all run in a train of presuming every thing after a verdict, according to the spirit of the statute of Jeofails. They further prove to me, that all the cases cited, turn upon the want of a venue, which the statutes of Jeofails do not cure in proceedings in those inferior courts, and by no means upon the want of those particular words.

87 *Since then the precedents are founded on reasons applicable only to the nature of inferior courts in England, (in every respect unlike to our Corporation Courts,) to which our act of Jeofails does certainly extend, as well as to the County Courts, the principle of presuming every thing after verdict, which might have been proved, remains in cases of this sort, as in others, uninfluenced by those precedents.

Would it not be strange, that after a fair trial, where the defendant waived all exceptions not connected with the merits, when if they had been well founded, he might have availed himself of them; and after a jury has assessed the damages sustained by the injured party, a superior court shall declare, that for the want of a few cabalistical words, which, if inserted, every man of common sense would pronounce to be tautologous, the plaintiff shall not have the effect of his judgment? I say tautologous, because if the cause of action arose in the city, the law declares it to be within the jurisdiction of the court.

However, the other judges are impressed with a different view of the subject, and are of opinion that the judgment of the District Court is right. After having discharged my conscience, I shall acquiesce in the opinion and not stir the question again, unless the other judges should, on any future occasion, wish to reconsider it.*

Judgment of the District Court affirmed.

David Ross v. Erasmus Gill and Sarah, His Wife.

April Term, 1792.

Guardian and Ward†—Lease of Ward's Lands—Payment of Rent.—A guardian may lease the lands of his ward, during infancy, if the guardianship so long continues, and may reserve the rents to the ward or to himself: and payment of the rent, in either case, to the guardian, would be good.

Debt for Rent—Verdict—Judgment‡—Release.—In debt for rent, the debt was for 490l., the debt in the declaration mentioned, and 130l. 19s. 3d. damages. Judgment for the same to be discharged by the payment of 420l. The latter is no part of the judgment, and is to be considered as a release of the difference.

Nonsuit—Right of Court to Direct.§—The court may recommend a nonsuit, but cannot direct it to be entered, against the will of the plaintiff.

Evidence—Province of Jury.‖—The jury, and not the Court, are to decide on the weight of the evidence.

Debt for Rent—Plea—Nil Debet.—If the tenant has enjoyed the land uninterruptedly under the lease, the plaintiff is entitled to recover, whether he had a title to the land or not.

This was an action of debt determined in the District Court of Petersburg in favor of the appellees, the plaintiffs in that court. The declaration demands £490, and contains two counts. The first states that Lucy Newsum, the guardian of the female plaintiff, then an infant, and unmarried, did demise the premises for which the

88 rent is *claimed, whereof the said Sarah at that time was seized in her demesne as of fee to the said Ross, to hold from the first day of January 1776, till the said Sarah should marry or attain the age of 21 years which ever should first happen; yielding to the said Sarah £70 a year.—It states the entry thereupon and enjoyment for eleven years:—"that afterwards, to wit on the first of June 1786 the said Sarah being still an infant, intermarried with the said Erasmus, and £490, for the rent for 7 years ended the 1st of January 1787, to the said Erasmus, and Sarah, after the demise of the said premises to the said

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*In the fall term of 1792, the case of Winder v. Eddy, was decided upon the same principles. The suit in that case was brought in the corporation Court of Fredericksburg: The declaration was headed, "corporation court of Fredericksburg, to wit:" and laid the cause of action and assumpsit "at the corporation aforesaid," but the words within the jurisdiction of the court were omitted. —Note in Original Edition.

†**Guardian and Ward.**—See monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 308.

‡**Debt for Rent—Verdict—Judgment.**—The principal case is cited in *foot-note* to Johnson v. Jennings, 10 Gratt. 1; Lewis v. Long, 3 Munf. 158; Cooke v. Wise, 3 Hen. & M. 487, 497; Eib v. Pindall, 5 Leigh 118; Northwestern Bank v. Fleshman, 23 W. Va. 328. See monographic *note* on "Debt, The Action of" appended to Davis v. Mead, 13 Gratt. 118; monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

§**Nonsuit—Right of Court to Direct.**—For the proposition that the court may recommend a *nonsuit*, but cannot direct it to be entered against the will of the plaintiff, the principal case is cited in Gunn v. Ohio River R. Co., 36 W. Va. 176, 14 S. E. Rep. 468. See also, Thweat v. Finch, 1 Wash. 217; monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

‖**Evidence—Weight—Province of Jury.**—For the proposition that the jury, and not the court, are to decide upon the weight of the evidence, the principal case is cited in the following: Blincoe v. Berkeley, 1 Call 412; *foot-note* to Bogle v. Sullivant, 1 Call 561; Moore v. Chapman, 3 Hen. & M. 266; Brooke v. Young, 3 Rand. 114; *foot-note* to Grayson v. Com., 6 Gratt. 712; *foot-note* to M'Dowell v. Crawford, 11 Gratt. 377; Whitelaw v. Whitelaw, 83 Va. 43, 1 S. E. Rep. 407; State v. Hurst, 11 W. Va. 75; Nicholas v. Kershner, 20 W. Va. 263; State v. Thompson, 21 W. Va. 756; State v. Heaton, 23 W. Va. 793; Gwynn v. Schwartz, 32 W. Va. 494, 9 S. E. Rep. 883; State v. Morgan, 35 W. Va. 273, 13 S. E. Rep. 389; Neill v. Rogers Bros., etc., Co., 38 W. Va. 231, 18 S. E. Rep. 564; State v. Musgrave, 43 W. Va. 678, 28 S. E. Rep. 816; Lloyd v. Scott, 15 Fed. Cas. 726. See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

David, and after the espousals between the said Erasmus and the said Sarah celebrated, —were in arrear and yet are &c. whereby action accrued to the said plaintiff, &c. Nevertheless the defendant hath not paid &c."

The second count states a demise made by the plaintiff Sarah who was then a feme sole, of other lands to the defendant, to hold so long as both parties should please, yielding the yearly rent of £70.—also the enjoyment thereof for eleven years by the defendant—the marriage of the plaintiff, and the same sum of £490 in arrear and unpaid "whereby action accrued to the plaintiffs, &c. nevertheless &c." the damages are laid at £800. Plea, owe nothing.

At the trial, a motion was made by the defendant, for a nonsuit; which the court refusing to direct, a bill of exceptions was filed, stating, that the plaintiffs gave in evidence a memorandum in writing, signed by Joseph Jones, in behalf of one Lucy Newsum, bearing date the 27th of January 1776, in these words to wit: "That David Ross shall occupy and possess the houses and plantations belonging to the estate of Peter Jones, from 1st of January 1776, until the heir shall marry, or come to age; but be at liberty to give it up, at the expiration of any of the years, giving three months previous notice; to pay £70 per annum; to leave the plantation in tenantable repair; to commit no abuses in cutting fire-wood, nor get more rails than necessary to repair the fences from time to time. Should the heir when of age, or married, want the said houses and plantation, to give the like notice of three months, before the expiration of the year; otherwise the said David to remain in possession, till the ensuing year, on the aforesaid terms:" That the plaintiffs also proved by a witness, as well as by letters of the defendant, that a verbal contract was entered into between the mother of the plaintiff with the defendant, as stated in the declaration, of which the defendant took the above memorandum, written
89 by *himself, and signed by Joseph Jones: That in pursuance of the agreement aforesaid, the defendant entered into, and was possessed of the demised premises, but that they produced no proof of any contract between the plaintiffs and the defendant, other than as above, or that the memorandum aforesaid was ever assigned to the plaintiffs, otherwise than as stated in the declaration: and this being the only evidence in the cause, to prove the terms on which the defendant held the lands, or to support the claim for rent; the defendant moved for a nonsuit, &c.

The jury find that the defendant "doth owe the debt in the declaration mentioned," and assess the damages to £130: 16: 3.

The judgment is, that the plaintiff recovered against the defendant £490, the debt in the declaration mentioned, and their costs, but to be discharged by the payment of £420, together with the damages aforesaid and the costs.

The PRESIDENT.—A doubt was started at the bar whether two counts could properly be laid in debt for rent; at least without demanding the amount of the two rents claimed in both counts. But a precedent of a similar kind was produced, and as the record states that no evidence was given on the second count, the court are satisfied that that count may be thrown out of the case as mere surplusage.

An objection was made, that the verdict finds that the defendant owes the debt in the declaration mentioned; and there being two counts for the same sum, there is nothing to guide the court in referring the finding to the one or the other.

The bill of exceptions furnishes an easy answer to this objection, by stating that no evidence was given upon the second count, and that full evidence was given upon the first. Of course the verdict obviously refers to that, to which the testimony applied, and considering each count as a distinct declaration, the expression is by no means doubtful or improper, particularly as the second count appears to have been abandoned by the parties.

The court were certainly right in rejecting the motion which was made; as we are of opinion that they had no power to direct a nonsuit, however destitute the plaintiff might be of a right to recover. They may advise it, and may direct the plaintiff to be called; but if he refuse to suffer a nonsuit, the court can no otherwise protect and enforce their opinion, but by awarding a new trial, in case the jury have found against their direction. Consequently a refusal in the court to direct a nonsuit, cannot be a ground of exception.

90 *If the court admit improper evidence, an exception may be taken to their opinion; but if the question depend upon the weight of testimony, the jury, and not the court, are exclusively, and uncontroulably the judges.

This question then must turn upon the whole evidence, as well the parol as the written. The plea is nil debet; and it was insisted at the bar, that nil habuit in tenementis could not be given in evidence —This is a point which need not be now decided, since the lessee having uninterruptedly occupied and enjoyed the land; he cannot avail himself of a want of title in the plaintiff, if the fact were, that she had none; it would have been otherwise if eviction had been proved.

But the bill of exceptions, tho' it does not set forth the parol evidence at large, states generally the weight of it, and that it proved a parol demise as laid in the declaration. This aided by the verdict, sufficiently establishes the title of Sarah, to the premises, and the demise of them, by her guardian, to the defendant.

There is no doubt but that a guardian may lease the lands of the ward during infancy, if the guardianship so long continue: and in this case, the demise being from year to year, if another guardian had been appointed, the term would have ceased.

The reservation of the rent to the infant was proper, and cannot be likened to the case of a reservation to a stranger: for the inheritance being in the ward, there is a privity between her and the lessee, and therefore there is no doubt of her right to maintain an action of debt, to recover the arrears of rent. It is true that the guardian may, by a lease in writing, reserve the rent to himself to cover advances which he may make for the use of the ward; and in that case the action must be brought in his own name, unless he assign the lease to the ward. The reason why the ward cannot in such a case maintain the action is, that, as he must declare upon the written lease, there would be a variance between the allegation, and the proof. But in either case, there is no doubt but that a payment of the rent to the guardian, during the continuance of the wardship, would be a good discharge of the tenant for so much.

We find no error therefore until we come to the entering up of the judgment. The verdict is for £490 the debt in the declaration mentioned and £130: 16: 3, damages and costs. The judgment is for the same, but to be discharged by the payment of £420.

91 *This latter part we do not consider as being any part of the judgment, but merely surplusage. For as there is no penalty in the case, the law does not warrant such an entry.

As the plaintiffs do not complain of this reduction, we consider it as a release of so much by them, and as it is for the benefit of the defendant, he cannot object.

Judgment affirmed.

Bibb v. Cauthorne.

April Term, 1792.

Sheriff's Bond—Obligee.*—The proper obligee in the Sheriff's bond is the Commonwealth.

Same—Action on—Judgment.†—In an action upon a Sheriff's bond in the name of the Commonwealth, for the benefit of a person aggrieved by the misconduct of the Sheriff, the judgment should be entered for the penalty, to be discharged by the payment of the damages assessed and costs, "and such other damages as may be hereafter assessed upon suing out a scire facias, and assigning new breaches, by the said [Cauthorne,] or any other person or persons injured."

This was an action of debt brought in the name of the commonwealth for the benefit of Mrs. Cauthorne, against William Bibb, Richard Bibb and John Watson, upon a bond executed by them, the former as sheriff, the two latter as his securities. The breach laid in the declaration is, that the said William Bibb did execute two writs of fieri facias issued from the County Court of Essex, upon judgments obtained there by A. R. against the said Cauthorne, notwithstanding two writs of supersedeas to the said judgments, had been obtained by the said Cauthorne directed to the said William Bibb, and which were tendered to, and refused by him before the service of the said execution; and for selling the goods of the said Cauthorne upon the said executions, in contempt of the said two writs of supersedeas, although there was manifest error in the said judgments, which the same would have reversed; whereby action accrued to the commonwealth for the benefit of the said Cauthorne to demand the penalty of the said bond.

The writ against William Bibb being returned "no inhabitant" the suit abated as to him, the other defendants plead conditions performed. A verdict was found, that the defendants had not performed, but had broken the condition of their bond, and assessed the damages for levying the executions in the declaration mentioned, in contempt of the said two writs of supersedeas to £260.

The judgment of the court is, "that the commonwealth recover against the defendants for the benefit of the said Cauthorne £1000 (the penalty of the bond) and the costs, but to be discharged by the payment of the damages aforesaid, and such other damages as may be hereafter assessed, upon suing out a scire facias and assigning new breaches."

From this judgment the defendants appealed.

92 *The PRESIDENT. It was objected by the defendant's counsel, that this action ought not to have been sustained, the bond having been made payable to the commonwealth, instead of the justices, as required by the ordinance of convention passed in 1776, Ch. 5, Sec. 8, which gives the remedy to individuals injured by a breach of it.

If the counsel had been correct in his premises, his conclusion would have been right; but there was at the time of passing this ordinance, a prior subsisting law of 1748 amended by another in 1753, which directed the giving of bonds of this sort, payable to the king, and pointing out the same remedy to individuals, injured by a breach of them. This law amongst others, was by the same ordinance of convention declared to be in force, and the legislature in 1782 considered it as being in force, by referring to and repealing part of it.

***Sheriff's Bond—Validity.**—On the question of the validity of a sheriff's bond, the principal case is cited in Winslow v. Com., 2 Hen. & M. 464, 466. See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

†**Same—Action on—Judgments.**—For the proposition that, in an action upon a sheriff's bond, for misconduct of the sheriff, judgment should be entered for the penalty, to be discharged by payment of the damages assessed and costs, and such other damages as may be hereafter assessed upon suing out a *scire facias*, the principal case is cited in Newell v. Wood, 1 Munf. 556; Gordon v. Justices, 1 Munf. 8; Smith v. Cooper, 6 Munf. 405. See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

The bond in question, pursues the form of those laws, substituting the commonwealth for the king.

Upon the merits the plaintiff is right; but the court is of opinion that there is error in the judgment, in attaching the recovery to Catharine Cauthorne as to future injuries, excluding all others.

The judgment therefore must be reversed for this error, and entered, "that the commonwealth recover against the defendants the said sum of £1000 and the costs, but to be discharged by the payment of the damages by the jury assessed for the benefit of Catharine Cauthorne, and the costs, and such other damages as may be hereafter assessed upon suing out a scire facias and assigning new breaches by the said Catharine, or by any other person or persons injured."

Taylor v. Dundass.

April Term, 1792.

Execution Book—Entries—Effect as Evidence.—The execution book kept by the Clerk is prima facie evidence of the truth of the entries made in it; but it may be contradicted by other evidence.

Executions—Replevy Bond—Right to Sue Out Second Execution While Bond in Force.*—An execution being levied upon the property of one defendant, and a replevy bond taken, a second execution against the other defendant cannot issue so long as the replevy bond is in force, it being a satisfaction of the original judgment.

The case was this: Dundass having obtained a judgment against Hendricks and Taylor, an execution was taken out at the request of Taylor, who was only a se-
93 curity, in order *that it might be levied upon the effects of Hendricks, who was about removing with his property from this state. It was issued without the knowledge or permission of Dundass, but with the consent of a gentleman, who had been counsel for him in the High Court of Chancery, upon an injunction, obtained by Hendricks, to the judgment at law. The execution was served upon the property of Hendricks, and a replevy bond taken. The security being entirely insufficient, Dundass sued out another execution with a direction to levy it upon the property of Taylor only; and upon a motion made by Taylor in the County Court, where the judgment was rendered, to quash the last execution, this question came on. The judgment of the County Court is, "that the execution be quashed, it appearing to have issued illegally."—Sundry exceptions being taken, the cause was carried by supersedeas before the District Court, where the judgment of the County Court was reversed, from which an appeal was granted to this.

The PRESIDENT. The motion made in the County Court, as well as the grounds of the courts opinion, are imperfectly stated in the record; and had nothing else appeared, perhaps it might not have been sustainable. But, as the short entry of the motion and judgment was probably occasioned by the bill of exceptions stating the whole evidence, if from thence it appears, that a second execution issued, and was levied, after a former one had been issued on the same judgment against the same party, returned, "levied on slaves and a replevin bond taken"—the ground of the courts opinion will sufficiently appear, to enable a superior court to judge of its propriety.

The first execution is set forth, dated November 18th 1789, returnable to January court, and directed to the sheriff of Cumberland County. The return dated the 23d November 1789, is "levied on Peter, &c. and replevied for twelve months, J. Hendricks security."

The second execution does not appear in the record, nor the date of it; except, that it is stated in the petition for the supersedeas, to have been issued April 29th 1790, against Hendricks and Taylor, and to have been served on Taylor's property only—and that this was the execution which Taylor moved to quash, and which was quashed in June 1790.

The time of the first execution being returned (on which the question as to the propriety of issuing the second will turn) is no otherwise ascertained, than by the date of the return; which I suppose (as expressed) is the day on which it was levied.

94 *It was for this purpose, I presume, that the execution book was referred to, where, I suppose, the clerk enters the time of the return; otherwise, I can see no reason for referring to it at all, as the first execution with the return on it, was before the court.

***Executions—Replevy Bond—Right to Sue Out Second Execution While Bond in Force.**—In Ward v. Vass, 7 Leigh 148, it is said: "A replevy or forthcoming bond, so long as they are in force, are a satisfaction of the judgment, and no new execution can issue until they are quashed. And, in like manner, where an execution which is valuable, such as an *elegit*, *levari facias* or *fieri facias*, has been executed on the estate of the defendant, a new execution can never issue on the same judgment, until the first execution is quashed. (*Taylor v. Dundass*), 1 *Wash.* 95." See also, citing the principal case, Winston v. Whitlocke, 5 Call 437; Quinling v. Com., 2 Va. Cas. 497; Com. v. Hewitt, 2 Hen. & M. 185; Randolph v. Randolph, 3 Rand. 492; Garland v. Lynch, 1 Rob. 560.

Same—Quashing.—In Reinhard v. Baker, 13 W. Va. 809, it is said: "In Hendricks v. Dundass, 2 Wash. 50, the court quashed an execution some two or three years after the return day of the execution, as will appear by this case in connection with *Taylor v. Dundass*, 1 *Wash.* 93. This practice of quashing an execution after return day, is incidentally recognized, and impliedly approved, in Claiborne v. Gross, and Wimbish v. Gross, 7 Leigh 344, and in Beales' Adm'r v. Botetourt Justices, 10 Gratt. 282." See also, citing the principal case, Windrum v. Parker, 2 Leigh 367; Hendricks v. Dundass, 2 Wash. 50, and *note*. See monographic *note* on "Executions" appended to Paine, Surv., etc., v. Tutwiler, 27 Gratt. 440.

The bill of exceptions presents four questions, propounded to, and decided by the court. The first is a general one: Is the execution book a record, not to be contradicted by parol proof? The court decided in the affirmative. The nature, and tendency of the parol proof, not being stated, it is difficult to decide the question, as a general one either way. That the execution book, directed by law to be kept by the clerk, becomes part of the records, seems generally true. But, as in this instance, the time of returning an execution, is entered by the clerk in his office, without any writing to direct him, and as he might make a mistake in his entry, although prima facie it will be presumed right, it would seem too rigorous to preclude a part from denying the truth of the entry, if made out by clear proof.

Suppose a case of a motion to fine a sheriff for not returning an execution in time: the execution book might be received, as prima facie evidence, to prove the time of the return, liable to be contradicted by other proof. However, as no evidence is stated in this case to have been offered, to prove a mistake in the entry, I conclude that the question is stated as a general one, relative to the particular evidence spread upon the record.

The second question is: whether the defendant might be admitted to prove, by any evidence less than record, that the first execution was not issued by the order of Dundass, or his attorney? This is decided by the court in the negative.

The third point made, was: whether the defendant might be at liberty to prove, that Taylor undertook the management of the first execution, which was, by his agent, unduly served, and unfairly executed; so as to deprive the defendant of the benefit thereof? the court thought such evidence inadmissible, and not to be heard.

The fourth question was: whether the second execution ought to be quashed, being levied only on Taylor's estate, and it not appearing that Dundass had received any part of his judgment, or any satisfaction therefor, from the said Hendricks and Taylor, or from any other person? This was decided in the affirmative. Whether the evidence, offered to be given, was admissible or not, as contradicting a
95 record, was *entirely immaterial, and did not tend to oppose the motion for quashing the second execution. It might have afforded good ground for quashing the first execution, or might have entitled Dundass to a suit against Taylor for his conduct, but it could not warrant the issuing of the second execution, where a former one had been returned levied, and continued at that time in force, unquashed.

As to the fourth question, it is made a point: Whether the first execution being returned levied, was a bar to the second, if no actual satisfaction was made on the first. The replevy bond is the same as if the estate had been sold to the amount of the debt; and though it is an indulgence given to the defendant, still the execution is considered as levied, and the judgment discharged.

According to the English authorities, if a motion be made to quash a second execution, or a writ of scire facias issue, to have execution, after service on one defendant; if the first execution be valuable, as an elegit, levari facias or fi. fa. executed on the estate of one, a new execution can never issue on that judgment, whatever becomes of the estate, unless the first execution be quashed; but it is otherwise in case of an execution against the body; for that is not a satisfaction, but only tends to satisfy.—But in that case, whilst the body is in custody, a new execution cannot issue, and the question can only come on, when an escape or death happens, or when the party is discharged by taking the oath of an insolvent debtor. The distinction is taken in Blumfield's case, 5 Co. Rep. and many others, and I believe no case lays it down, that a second fi. fa. can issue on the same judgment against several defendants, if upon the first, a sufficiency of goods had been taken, no matter to which of them they belonged.

In the case of Dykes against Mercer, cited in 2 Ld. Ray. 1072, two were bound in a bond jointly and severally, and judgment obtained in a separate suit against one. A fi. fa. issued, and a seisure to the value returned; but the property was not sold, nor the money paid. To a second action brought against the other obligor, this matter was pleaded in bar; but determined against him, nothing but actual satisfaction by the other obligor being sufficient to discharge him. In this case, both the obligors might have been sued separately at the same time, and judgments obtained against each for the whole, but the plaintiff could receive but one actual satisfaction.

96 *The case of Hayling against Mullhall, 2 Blac. Rep. 1235, is decided upon the same principle: to wit, that the holder of a bill of exchange may sue a subsequent endorser, notwithstanding an ineffectual execution against a prior endorser. In that case, there was no doubt, as the execution was against the body, which was rendered ineffectual by being discharged by the plaintiff.

The court say in that case, that the remedy still remains in force (after the death or discharge of the defendant) against every other endorser, notwithstanding the ineffective ca. sa. in like manner, as if the plaintiff had sued out an unproductive fi. fa. I understand the court to mean by this expression, an execution on which no goods are taken.

Upon the whole, we are of opinion that the judgment of the District Court is erroneous; the evidence offered by the appellee, tending to prove that the first execution was issued and executed improperly, though if true, it would have been a good ground for quashing the first execution, if the appellee had made a motion for that purpose,

yet it did not apply in opposition to the quashing of the second execution, which issued after the first was returned executed, and remained in that state: for we think, that under the act of Assembly, a bond to replevy, whilst the execution remains unquashed, is as complete an execution of the judgment, as if the estate had been sold to the full amount of the debt, and the party is left to pursue his new remedy upon the bond.

Judgment of the District Court reversed and that of the County Court affirmed.

Kennon v. M'Roberts and Wife.

April Term, 1792.

Wills—Construction—Devise without Words of Inheritance—Residuary Clause*—Case at Bar.—R. M. seised of three tracts of land, and entitled to the equity of redemption in a fourth, made his will in 1743, and after declaring that, as touching his temporal estate, he desires the same may be employed as follows: directs, in the first place, that all his just debts shall be paid. He then devises to his eldest son, all his lands at O. and F. with some negroes and stocks. To his other son, all his lands at C. with other negroes and stocks. To his wife and daughter he gives all the rest of his estate real and personal (saving one negro, by name, whom he gives to his second son) but no words of inheritance are annexed to any of the devises. The inheritance in the land devised to the heir at law, descended upon him, and did not pass under the residuary clause.

Same—Same—Same.—In a general devise of lands, without limitation or restriction, the reversion will not pass under a general residuary clause, but will descend to the heir.

This was an ejectment brought by the appellees to recover a tract of land called Ochaneachy island in which the following case was agreed.

That Robert Mumford was in his lifetime seized in fee of the lands in dispute, called Ochaneachy island, of another tract called Finney wood, and of another
97 called Cargills. That he *was also seized and possessed of, and entitled to, the equity of redemption in a tract of land called Whitehall on Appamatox, containing 711 acres, which it is agreed was at his death of greater value than the Ochaneachy and Finney wood lands,—what other estate he possessed, or what debts he owned is not stated, except what was due on the mortgage of the Whitehall estate to Theophilus Field.

That being so seized and possessed, the said Robert Mumford made his last will bearing date the 8th of September 1743, and after the usual clauses respecting his soul and body, he adds "as touching my temporal estate, my will and desire is that it shall be employed and bestowed as hereafter, in this my will, is expressed."

"Item: I will that all my debt I owe in right or conscience, shall be paid by my executors, within convenient time after my death."

"Item: I will and bequeath to my son Robert Mumford (his heir at law) all my lands at the Ochaneachy island, also all my lands of Finny wood, with six negroes (by name) and ten horses and mares."

"Item: I will and bequeath to my son Theoderick all my lands at Cargills on Roanoke River, containing 690 acres, with two negroes; Sam at Roanoke, and Jack at Rowanty, also ten horses and mares."

"Item: to my well beloved wife, and only daughter Elizabeth, I will and bequeath all the rest of my estate real and personal saving one negro girl to my son Theoderick."

And appointed his wife, Theophilus Field, and Theoderick Bland his executors.

That he died in the year 1745 leaving his said widow and children before mentioned, and that the will was proved and admitted to record.

That Robert and Theoderick entered into the lands to them respectively devised, and they, and those claiming under them, continued in possession, till their several deaths.

That Theoderick died in 1772 and Robert in 1783, that the latter was aged about eight years at the time of his father's death.

That Ann the widow died in 1770; the daughter Elizabeth (now wife of the lessor of the plaintiff) surviving, and that no partition or severance was made between them.

The proceedings in a suit in chancery brought by the widow and daughter, to redeem the Whitehall estate is agreed, as also the payment of £830: 16: 4 on that account.

98 *That the widow (who after her husbands death intermarried with —— Currie) and daughter with their husbands, in 1770 conveyed the Whitehall estate to Theoderick Mumford in fee, for the consideration of £1000, reserving the use of a moiety of the land, with the houses thereon to Mr. Currie and his wife, and to the survivor for life, and afterwards half that moiety to Mrs. M'Roberts, during widowhood, upon the contingency of her becoming a widow.

***Wills—Construction—Intention.**—See, citing the principal case on this question, the following: Wilkins v. Taylor, Wythe 345, 350, 352, 353; Cole v. Clayborn, 1 Wash. 265; Horde v. McRoberts, 1 Call 337; Watson v. Powell, 3 Call 308; Smith v. Chapman, 1 Hen. & M. 291; Ambler v. Norton, 4 Hen. & M. 44; Wyatt v. Sadler, 1 Munf. 541, 542, 543, 545, 546; Johnson v. Johnson, 1 Munf. 552, 553; Minor v. Dabney, 3 Rand. 209; Goodrich v. Harding, 3 Rand. 282, 284, 285; Miars v. Bedgood, 9 Leigh 377; Wootton v. Redd, 12 Gratt. 205, and *note*; Hooe v Hooe, 13 Gratt. 247, 255; *foot-note* to Tebbs v. Duval, 17 Gratt. 349; Markells v. Markells, 32 Gratt. 556; Stonestreet v. Doyle, 75 Va. 368; Carr v. Effinger, 78 Va. 206; Cole v. Cole, 79 Va. 255; Randolph v. Wright, 81 Va. 612; East v. Garrett, 84 Va. 537, 9 S. E. Rep. 1120; Wallace v. Minor, 86 Va. 556, 10 S. E. Rep. 423; Hall v. Palmer, 87 Va. 356, 12 S. E. Rep. 618; Hurt v. Brooks, 89 Va. 500, 16 S. E. Rep. 358; Graham v. Graham, 4 W. Va. 322; Irwin v. Zane, 15 W. Va. 653. The principal case is reported with a note in 1 Am. Dec. 428.

The District Court of Brunswick gave judgment for the plaintiffs from which the defendant appealed.

The PRESIDENT delivered the opinion of the Court.

The principal questions made in this cause were: 1st, what estate the sons Robert and Theoderick took in the lands devised to them: whether in fee simple or for life only? If the former, then the appellees have no title; if the latter, then

2d Whether the reversion in those lands passed under the residuary clause to the wife and daughter, or was undisposed of, and descended to the heir; and this latter supposition if true will be equally fatal to the title of the appellees.

For the appellant it is insisted that the fee passed to the sons.

1st Because the testator's debts are by the first clause in the will, charged upon the lands, and that this is sufficient to enlarge an estate, not given expressly for life, into a fee. That justice requiring, that all a man's property should be subject to the payment of his debts, slight words in a will, are sufficient to create a charge upon lands for this purpose, where the debts cannot otherwise be paid: cases cited Cas. Temp. Talb. 110 Prec. Ch. 430.

If this were a case between creditors, and the devisees of the lands, I think that such a construction would be made.

But a charge which is by construction to give a fee in lands devised, seems to stand upon other ground. It must be direct charge of a sum in gross, either upon the lands devised, or upon the person of the devisee, however small the sum may be; for life being precarious, it might end before any part of the money were raised, so as to render that onerous, which was intended to be beneficial to the devisee. 3 Burr. 1533—1618 Cowp. Rep. 352.

If the money charged be to be raised by rents and profits, or if the land be made liable only upon the event of the personal estate becoming deficient, a fee will not be created; because in neither case can the devisee be a loser by taking an estate for life. 3 Cowp. Rep. 236.

99 *The will now under consideration directs the testator's debts to be paid by his executors, without prescribing the mode, and contains no words exempting the legal fund, and charging them upon the lands or upon the persons of the devisees—so that the residuary estate is alone burthened with them, and the lands in question can only be resorted to, as an auxiliary fund, to make up the deficiency—and as an application for that purpose could only be made by the creditors, there seems to result from considerations of this sort no necessity to create a fee in the devisees.

2d, It is insisted that a fee was intended to pass, because in the preamble of the will, the testator declares an intention to dispose of his whole estate; and when he devised lands to his sons generally, without limiting the duration of their tenure, he meant to give it absolutely. That if so, the court, rather than disappoint that intention, will carry the word estate, from the preamble, to each devise, so as to make the clause in question read thus: "as to my estate in the land at Ochaneachy, I give it to my son Robert," &c.

The counsel on the other side admit, that the testator's intention is to be the rule of decision; but with this restriction, that it is to be collected from the words of the will itself—and that it must consist with the law and settled rules of construction: that the rule, in common law conveyances "that where lands are conveyed without limiting any estate, they only pass for the life of the grantee," extends equally to wills, unless the testator use some words expressing his intention to pass a larger estate: that none such are to be found in this will, unless it be the word estate, in the preamble; which cannot have that effect, according to a late determination in the case of Wright and Wright &c., 3 Wils. 414.

To discover what is comprehended in the residue, we must view and discuss the preceding bequests, to ascertain what he has disposed of, and what remains undisposed of, for the word rest to act upon. But I would first premise, that we disclaim all legislative power to change the law, and only assume our proper province of declaring what the law is: we disclaim all authority to mould testator's will into any form which fancy, whim, or worse passions might suggest; we regard his own words, and compare them with his circumstances, and the relative situation of the devisees. So far we approve of Mr. Fearne's general reasoning, tho' we may not accord with him in another assertion: namely, "that legal rules of construction ought not to yield to the intention of ignorant testators:" since it is on account of that

100 ignorance, *that their words are to be taken in the sense in which such men commonly use them, and not in that technical sense affixed to them by professional men. In Hodgson v. Ambrose, Dougl. 323—a distinction is made which seems to be a sensible one, to wit: if the testator use legal phrazes, his intention should be construed by legal rules. If he use those that are common, his intention, according to the common understanding of the words he uses, shall be the rule.

The apparent clashing of the cases relied upon in this discussion, induced the court to trace the subject to its foundation, to see if they could discover a principle so certain and uniform, as to direct a satisfactory decision either way.

When upon the adoption of the feudal system in England, an arrangement was made of the various tenures by which lands were to be holden, the mode and form of creating each of them was pointed out, and the power of each particular tenant over his estate settled: it was natural to suppose that their technical forms would not always be attended to, and therefore it became

necessary to provide a rule for cases, where the duration of the estate was not described.

Common sense would have dictated, that an absolute estate should pass by a conveyance unlimited as to duration, and containing no provision for its return to the grantor, at a future period, or on a contingency. But reason was made to yield to the spirit of a system, unfriendly to alienations, or divisions of lands: and therefore, the rule that such conveyances passed only an estate for life, was established. The same spirit established the rights of primogeniture, and, (aided by the statute de donis,) permitted estates tail, and all lesser estates to be carved out of the fee simple; the residue ultimately continuing in the grantor, capable of being disposed of when the paticular estates should be ended. This disposition gave what was called a remainder in fee—but it often happened, that the fee was not disposed of; and generally in such cases, as this now before the court, when that fee rested in the donor as part of the old estate, it acquired the character of a reversion, and descended to the heir at law.

This spirit of the feud, is mentioned, as explanatory of those rules of construction, which, in favour to the heir at law, narrow as much as possible the operation of all conveyances, calculated to disinherit him.

By the American revolution, and some of our laws, we have happily got rid of
101 the feudal system, and the *rights of primogeniture; so that the favour hitherto claimed by heirs at law in the construction of conveyances affecting their rights, will no longer be heard of, in cases happening after January 1787, when those laws took effect: but the intention of testators will become in reality the rule, which, though hitherto avowed to be such, hath been so refined away as in many instances to have been sacrificed to rigid technical terms.

However it may be as to such new cases, the present, as well as all others which may come before us, arising at a prior period, must be decided according to the law of that time, as far as we are enabled to discover it.

A general observation may here be made: that all the legal artillery now played off against the heir, was furnished by the above mentioned bias, to fortify his title; but if it may be thus turned against him by the rules of legal warfare, we cannot help it: we have only to enquire, if it do defeat him or not.

The feudal Rule "that where an estate was conveyed without limitation, no more than an estate for life passed, and the reversion descended to the heir," acted for a long time merely on feoffments and grants, the only conveyances then in use; and in such, the rule has constantly prevailed.

But it may be remarked, that as the personal wealth of the nation increased, a desire in the rich commoners, to realize their money, produced a new contending spirit, averse from perpetuities of land in the same families, and favorable to alienations.

It was this spirit which enabled Henry the 7th to gratify his wish of lessening the power of the Barons, by introducing the fictitious fine and recovery, as an effectual bar of estates tail, and all remainders and reversions depending upon them, and this became a new and common mode of conveyance.

The same spirit operated more powerfully in the next reign, producing the statute of uses, the parent of conveyances by lease and release and giving new vigor to covenants to stand seized to uses. This, and the statute of inrolments, gave rise to bargains and sales for money; and finally the statute of wills enabled proprietors of lands to dispose of them, by their last wills at pleasure.

These new statutory conveyances received a much more liberal interpretation, to favor the intention of the parties, than were indulged to those at common law, but which need not now be mentioned.

102 *In the construction of wills (more particularly,) an extensive latitude has been allowed, on account of the extremity, in which they are often made, not admitting of counsel being called in, but inducing the necessity of resorting to any person, however unskilful, who may be at hand. And it is not improbable, that the respect which all men have agreed to pay to the will of the dead, might have had considerable influence.

That the intention of the testator is to give the rule of construction, is declared by all the judges both ancient and modern. Ld. Holt and some others more modern, emphatically call that intention, the Polar Star, which is to guide our decision—and in a late case of Hodgson v. Ambrose, Dougl. 323, the court say, that this is the governing rule, to which all other rules of construction must yield.

If this were a new question, I believe there would be no great difficulty in deciding, that the rule, which prescribes technical terms for the passing of different estates in common law conveyances, did not extend to wills at all; since no such terms were prescribed to testators, by the statute of wills, which enabled them to dispose of their lands at pleasure. But the judges, after laying down the true rule built upon intention, unfortunately admitted, that if there were no words of limitation, the common law rule must prevail; by which they tied a gordian knot, which they have since struggled to unite. It would have been better if they had cut it at once.

This rule however of construing wills according to intention, is laid down with some limitation, as 1st, The disposition, intended to be made, must not conflict with the rules of law: which I understand as applying to restraints upon the creation of perpetuities, devises in Mortman, and the like; and of course, it has no influence upon this question.

2d, The intention must be collected from the will itself.

This is true, if we admit those words to be explained by the relative situation of the parties, and the circumstances of the testator; which, a multiplicity of cases prove, ought to be considered. Thus explained, this limitation will be regarded.

3d, The intention is not to prevail against settled and fixed rules of construction.

If we could discover those settled rules of construction, we would pursue them. But, after all our researches, we are much inclined to affirm what is said by judge Wilmot in Baddeley v. Leppingwell, 3 Burr. 1533. "that cases on wills serve rather
103 *to obscure, than illuminate questions of this sort;" in which the present may be classed. So it is said by the court, in Jeffereys v. Poyntz. 3 Wills. 141. "That cases on wills may guide as to general rules of construction, but, unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little, or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills."

The appellees, in applying this objection to the present case, insist upon it as a settled rule of construction, that where lands are devised without limitation, and no words are used to shew an intention to give a fee, the rule of law that only an estate for life passes, prevails. And this is laid down as a general position by most of the judges, who speak upon the subject: but from their manner of expression, and from their application of it to particular wills, it will appear to have but little influence upon their decisions.

In Bows v. Blacket, Cowp. Rep. 236, a singular decision is made. It was a devise, "of all his freehold and leasehold lands, and all his estate and interest therein to his wife for life," remainder to two sisters as tenants in common, chargeable with the payment of debts and legacies; and it was determined that only an estate for life passed to the sisters.

In the case of Mudge v. Blight, Cowp. Rep. 352. lord Mansfield says, "I really believe that every case determined upon the rule of law, directing an estate for life, if there be no limitation, defeats the intention of the testator."

To the same purpose is judge Buller, in Palmer v. Richards, 3 Durnf & East 356. "There is hardly a case of this sort, where only an estate for life is held to pass, but that it counteracts the testator's intention: for where a testator uses general words he means to dispose of every thing he has."

When therefore we find judges declaring that the intention of the testator is to be their guide, and that the rule of law now insisted on violates that intention, (as I believe all mankind will agree it does, for the reason given by judge Buller,) it is no wonder, that we find them constantly declaring, that tho' the rule must prevail if there be no words to controul it, yet no technical terms are necessary, but they will lay hold of or (as some express themselves) will catch at any slight expressions, and make them answer the purpose.
104 *At first indeed, they went no farther, than to supply the omission of the word heirs, necessary to give an inheritance in common-law conveyances, by other words tantamount to it. Such as to him and his assigns, to him and his seed, to him forever, to him and his——and such like.

But in the progress of their struggle for the intention, against this rigid, unjust rule of law, they went further, and made various other words answer their purpose.

It was in this manner that the word estate was taken into the service, which in its vulgar and common meaning, is descriptive only, of the quality of things: as land &c. and not of the interest in them. Yet to serve this beneficial purpose, they have given it a more extensive signification, so as to make it comprehend as well the thing as the testator's interest in it; and so to pass a fee, which it would no more do in common-law conveyance; than if there were no limitation whatever. For tho' lord Holt in the case of the countess of Bridgewater v. the Duke of Bolton, 1 Salk. 236, says "the word estate is genus generalissimum, and comprehends both the thing and the interest," yet that was in a case of a will; and lord Mansfield in Mudge and Blight before mentioned, expressly says, "It was on the ground of the judges laying hold of any expression to favor the intention, that a devise of all one's estate, or of all his estate at A, passed a fee." See also 2 Ld. Ray. 31—1 Salk. 234.

In the case before us, in the devises to his two sons, he gives to Robert all his land at Ochaneachy island and Finneywood; and to Theoderick all his lands at Cargills, without any words of limitation whatever. The word estate is not used in the devise, nor are there any other expressions, indicating an intention to give a fee.

But it insisted upon at the bar, 1st, That his intention is apparent from the relative situation of the testator, with the several devisees; since he could not intend to disinherit the grandsons who were to bear his name in favor of the issue of a wife and daughter.

It must be confessed, that such an intention would make the testator invert the order of every family provision; giving sons only an estate for life in lands, for whom perpetuities would generally be created, if not restrained by law, and instead of a present provision for a wife, give her a reversion after estates for life to her infant children; from which she could expect no benefit, tho' her issue by a second husband, might take the estate from the testator's grand-children.
105 *To suppose such an intention in the testator is absurd in the extreme, and I am persuaded, that there is no person who believes he so intended it.

2d, The counsel then insisted that rather than disappoint this apparent intention, the court will carry the word estate from the preamble, to each clause in the will, so as to bring the case within the rule, that a devise of the estate passes a fee.

In opposition to this, Wright & Wright, 3 Wils. 414 is cited, and relied upon, as being not much unlike the present case.

In this case, the testator sets out thus, "As touching my temporal estate, I give and dispose thereof as followeth: my debts to be paid.—Item: I give to my nephews Henry and Nathan a house at Leeds, &c. Item: I give to my nephew William two houses at Seacroft," &c. After giving a number of small pecuniary legacies, he adds. "It is my will that none of the houses, &c. be entered into, 'till after the death of my executors,"—and makes his brother executor. It was determined, that only estates for life passed to the nephews in the houses; and chief judge De Grey declared, that there was no case where the testator makes use of these or the like words, "as touching the disposition of all my temporal estate, I give and dispose thereof as followeth," and immediately afterwards devises his several estates or his several lands to divers persons, that ever a fee was determined to pass. That by the words, all my estate, he must be understood to mean the thing (his lands) and not the quantity of estate, (the fee).

This is a case in point, and rather stronger, since an argument in favor of a fee might there have been drawn from the reservation to the brother for life, and if this case is of conclusive authority, it will put an end to this part of the dispute.

But 1st, Does not this case lose its weight by proving too much? For it lays down the principle, that a devise of all the testator's estate, means the thing only, and not his interest; from which it would follow that by such a devise, a fee would not pass, contrary to the whole string of adjudications, from Lord Holt down to the present day.

2d, If the assertion of the chief justice "that there is no case where the word estate, in the preamble, had been adjudged to give a fee in lands afterwards devised without limitation," be true, then this single case might decide the present; but if it shall appear to be unfounded, it
106 will evince the decision to have *been made without due consideration, and the authority of the case must be given up.

The cases cited upon that occasion were Hob. 65,—1 Salk. 236,—1 Vern. 85,—Prec. Chan. 264,—2 Vern. 690,—3 P. Wms. 295,—Cole v. Rowlinson, 1 Salk. 234, was also cited —In this case nothing is said about the preamble, but the devise being of all the testatrix's estate, right, title and interest, in whatever he held by lease from sir John Freeman, and also the house called the Bell tavern, of which she had only the reversion in fee after an estate tail in the son, to whom she devised it; the whole was considered as one sentence, tied together by the word also, and therefore the word estate as carried to the devise of the Bell tavern so as to pass a fee.

1 Salk. 236 does not apply, for there the word estate was in the devise and not in the preamble.

The case of Murray v. Wise, Prec. in Chan. 264, is susceptible of the same answer.

In Beachcroft v. Beachcroft, 2 Vern. 690, the preamble is stated and referred to by the lord Chancellor, when he says, "my worldly estate comprises all he had in the world real and personal." This however is not material, since the word estate is used in the devise itself. But this hint, probably gave rise to the idea of looking to the preamble for aid, in this pious work of fulfilling the will of the dead.

3d P. Wms. 294, Tanner v. Wise, turned upon the question wheter the real estate was comprehended in a devise after personal bequest, of "all the rest of his estate, goods and chattels whatsoever, real and personal, to his wife."

Here the word estate in the devise being explained by goods and chattels would naturally mean personal estate; nor would the words real and personal help it, as there might be chattels real. Recourse was therefore had to the preamble, in which he declared his intention to dispose of all his temporal estate, which the counsel for the heir insisted more properly applied to personal estate, and leases for years, which were in their nature temporary, and would wear out in time, than to permanent real estate. Lord Chancellor referring to the preamble also, says "temporal estate means the same as worldly estate, or all a man has in the world real or personal, and adjudged that the real estate passed to the wife, and in fee.

In this case also, the Chancellor furnished an instance of incorporating the words of the preamble with the devise. He says, "rest and residue are words of relation, and must refer to some estate mentioned before." Now here was an estate
107 mentioned *before his temporal estate, which brought it to signify the same as if he had said "I devise the rest and residue of all my temporal estate."

This case alone might have made the chief justice pause at least, before he made the bold assertion now under consideration. But there are others much stronger.—Ibbetson v. Beckwith, Cas. Temp. Talb. 157, was this: the testator in the preamble declares "as touching my wordly estate, I dispose of the same in manner following: to my sister Mary Beckwith, all my estate at H. in hither dale, leasing at Crew, and all my estate at Cubeck, paying and discharging all legacies before charged by my father's will. To my loving mother all my estate at Northwith-close, North-closes, and my farm at Roomer with all my goods and chattels for her life; and to my nephew Thomas Dodson after her death, if he will change his name to Beckwith; if not, I give him £20 to be paid him for life, out of

the closes, and farm, which I give her, upon that refusal, to her and her heirs forever."

The question was, if Thomas took a fee in that which was devised to him, after the death of the mother, or only an estate for life?

The word estate is in the devise to the mother, but must be descriptive of the thing, and not of the interest, because it is his estate at Northwith-close, which means the same as my houses or lands at those places: and though the Chancellor cites some cases, to prove that a fee will pass by a devise of all his estates at, or in such a place, the point is certainly very disputable, and there are many express cases to the contrary. However, those he mentions may serve to show the growing influence of the testator's intention over rigid rules of construction: another reason why it must be descriptive of the thing, and not of the interest, is, that it is given to the mother for life.

However, the case is mentioned for the sake of Lord Talbot's reasoning on the preamble, enforced in his usually clear and perspicuous manner. He says, "in order to come at the testator's intent, the whole complexion of the will has been properly taken into consideration on both sides. The words, worldly estate, in the preamble, prove him to have had his whole estate in view. Indeed he might have made but a partial disposition afterwards; but if the will be general and taken in one sense, it will make a complete disposition of the whole, and in another will create a chasm, and leave a part undisposed of; that sense shall prevail which is agreeable to his intention to dispose of the whole."

103 *To apply this to the present will, which has the same declaration in the preamble.—Has the testator made but a partial disposition of the lands to his sons? The feudal law says so, but he does not, since he gives it to them without restraint, or direction that their estate shall cease at any fixed period, or on any event. Is not this the very case Ld. Talbot puts, of a testator using general words, which he says shall be so construed, as to pass a fee; because that will best agree with his intention declared in the preamble, to dispose of the whole? So far the case may not apply strongly, as there is no residuary clause, and the word estate is in the devise.

In Grayson v. Atkinson, 1 Wils. 333, the testator, after declaring in the preamble his intention to dispose of all his temporal estates, devises several legacies, amongst others to A. and having empowered him to sell all, or any part of his real or personal estate, for payment of his debts and legacies, adds, "as to all the rest of my goods and chattles, real and personal, moveable and immoveable, as houses, gardens, tenements, my share in the copper works, &c. I give to the said A."

The question was, if A. took a fee, or a life estate only in the real estate? Here were no words of limitation, nor was the word, estate, used in the devise, which was of houses, gardens, and tenements, and the preamble must be referred to, for that important word. Lord Hardwicke doubted at first, and had he as hastily decided as chief justice De Grey did, he might also have pronounced that the word estate had never been so used or applied, and adjudged it only an estate for life. But he searched for, and examined the principles of the cases; and then said, he was clear in his opinion that a fee passed; and his first and third reasons inform us of the ground of his conviction, which was the cases of Beachcroft & Beachcroft, Tanner and Wise, and Ibbetson and Beckwith; particularly the last, for he repeats Ld. Talbot's reasoning, drawn from the word estate in the preamble. He mentions another reason which no doubt had some influence, namely, that the estate was charged with, and might be sold for the payment of debts and legacies. But this I consider as the weakest argument, and placed by him, (as such generally are) in the middle, between the two stronger ones. For his power to sell was in a distinct devise, which he might exercise at all events, so as to be no looser, whether he took an estate in fee, or for life only, in the residue.

The cases of Coghill and Noel in the old General Court, and Halstead v. Halstead, may also be here mentioned.

109 *If this were a new case, I should feel no hesitation in declaring it as my opinion, that the rule as applied to common law conveyances, did not extend to wills; since the statute respecting them, allows men to dispose of their lands, not by any technical terms but at their will and pleasure. But since we have precedents to follow, I have no difficulty in thinking myself warranted by the opinions of those great men Ld. Cowper, Ld. Talbot, & Ld. Hardwicke, to say, that by connecting the word estate in the preamble, with the devises to the two sons, a fee simple estate passed to them in the lands; which will fulfil the will of the dead, and settle the peace of the family; and it is for this purpose, that the point has been so thoroughly investigated and discussed—yet as the cases of Dean v. Gaskins, referred to in Mitchel v. Sidebottom Dougl. 759 as well as the principal case, and that of Wright v. Wright are in opposition, the point is left undetermined.—For as to the present question, let this point be determined the other way, it will not warrant a recovery against the heir.

1st, Because he will take by descent, and not under the will: and 2d, because the reversion in neither of the sons lands will pass by the residuary clause.

1. The rule is, that where the testator makes the same disposition to the heir which the law would have made, or where it is made in such general terms, that the intention is left doubtful, the heir shall take by descent, as his better title, and not under the will. 2 Bac. 79—Mod. Ca. Law. & Eq. 23, 1 Ld. Ray. 728.

Here is a devise of lands to the heir, unlimited as to estate; unincumbered with any charge, and therefore it amounts to no more than pointing out the lands which his heir should take by descent.

In Smith v. Triggs 1 Str. 487, it was determined, that a devise in fee, by a mother to her daughter, who was her heir, would not make the daughter a purchaser so as to cast the descent from her upon the heir on the part of the father. In Beachcroft v. Beachcroft, a close in St. Peter's, Derby, is devised to sir Robert (who was probably heir) without limitation; the reversion is never mentioned as having passed either to the wife, or to the brother Joseph, under the residuary devise.

I was very attentive during the argument, to discover, if any cases were cited of a devise of lands to an heir without limitation, where the reversion was adjudged to pass to another under a residuary clause in the same will, however large and
110 comprehensive *the words might be; not recollecting any such, and inclining to believe from the feudal reasoning and principles, favoring the heir, that none such were to be found.

The gentleman of counsel for the appellee, (whose laborious researches on such occasions are pleasing to the court, as they generally impress an opinion, that what is not produced by him in favor of the side he advocates, does not exist,) very candidly acknowledged he could find no such case, except one in Fearne's essay on contingent remainders page 170; and I believe that gentleman on reviewing this case, will think it not a sufficient foundation for an exception to his admission. In a subsequent page the author says "it sometimes happens, that a remainder is limited in words which seem to import a contingency; tho' in fact they mean no more than would have been implied without them, or do not amount to a condition precedent, but denote the time when the remainder is to vest in possession." This he illustrates by several cases to the page which was read by the counsel, and then, for the same purpose, he quotes the case of Fortescue v. Abbot from Pollexsen & sir Thomas Jones. A testator devises a house to each of his eldest sons, and three other children, without words of limitation, but willed, that if either of his said children should die, then the houses should be divided between those that were living.

The eldest son died, and it was contended that the limitation over, to the children then living, was a contingent remainder to the survivors; that the eldest son's estate for life in the house was merged in the fee, which descended upon him as heir, and destroyed the contingent remainder. But it was adjudged not to be contingent but vested remainder; each child took a particular estate in the house devised to him, with a vested remainder to the others for their lives.

As this case applied to the author's position, there was the appearance of a contingency in the words "if either of my children die;" yet it being certain, that they must die, there was really nothing contingent in the event, and therefore it was a vested remainder on the death of a child.

To the present case it does not apply at all, since there was an express remainder devised upon the death of the eldest, as well as of the other sons, which does not prove, that where there is a devise of lands to the heir without words of limitation, the reversion in fee will pass to another, by a general residuary clause in the same will.

111 *In Peal v. Powell. Ambl. Rep. 387, tho' there was an appearance of intention, that the eldest son should take the freehold lands, by his being directed to confirm the leasehold lands to Giles, yet there was no devise of any kind to the eldest son, to take those freehold lands out of the general devise of all the rest and residue of his estate real and personal.

In Urry &c. v. Harvey, 5 Burr. 2638—the lands were not particularly devised to any person, and adjudged to pass to the wife by a devise of all the rest and residue of his estate whatsoever, and wheresoever: and Ld. Mansfield says "the word estate carries every thing, unless tied down by particular expressions."

In the case before us, there is an express devise of the lands in question to the heir, without limiting the duration of his estate, leaving it to the fee which the law cast upon him, which acts exclusively of this subject upon the words rest and residue of my estate, and ties them down to other estate, not disposed of in former parts of the will.

So much for what is particular in respect to the heir.—Let us now

2dly, Enquire in general, whether in any case of lands devised without limitation, where only an estate for life shall be supposed to pass, the reversion in fee will pass by a general devise, of all the rest of the estate, real and personal.

The word rest is a relative term, and refers to the whole of a subject before contemplated by the testator. That subject here, was all the testator's property, which the preamble shews, he placed in his view, in one collected mass of lands, slaves, stocks, &c. In his disposition he takes out for Robert two tracts of land, six slaves, and ten horses.

For Theoderick one tract of land, two slaves and the same number of horses.

The rest to his wife and daughter—rather two considerable, and therefore, he excepts a young negro girl for Theoderick.—Strange that he should do so, and yet leave in it, the more valuable reversions of the three tracts of land given to the two sons.

A plain man would understand this word rest, to mean, what remained of the mass of property undisposed of, and would never suppose it could reach what had been given to the sons, at any period, or on any event, since the testator had not appointed

any time, or any event, on which their rights were to cease.

112 *It is true, a testator might devise lands for years, or for life, and limit no particular remainder, and in that case, the reversion would pass in the residuary clause. Skinner 150. Allen 28. 2 Ventr. 285. 2 Vern. 461, 621. Eq. Ca. Ab. 211. 3 Atk. 486. In these cases, the testator, having given a limited estate, shews his intention, that on the termination of that estate, the land should return into the mass of his property, and making no further particular disposition of it, means it shall pass in the residue.

But in a general devise of lands without limitation, I will not say there is no case, but I have not met with one, which determines that the reversion will pass by a general residuary devise in the same will.

And the distinction is obvious—since by such a devise the testator means to give a fee, as the judges all agree, and therefore he could not intend to include it in the residue. If the devisee must lose the land upon the rule of law, it goes to the heir, for whose benefit the rule was made.

In Davis v. Saunders 2 Black. Rep. 736 and Cowp. 420, a devise to the eldest son and his wife for life, remainder to their eldest son and his heirs; if no male issue, to daughters and their heirs, and if they die without issue, to the testator's right heirs. To his son in law Humphrey Davis, and his heirs he gives all his estate freehold and copy-hold, tenements and premises, not before devised, for payment of debts, and the surplus to be equally divided amongst his children; and then he devises all the residue and remainder of his estate real and personal to the said H. Davis. The eldest son and his wife died, and never had issue—The question was, if his reversion passed to H. Davis; and it was determined, that the devise, to right heirs, tho' nugatory, excluded it from passing as part of the residuum, tho' latent reversion might pass.

Strong, Clark, v. Mervyn 2 Burr. 912. Audly Mervyn seized in fee of lands in Tyrone, on the marriage of Henry his eldest son, settled those lands to the use of himself for life, remainder to Henry for life, remainder to the first and other sons of the marriage in the usual form, remainder to the right heirs of Audley the father.

The father seized of other lands by his will devised several parcels by specific descriptions in the counties of Tyrone and Meath, "and also all other the lands, tenements and hereditaments in the said counties of Tyrone and Meath, or either of them, whereof I am seized in fee simple, or

113 of which any *other persons seized in trust for me to his wife Olivia," in trust for several purposes. Henry afterwards dying without issue, the question was, if the reversion in fee of the lands settled on him at his marriage, passed by the general residuary devise to the wife? It was determined in Ireland, that it did pass: but upon a writ of error, the whole court of King's Bench in England decided that it did not. Among other reasons given by Ld. Mansfield, he says, "if the question had been between the issue male of Henry by a second wife, and the residuary devisee, could it possibly be imagined that the testator intended in such a case, that Henry's sons by a second wife should be disinherited? and yet they must have been so, if the reversion of this settled estate passed by this devise."

If it could not be imagined, that the testator there intended to disinherit remote, and barely possible, children, of his son by a second wife, when he had a first wife, living, whose children were provided for, much less can it be imagined that the testator in this case intended to disinherit all the children of his sons by any wives by devising these reversions in this residuary clause; and what gives additional weight to the objection is, that we are all satisfied that the testator believed he had fully disposed of the land to his sons, and had no reversion to pass by the residuary clause.

If the law raises that reversion contrary to his intention, the law must dispose of it, since he has not, and give it to the heir at law. It might have had some weight (though but little) to prove these reversions included, if there had not been other lands undisposed of, to have satisfied the words real estate. See the reasoning of the court upon this point in the case of Knotsford v. Gardiner 2 Atk. 450. And if in that case it were thought, that the testator could not intend to mangle a tenement by separating the freehold from the leasehold, to give part to his wife from his only child who was a daughter: it would seem equally, or more strange, that this testator should mean to mangle the interest in these lands, to give the inheritance from his sons, to his wife and daughter. See 1 P. Wms. 286, where it is decided, that under a devise "of all his freehold lands," if there be none, leasehold shall pass rather than defeat the will.

2 Bacon 92. 1 Rolls Ab. 613—a man seized in fee of tenements, and possessed of a lease for years, and also of goods, devises two tenements to one of his sons, and the other to a daughter and adds, "I make my two sons executors of all my goods

114 *moveable and immoveable, and all my lands, debts, dues and demands,"—determined, that no estate passed in the three tenements, (I suppose in the reversion,) because the words, all my lands, might be satisfied with the leasehold lands.

The case, of a devise of lands to A in fee, and of all the residue of his real and personal estate to B and C.—is stated in Goodright v. Opie Cas. in L. and Eq. 123 and in Wright v. Horne (same Book p. 222). A dies in the testator's lifetime and the question was, if his lands passed to the residuary devisees, or descended to the heir? in both, the reasoning is strong for the heir, but neither is determined—it is strange, that in so plain a case it should not. For if a nugatory limitation to the right heirs,

(nugatory, because it does what the law would do without it,) shall prevent that reversion from passing in the residue, much more shall an actual devise effectual at the time, but defeated by a subsequent accident prevent that land from passing in the residue.

Upon the whole, we think the law is with the appellant and therefore reverse the judgment of the District Court.

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115 *OCTOBER TERM, 1792.

Scott's Executors v. Call.

October Term, 1792.

Action of Debt on Bill of Exchange for Sterling Money*—Declaration—Judgment.—In an action of debt upon a protested bill of exchange, drawn for sterling money, if the declaration is for the current money value of the sum for which the bill was drawn, the judgment being for the sum so demanded, will be reversed on a writ of error.—The suit should have been for the sterling money.

This was an action of debt, brought by the appellee against the appellant, upon a protested bill of exchange, drawn by the testator of the appellant, for £187: 15, sterling for value received: as also, for the damages at the rate of 10 per cent. together with the charges of protest &c. The declaration demands the £187: 15, sterling of the value of £250: 6: 8, current money; and 4s. 6 sterling of the value of 6s. current money and interest at the rate of 10 per centum per annum, on the said £250: 6: 8, from the date of the bill: it states also the protest; "whereby and by virtue of the act of Assembly in that case made, action accrued to the plaintiff, to have and demand of the defendant the said £187: 15 sterling, of the value aforesaid, and the said 4s. 6 sterling of the va'ue aforesaid, and interest as aforesaid:" the breach assigned is, in the non-payment of the said several sums of money and interest &c. to the plaintiff's damage of £500. Upon the plea of payment, the jury found that the defendant's testator had not paid the debt in the declaration mentioned, and assessed the plaintiff's damages to one penny. The court gave judgment that the plaintiff recover £509: 3: 6 sterling, the principal, interest and charges of protest, together with interest thereon, after the rate of five per centum per annum from that day; and they settled the exchange at 33⅓ per cent.

Exceptions being taken to the opinion of the court, upon certain points moved by the defendant's counsel, an appeal was prayed to this court.

116 *The question made by the bill of exceptions was; whether the plaintiff, to entitle himself, under the act of Assembly, to 10 per cent. damages beyond 18 months, ought not to prove an actual presentation of the bill protested to the drawer within that time.

CARRINGTON, J., delivered the opinion of the court.

The point which was argued at the bar, and which grows out of the bill of exceptions, need not be decided, as the court think the judgment erroneous in this, that the demand in the declaration is for the current money value of a debt, due in sterling money, on a protested bill of exchange, which is recoverable in sterling money only.

The judgment therefore must be reversed with costs.

White v. Jones.

October Term, 1792.

Supersedeas—Nature of—Reversal of Decree—Restitution.*—A supersedeas is sometimes an auxiliary process, but most commonly it is one by which the record of an inferior Court may be removed before a superior one for revision. In the former case, it can have no effect after the decree or judgment is executed, though the suit may still go on; and if a reversal take place, a writ of restitution will be awarded.

Grants—Fraud in Obtaining—Jurisdiction of Equity.†—Where one person fraudulently obtains a grant in preference to another, having a prior equitable title, a Court of equity has jurisdiction of the case, and can afford the most ample relief.

This was a suit, instituted originally in the County Court, on the Chancery side, by the appellant. The bill states: that the complainant in 1761 or 1762, purchased a tract of land from H. Hatcher for which he paid a valuable consideration. That this land was surveyed for the said H. Hatcher in 1740, and that a patent for the same was made out on the 17th August 1756; but, on account of a dispute then depending before

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*The principal case is distinguished in Skipwith v. Baird, 2 Wash. 166, 167. See monographic *note* on "Debt, The Action of" appended to Davis v. Mead, 13 Gratt. 118; monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

***Supersedeas—Reversal of Judgment—Writ of Restitution.**—It is well settled, that after judgment has been executed, a *supersedeas*, writ of error or appeal may lie, and upon reversal the appellant may have a writ of restitution of what he has paid. Erskine v. Henry, 6 Leigh 384, citing *White v. Jones*, 1 *Wash.* 118. The principal case is also cited for the above in Hudgins v. Marchant, 28 Gratt. 183; Morriss v. Garland, 78 Va. 229; Wingfield v. Crenshaw, 3 Hen. & M. 252; Hite v. Wilson, 2 Hen. & M. 285. See Burnley v. Lambert, 1 Wash. 308; Stanard v. Brownlow, 3 Munf. 229.

†**Grants—Fraud in Obtaining—Jurisdiction of Equity.**—For the proposition that, where one person fraudulently obtains a grant in preference to another, having a prior equitable title, a court of equity has jurisdiction of the case, and can afford the most ample relief, the principal case is cited in Depew v. Howard, 1 Munf. 300; Noland v. Cromwell, 4 Munf. 168, 172, 174; McClung v. Hughes, 5 Rand 483, 486, 489, 505; *foot-note* to Hambleton v. Wells, 4 Call 213; *foot-note* to White v. Jones, 4 Call 253; Jones v. White, Wythe 113.

the king in council, respecting a claim, set up by governor Dinwiddie, of a pistole for signing patents for lands; this patent was so long withheld from H. Hatcher, that the land became forfeited for non-payment of quitrents, and for want of seating. That the complainant, in order the better to secure his title to the land, petitioned for the same as lapsed, and with the consent of H. Hatcher, obtained a patent in his own name in 1764.

That the defendant in 1743, obtained an order of council for surveying 2000 acres of land, including the land in question, and pending the above dispute between Virginia and governor Dinwiddie, fraudulently paid the pistole fee demanded by the governor, and obtained a patent. The prayer of the bill is, that the defendant may be compelled to relinquish his title to, and possession of, the land in dispute, to the complainant.

117 *The Answer of the defendant, the heir at law of the original patentee, relies principally upon the want of equity in the bill; and denies notice of Hatcher's survey.

The case coming on upon bill and answer, together with the certificate of survey, the order of the governor in council, and the grants before mentioned, read as exhibits, the plaintiff obtained a decree for the land in the County Court, which was reversed by the High Court of Chancery upon a petition of appeal: the decree of reversal is in the following words, to wit: "This court is of opinion, that the appellee's title, if any he hath, to the land in controversy, must be supported on this foundation: That the grant to Henry Hatcher operated retroactively, giving to his title like vigor as if the consummation thereof, by the grant, had been cotemporaneous with the commencement, which preceded the commencement of the appellants right; or on this other foundation: that the grant to Wood Jones was obtained surreptiously, when the officer, to whose function the transaction of that business belonged, did not know part of the land comprehended in the grant, to have been appropriated, or claimed by another, who, in not perfecting his title, had been in no default; or was obtained by collusion between the officer and the grantee; and upon supposition that the grant to Henry Hatcher by relation, was prior in effect, although posterior in date, to the other, or that the latter was fraudulent, this, so far as it tended to intercept his right, was void; and the appellees remedy in a court of common law was proper and adequate; and this court, discerning no ground for application, by the appellee to a court of equity,—especially, when so great a length of time had elapsed, after the commencement of Hatcher's title, before any one appeareth to have attempted to assert it, and the manner in which it was derived to the appellee, are remembered,—is of opinion that the said decree of the County Court, by which the appellee recovered the said land against the appellant with costs, is erroneous; and therefore doth reverse the said decree; and doth adjudge, order, and decree, that the bill of the appellee be dismissed."

From this decree, there was an appeal.

The PRESIDENT delivered the opinion of the court.

It was objected to by the counsel for the appellant, but the decree of the County Court having been carried into execution by the return of an habere facias possessionem, executed, the petition of appeal was made too late, and ought not to have been granted, since the supersedeas thereupon awarded, could have nothing to operate upon.

118 *A supersedeas in England, is merely an auxiliary process; and so it is, in some instances, in this country. But in general, it is a mode by which the record of a judgment of an inferior court, is removed before a superior jurisdiction.

When merely auxiliary, it can have no effect after the decree, or judgment is carried into execution; since it can only stay the proceedings in the state in which they are; but yet the suit goes on, in the superiour court, by the other process; and if the judgment be reversed, a writ of restitution issues, to restore the party to that, of which he had been dispossessed by the execution.

Where the supersedeas is the only process, by the laws of this state, it may have one, or both of those operations, as the judgment happens to be executed or not.

At law, a party may appeal at the time the judgment is rendered; or he may afterwards obtain a writ of error, which, it is admitted, may issue after the judgment is executed.

Upon the merits, though the court is of opinion, that the decree of the Chancellor ought to be affirmed, yet we do by no means coincide with him, in the reasons and arguments upon which he seems to have grounded his opinion.

The plaintiff has stated a very fair and proper case for a Court of Equity.—He was a purchaser, against whom the defendant unfairly and fraudulently obtained a preference; and in questions like this, where fraud is suggested and proved, courts of equity have competent jurisdiction, and can afford the most ample and adequate relief.—But in this case, the plaintiff not having supported the allegations in his bill, which charge Wood Jones with fraud in obtaining his patent, this court is of opinion, that there is no error in the decree, and that it must be affirmed with costs.

Winslow v. Dawson.

October Term, 1792.

Contracts—Usury—Penalty*—Case at Bar.—A contract to pay a larger sum at a future day, upon nonpayment of the sum agreed to be paid at a prior day, is not usurious, but the increased sum will be

*Contracts—Usury—Penalty.—On this question, the principal case is cited in *foot-note* to Groves v.

considered as a penalty, and relievable against in a Court of Equity, upon compensation being made; and that compensation is legal interest, unless some specific damage can be shewn.

This was a suit brought by the appellee, in the High Court of Chancery, to be relieved against a judgment for £50, which by an award of arbitrators (made under a rule of court) he had been adjudged to pay with interest;—insisting that the £50 was only intended as a penalty to enforce the punctual payment of £100, or to compel the appellee, in lieu thereof, to take up the appellant's bond to one Garret, for that sum, and which he was prevented from 119 doing by the appellant himself; *and praying an injunction against judgment rendered upon the award. The bill states and the depositions prove, that the memorandum was torn from the bond at the time the case was before the arbitrators, that the abitrators refused to hear the appellee's witnesses, but permitted a statement to be read by the appellant's counsel of facts which were controverted by the appellee. The answer states: that the defendant agreed to sell a tract of land to the plaintiff, and to receive payment in any one of the three following modes, 1st, £200 in hand, or 2d, £250 in twelve months, or 3d, £300 upon a longer credit. That the plaintiff acceded to the first proposition, if credit for a few months were allowed; and if not punctually paid, then, that the second proposition should prevail. This being agreed to by the defendant, two bonds were executed, one for the payment of £100 at the time last mentioned, and another for £150 in twelve months after:—but, to the latter bond, a memorandum was annexed, that it might be discharged by the payment of £100 by a certain time, sooner than that mentioned in the condition.

The Chancellor decreed a perpetual injunction, and the costs at law to the complainant. From which decree the defendant in equity appealed.

The PRESIDENT delivered the opinion of the court.

Taking the case to have been as stated by Winslow in his answer, the insertion of the £50 must be considered, either as a consideration for forbearance—and of course within the act of usury,—or as a penalty, for which a compensation may be made, and therefore relievable against in a court of equity:—for he admits, that the first proposition for £200 was acceded to, and adopted as the agreement between the parties.

The case of Groves and Graves, in this court, has decided this principle: viz, that such a contract to pay a larger sum at a future day, upon non-payment of the sum agreed upon, at a prior day, is not usurious; but that the increased sum shall be considered as a penalty, against which a court of equity ought to relieve, upon compensation being made.

That compensation—in case the condition be for payment of money—is legal interest; unless some specific damage be shewn, which may induce the Chancellor to direct a jury to assess the quantum of it.

In this case, Winslow speaks of difficulties to which he was subjected, but of no particular injury sustained, which 120 could entitle *him to a compensation beyond legal interest: so that upon his own statement of the case, Groves and Graves would be a direct authority in affirmance of the decree. But take the case either way, there is no difficulty in it. For since Dawson might have performed what was required of him in order to save the forfeiture, by taking up the bond to Garret by the 10th of February 1784, and was prevented by the interposition of Winslow himself from doing so, that ought in equity to be considered as done, and the penalty of course relieved against.

But, as the injunction is made perpetual for £3: 12: 8: more than ought to have been injoined, the decree must be reversed with costs, and the injunction dissolved as to so much, and stand for the residue of the sum, and the costs at law, which were properly decreed, since the appellee appears to have tendered to the appellant, before the institution of the suit at law, more money than was due at that time.

Ross v. Poythress.

October Term, 1792.

Custody of Debtor—Injunction*—Effect.—If a debtor in execution obtain an injunction, the Sheriff is bound to discharge him from custody.

Seisure of Property under Fi. Fa.—Injunction—Effect—Quære.—If an injunction be obtained after seisure of property, under a fieri facias, the officer may restore the property.

This was an action of debt brought by the appellant in the District Court of Petersburg, upon a prison bounds bond; the breach assigned in the declaration, is nearly in the words of the condition of the bond, with an averment, that the prisoner did depart and escape from the bounds, without being discharged by due course of law.

Pleas, 1st, Conditions performed. 2d, That the bond was given to the sheriff for and concerning a matter relating to his office, whilst the defendant was in custody of the said sheriff; contrary to the act entitled an act "prescribing the method of appointing sheriffs, and for limiting the time of their continuance in office, and directing their duty therein."—Issue was taken upon the first plea, and liberty reserved to the plaintiff to file his demurrer to the 2d plea, at the next court, if he please.

Graves, 1 Wash. 1; Campbell v. Shields, 6 Leigh 520; Muhleman v. Nat. Ins. Co., 6 W. Va. 523.

See same case, Wythe 114; also, monographic *note* on "Usury" appended to Coffman & Bruffy v. Miller, 26 Gratt. 698.

*See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518.

The jury found a verdict for the plaintiff: but if, in the opinion of the Court, a subpœna of injunction issued from the High Court of Chancery, and delivered to the sheriff having the prisoner in custody, and served on the plaintiff's attorney, whereby the judgment, on which an execution had issued, under which the defendant was consigned, was injoined, was a sufficient authority to the sheriff to discharge
121 him from custody under *that execution, then they found for the defendant. No notice was taken of the second plea.

Judgment for the defendant upon the special verdict in the District Court, and appeal to this.

Ronold for the appellant.

Until a final decree was rendered for the plaintiff in equity, the injunction granted by the Chancellor could not operate, so as to deprive the plaintiff at law, of a right already vested in him. The lands of a defendant, are actually bound from the time a judgment is rendered against him; as are also his chattels, from the time a writ of fieri facias is delivered to the sheriff.

It would be highly unreasonable to give to an injunction, an effect so extensive, as that which must be contended for. The principal, as well as his securities, might remove or become insolvent, pending the injunction. The estate seized by the sheriff on a writ of fieri facias, might during that time perish, and thus, might the plaintiff at law lose entirely the effect of his judgment. Injunctions are not authorised, or in any manner regulated, by the laws of this country, and therefore we must resort to the rules observed in the courts of England. There, the money is always brought into court by the party obtaining the injunction, unless, in special cases, it is dispensed with, 2 Harr. Ch. Prac. 224, 226. So if goods are taken on execution, or money levied, or paid in execution, and in the sheriff's hands, the process of injunction will stay them there, Ib. 225. Upon the same principle it is, that a bill of review does not prevent the execution of the decree impeached; but obedience is actually to be paid to the decree, as far as it can, without prejudice to the right of the party preferring the bill. 1 Harr. Ch. Prac. 171. Neither does a supersedeas set aside the execution, or stop the sale of the property seized under it. Dalt. Sheriff. 225—534. A capias, not executed, is arrested by a supersedeas; but if executed, the body must be returned with the supersedeas. Neither will an action for false imprisonment lie, if the body be taken on a ca. sa. without notice of the writ of error. If then, we are to take as our guide, the rules and principles of the English law, (and we have none other to follow,) we find, that an execution once served, is not interrupted by an injunction, or other proceedings subsequent to the judgment, until the debt is levied, or received by the officer, and is then only stopped in his hands.

122 *The old Chancery law, passed in the year 1777, Ch. 15, § 31, seems to give to injunctions, merely the power of staying executions. It neither authorises the discharge of the person, or property already taken in execution, nor does such an effect follow, as a necessary or reasonable consequence, from the order.

If the whole effect of the execution be done away by the granting of the injunction, I am at a lost to know, what return the sheriff can make upon the execution, or in what manner, the plaintiff is to proceed upon the dissolution of the injunction.

Marshall for the appellee. The cases read by Mr. Ronold, only prove that there are certain rules observed by the Chancellor in England, which neither are, nor ought to be guides for us, and this necessary departure from those rules, results from the very nature of our situation, compared with that country. In that, much of the wealth of the nation consists in money; it is easily procured by those who can secure the repayment of it; therefore no inconvenience can follow from requiring a deposit of the debt recovered at law, as the condition of granting an injunction. So too, nothing can stop the progress of an execution once served. Yet even there, we find that in some instances this rigid rule is dispensed with, as the cases referred to by Mr. Ronold prove. In this country, the wealth of the people consists principally in real property—there is so much of that, and so little money at market, that the latter cannot be procured on loan, with any security.

This difference, will furnish a strong argument, why the rule in England, even in case of executions against the property, should not prevail here; and the argument is fortified considerably, if we view the case by analogy to forthcoming and replevy bonds, which are unknown in that country, yet induced by necessity to be authorized in this. In these cases, the lien is entirely gone, and a compensation for it, provided in the security given by the debtor.

So too in England, if goods be taken by way of distress, and replevied, the distrainor loses his lien on the goods, and is left to his remedy on the replevy bond, Brow Ch. Rep. 427: so that the lost of the lien upon property once seized, is not unknown even in England, much less in this country.

But the case of an execution against the body, is much stronger than if it were against the property. For if the body might still be kept in confinement, the injunction would be an idle and vain thing; since the plaintiff, if entitled to equity, might receive the same benefit from an original bill, as he could by obtaining
123 *the injunction. The plaintiff at law cannot complain with reason, since his security is certainly bettered.

Mr. Ronold in reply. The act of 1791 Ch. 3, § 3, tho' it was made subsequent to this transaction, shews, from the manner in which it is expressed, the sense of the legislature upon this subject, by directing that the sheriff, having received money under an execution, shall, upon an injunction

being granted, repay the money to the plaintiff in equity. But this was unnecessary, if, before the law was made, an injunction produced the extensive effect now contended for.

The PRESIDENT. We shall give no positive opinion, as to the effect of an injunction obtained upon an execution against the goods and chattels, after seizure; as that case is not before us: probably it would be considered as settled by the act of 1791, which directing a restitution of the money levied, would seem to include inferior cases, and to extend, by an equitable construction, to the restitution of goods seized in execution, and not sold.

The reason is much stronger in the case of an execution against the body, where the injunction would have no effect at all, if it did not operate to discharge the body from confinement.

Judgment affirmed.

Jenkins v. Tom and Others.

October Term, 1792.

Indians—Slaves.*—At what time Indians might be made slaves of, and when not;—and what Indians they were.

This was an action of trespass, assault and battery, and false imprisonment, brought by the appellees in the District Court of Northumberland to recover their freedom. Plea, that the plaintiffs are slaves. Replication, that they are free, and not slaves; upon which issue is taken.

At the trial, the defendant tendered a bill of exceptions, which was seized by the court, stating: that the plaintiffs had offered in evidence sundry depositions of antient people to prove, that certain women named Mary and Bess, when they came first into this country, were called Indians; and had a tawny complexion, with long straight black hair: to strengthen this testimony, the plaintiffs produced a witness to prove, that he heard a certain other person now dead, say in the year 1701, that when he was a lad about 12 years old, these women were brought to this colony in a ship, and were called Indians; that they had the appearance of Indians, and that the
124 former of them *was called the grandmother of the latter. To the admission of this testimony, the defendant objected, but was over-ruled by the court.

The jury found a verdict for the plaintiffs. In the record there is a certificate of the judges, stating: That the defendant's counsel, in his argument, insisted much upon a clause in an act of Assembly, entituled an act "for the better government of servants and slaves," passed in the year 1753, which enacts "that all persons who have been, or shall be imported into this colony by sea or land, and were not christians in their native country,—(except Turks and Moors in amity with his majesty, and such who can prove their having been free in England, or any other christian country before they were shipped for transportation hither)—shall be accounted, and be slaves, and as such, be here bought and sold, notwithstanding a conversion to christianity after their importation:" and argued from thence, that all Indians as well in America, as elsewhere, not particularly excepted in that clause, might be sold as slaves: that the court informed the counsel, that he misstated the law; that there was a time at some period in the last century, when a law was in existance, which declared Indians at war with the people of this country, slaves, when taken prisoners: that under that law, many Indians were made slaves, and their descendants continue slaves to this day:—but that this law was some time after repealed; from which period, no American Indian could be sold as a slave, and that all such as had been brought into this country since that time, and who had sued for their freedom, had uniformly recovered it. That the same counsel still insisted upon his former argument, and considering the court's address to the bar, as a misdirection to the jury, had prayed this certificate to be entered at the foot of the judgment.

From this judgment the defendant appealed.

*After argument the Court affirmed the judgment.

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125 *Thompson, Appellant, v. James Davenport and James Davenport, Jun. Appellees.

October Term, 1792.

Equity Practice—Distinction between Absolute Purchase and Mortgage—Intention.†—In question whether a deed is to be considered as a mort-

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***Indians—Slaves.**—The principal case is cited *in Gregory v. Baugh, 4 Rand. 648. See also, Butt v. Rachel, 4 Munf. 209; Hudgins v. Wrights, 1 Hen. & M. 134.

Evidence—Hearsay—Admissibility.—In Claiborne v. Parrish, 2 Wash. 148, it is said: "It has been well observed, that in some instances hearsay evidence may be proper, where, from the nature of the case, it is not to be expected that better evidence could be procured. Such as where the transaction is ancient, and in others which have been mentioned. It was upon this principle, that the case of *Jenkins v. Tom* (1 *Wash.* 123), was determined." See also, citing the principal case, Shelton v. Barbour, 2 Wash. 67; Pegram v. Isabell, 2 Hen. & M. 205; Boudereau v. Montgomery, 3 Fed. Cas. 995. See also, Hudgins v. Wrights, 1 Hen. & M. 134.

*The reporter was not in court, when the opinion in this case was delivered.—Note in Original Edition.

†**Mortgages and Conditional Sales—Distinction.**—On this question the principal case is cited in *foot-note* to Robertson v. Campbell, 2 Call 421; Walraven v. Lock, 2 Pat. & H. 552; Klinck v. Price, 4 W. Va. 9; Davis v. Demming, 12 W. Va. 282, 283; Lawrence v. Du Bois, 16 W. Va. 460, 461; Hoffman v. Ryan, 21 W. Va. 480; Sprigg v. Bank, 22 Fed. Cas. 976. See monographic *note* on "Mortgages" appended to Forkner v. Stuart, 6 Gratt. 197.

gage, or an absolute purchase, a Court of Equity governs itself by the intention of the parties: and if the former appears to have been intended, the Court will not suffer it to be turned into a purchase by any form of words, so as to preclude a redemption.

Same—Same—Governing Principles.—The deed in this case is in aspect, form, and expense, a mortgage. —No price was contemplated or agreed upon;—the grantor retained the possession, and there is a covenant for payment of the money: and though interest is not mentioned, yet the principal debt being payable on demand, it bore interest from the date. In the case of a purchase, the vendee takes possession, in lieu of interest, and if there be a condition to re-purchase, it is done on payment of the principal only, unless the contrary is stipulated.

Payments—Application—Judgments—Relief against.—In what manner payments are to be applied.—On a bill to be relieved against a judgment at law, if the relief is granted in part only, the defendant is entitled to his costs at law, and must pay the costs in equity.

This was an appeal from a decree of the High Court of Chancery. The bill was filed by the appellees, to be relieved against a judgment at law, on a bond payable the 2d of March 1784, executed by the appellees for £113: 16: 4, being the amount of a tract of land, mortgaged by a certain David Davenport to the appellant, to secure a debt of £40: 18: 7, with interest from the 19th of August 1756, and sold under a decree of the County Court of Hanover, and purchased by the appellee James the younger, for whom the other appellee was security.

The ground of equity is, that the mortgage had been paid off by David Davenport:—that under a deed of trust, or power of attorney, from the said David, to Lewis and Ross, the land, had been long before the decree of Hanover Court, sold at public auction, and purchased by the appellee, James Davenport, the elder, at £30, the appellant being then present, and silent as to his title. That James the elder, paid the purchase money to Lewis, has been ever since in possession, and in 1779 received a conveyance from David Davenport for the land; so that James the younger, has had no benefit from his purchase under Thompson's decree, and ought therefore to be relieved against the payment of the money.

Both grounds of equity are flatly denied by the answer. So far from the mortgage money having been paid off, the defendant states an account, commencing in December 1756, by which, after crediting the said David with every payment contended for, he makes him debtor £7: 5: 4, over and above the mortgage money.—The defendant insists, that the intention of the mortgage was to secure subsequent advances of money, or other things; and that the balance due, for posterior dealings, ought to be satisfied out of the mortgaged premises. He denies, that he concealed his incumbrance from the plaintiffs, but, that on the contrary, he disclosed it to them, on the day of Lewis and Ross's sale, that besides this, James the elder, is a brother to David; has been a near neighbor to the defendant, ever since the purchase was made, and 126 finally, that the price which *he gave for the land, was not more than the value of the equity of redemption.

The proofs in the cause, relate principally to Thompson's confessions, that the mortgage was paid off, and his silence at the sale. Amongst the exhibits, is a letter from David Davenport to the court of Hanover, desiring a decree to be entered up, in the suit of Thompson against him, for the principal sum mentioned in the mortgage, and interest from the date, which he says is justly due. The account stated, and reported by the master, after crediting Davenport with all his payments, and debiting him with the posterior account of Thompson, down to the last payment made by Davenport, makes a balance of £29: 1: 3, due upon the mortgage in June 1762, and £31: 5: 7½, due for subsequent dealings.

The court injoined the defendant, from proceeding to levy more of his judgment at law, than so much of £29: 1: 3, with interest from the 28th of June 1762, as shall remain, after deductions therefrom, of the costs expended by the plaintiffs, in their action at common law, and in the said High Court of Chancery.

The PRESIDENT delivered the opinion of the court.

The evidence of Mr. Thompson's confession, respecting the payment of the mortgage money, is loose and desultory; liable to the objections justly stated by the Chancellor, and to others also important; amongst which, one is, that none of the witnesses mention the time, or near it, when those confessions were made—the proof respecting his silence at the sale, is also very defective.

To sustain the decree so far as it goes, the counsel, made several observations upon the evidence, which need not be further noticed, since we agree with the Chancellor on that ground.

The counsel for the appellees, upon this point, supposing that the evidence should be adjudged insufficient, to prove the mortgage to have been paid off, insisted, that no day of payment being mentioned, it was a conditional purchase, and not a mortgage; that Davenport might repurchase at any time, upon payment of principal without interest; which not being mentioned, cannot properly be demanded.

In questions, whether a deed should be considered as a mortgage, or an absolute purchase, chancellors have said, they would govern themselves by the intention of 127 the parties; and *if the former appeared to have been intended, they would not suffer it to be changed into a purchase by any form of words, which might elude the justice of the Court, in permitting a redemption.

In aspect, form, and essence, this is a mortgage without a trait, indicating a purchase. No price for a purchase was contemplated, or discussed, as in a sale. The

vendor retains possession, which is uniformly the effect of a mortgage, and not of a sale. There is also a covenant for payment of the money; and tho' interest is not mentioned, yet the principal debt was due on demand, and bore interest from the date, as in the common case of a bond.

In the case of a purchase, the vendee, has possession of the property, in lieu of interest, and therefore, if there be a condition to repurchase, it is done on payment of principal only, unless interest be expressly mentioned; because otherwise, the vendee would have double satisfaction, namely, interest, and the use of the land. But, in this case, Thompson has received no equivalent for interest, since Davenport retained the possession of the land. Upon the whole, it is clear, that this is a mortgage, and as such, is redeemable upon the common terms, of paying principal and interest.

But the decree, reducing the mortgage from £40: 18: 7 principal debt in 1756, to £29: 1: 3, principal in 1762, is complained of, by both of the parties. The appellant's counsel insisting, that since there was a running account between the parties, on the close of which, a balance was due to Thompson, there ought therefore, to be no deduction from the mortgage debt. On the other side it is insisted, that since payments were made subsequent to the mortgage, more than sufficient to discharge both principal and interest, they ought to be so applied, and the balance should be credited in the account.

The rule as it respects the application of payments is agreed, but the question is, how it operates on the present case?

It is insisted, that the credits, are not to be considered as payments, but as forming so many items in a running account. Whether this would be the case or not, if the credits were mere matters of account, we will not now determine, as we understand, that it will be made a question in some other cause which is to come on.

But in this case, the credit in June 1762 of £80, which reduces the mortgage, is not of goods, or produce, so as to be a matter of account only; but was a payment
128 made in money, *or what was equivalent thereto, by two orders on Jackson and Crenshaw.

After the account was paid off, to that time, there was no choice of application, there being no debt but the mortgage.

The decree therefore is right, so far as it respects the balance due, but is defective, in not decreeing a conveyance, and disposing of the surplus.

As to the costs in Hanover, and the District Courts; whether it proceeded from a difference in opinion between the Chancellor and this court, or that it was not attended to by him, we cannot say; we rather suppose the latter, since we cannot discover any ground for making the defendant pay those costs; since he was certainly entitled to a considerable balance, and was pursuing regular methods to recover it. The costs in the Court of Chancery, were properly awarded against him, since the plaintiff was relieved.

The decree as also the first decree dismissing the bill with costs must be reversed with costs.

Hill & Braxton v. Southerland's Executors.

October Term, 1792.

Payment—Application*—Duty of Creditor in Applying.—Although, if the debtor neglect to make the application at the time of payment, the election is cast upon the creditor, yet it is encumbent on the latter, in such a case, to make a recent application, by entries in his books or papers, and not to keep parties in suspense, changing their situation from time to time, as events should dictate.

Equity Practice—Account—When Not Payment in Paper Money—Offset.—An account for goods not delivered, nor accepted as payment of a pre-existing debt, nor liquidated between the parties, ought not to be considered as a payment in paper money so as to stand at the nominal value according to the strict words of the Act of Assembly, respecting the scale of depreciation but as an offset to be adjusted, especially in equity, upon just principles.

Paper Money—Scale of Depreciation.†—The legal scale of depreciation of 1777 and 1778, does not furnish a just rule, not corresponding with the general opinion of men, at the time it was made, as to the state of depreciation; nor does the scale, at any time, give a proper rule for fixing the price of imported goods.

Equity Practice—Account—Decree against Plaintiff for Balance.‡—Upon a bill for an account, if a balance be found against the plaintiff, the Court will decree against him for the amount.

The appellant Hill, with two others, were endorsers of a bill of Exchange, drawn by Braxton in favor of Southerland, which returned protested. The parties, having agreed upon the sum due by the said bill, in current money; the drawer and endorsers gave their note to Southerland on the 28th of February 1776, directed to the clerk of King William court, where a suit on the bill was pending, agreeing, to confess judgment for the amount due, (being at that time £778: 7: 4, at the exchange of 15 per cent.) with interest at the rate of five per centum per annum, from the 1st of June following. Southerland, held up this note until 1784, when without notice to any of the parties,

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***Application of Payments.**—On this question see the principal case cited in *foot-note* to Howard v. McCall, 21 Gratt. 205. See Hill v. Gregory, Wythe 73.

†**Paper Money—Scale of Depreciation.**—The principal case is cited in White v. Atkinson, 2 Wash. 99; Com. v. Beaumarchais, 3 Call 171; Dearing v. Rucker, 18 Gratt. 450.

‡**Equity Practice—Account—Decree in Favor of Defendant for Balance.**—In Payne v. Graves, 5 Leigh 569, it is said: "Where a bill is brought for an account, and a balance reported in favor of the defendant, the court will decree in favor of the defendant for that balance. *Hill & Braxton v. Southerland*, 1 *Wash.* 134; Fitzgerald, etc., v. Jones, 1 Munf. 150; Todd v. Bowyer, 1 Munf. 447." See also, citing the principal case, *note* to Spear v. Newell, 22 Fed. Cas. 906.

he procured a judgment to be entered up for 361: 6: 10, the balance which appeared by an account filed by the said Southerland, to be then due to him. An execution being sued out upon this judgment, Brax-
129 ton, obtained a supersedeas, *and reversed it. Southerland, then instituted a new suit against Hill alone, and got judgment in 1787, for £1400: 5: 9.

The appellant Hill, filed his bill in the High Court of Chancery, praying an injunction to this judgment, and stating, as the ground of his equity, that the bill had been nearly, if not wholly paid off by Braxton, and that, in consequence of a mistake in his counsel, no defence had been made at law, but the judgment had passed by default in the office, and was afterwards confirmed against him in court.

Upon the answer of Southerland to the injunction bill, the court directed Braxton to be made a party complainant, who filed his bill, stating the same facts, as those set forth by Hill, and further, that he Braxton, had in the year 1783, paid to the said Southerland, two bonds of Thomas Butler, amounting to £935: 15: 1, which were to be applied to the credit of the protested bill. That Southerland was also indebted considerably to him in account, the balance of which, if necessary, ought also to have been applied to that debt.

The defendant, in his answer to this bill, admits the payment of the bonds, but denies that any application of them to the credit of the judgment, was directed by Braxton; that the defendant had applied £661: 12: 8¼ of those bonds to the credit of this judgment, and part of the residue, (by Braxton's particular directions,) to the discharge of a bond dated in February 1776, due to him from Braxton, in which Claiborne was security; and the balance to a private debt of Braxton's.

There is no positive evidence in the cause, that Braxton directed the application of this, or of any other payment, to the credit of the judgment.

It is proved, that immediately after the payment was made, Braxton sent a message to his endorsers, informing them he had discharged the judgment; but this was not delivered in the presence of Southerland, nor does it appear, that any thing passed between them at that time, upon the subject. It is proved by one witness, that sometime after the bonds were received, Southerland declared he should lose money by taking them; but it does not appear, whether this happened before, or after the first judgment was entered up in 1784. That as late as the year 1786, Southerland, enclosed to Mr. Braxton his, and Claiborne's bond, with some accounts, which Braxton, received without objection, and that some time afterwards, Southerland mentioned, that he had been advised to deliver Mr. Braxton those papers, and to rest his demand upon the protested bill.

130 *The commissioner, to whom the accounts between the parties were referred, in his first report, applied the full amount of the bonds, to the credit of the protested bill, leaving a balance of only £34: 17: 9¼ due upon it. A similar statement had been before made by auditors, to whom the accounts had been referred. In stating this account, the commissioner charges interest on the £778: 7: 4, at the rate of five per cent. from June 1776, to December 1784, when the last payment was made; and credits all the payments, with interest on each, from the time they were made, until the same period in 1784. The report, contains also the private account of Braxton with Southerland, which is composed, of the bond of the former to the latter, in which Claiborne was security, and of some other items on the debit side; and of goods sold to Southerland, by Braxton, in the years 1777, 1778, & 1780, on the credit side. The commissioner made two statements of this account, in one of which he scales the credits, and in the other, fixes them at their nominal amount, submitting that question to the court.

The cause coming on to be heard; the court of chancery made a decree, in conformity with the following opinion, viz. "That the goods and merchandize, sold and delivered by the plaintiff Carter Braxton, to the said Fendall Southerland, between the years 1776 and 1781, ought not to be discounted, at the money prices then charged, against a debt contracted before the commencement of that period; but ought to be discounted at their true value, which, in this case, may be nearly perhaps ascertained by reducing those prices according to the scale for proportioning the depreciation of paper money; that the payments made to the said Fendall Southerland, by the plaintiff Carter Braxton, not appearing to have been directed by him, at the times of payment or before, to be entered to his credit in that account, wherein he is made a debitor for the bill of exchange, the said Fendall Southerland might enter them to the credit of the plaintiff Carter Braxton in any other account, subsisting between those parties; and that for the principal money, damages, and charges, due by the protested bill of exchange, in consequence of the settlement thereof, made the 28th of February, in the year 1776, the said Fendall Southerland was entitled to no more than £778: 7: 4, of current money of Virginia, with interest thereon, at the rate of five per centum per annum, from the first day of June, then next following."

The injunction is made perpetual, except as to £225: 18: 5¾ appearing, by the accounts stated according to the principles of the above opinion, to have been due
131 to the said Fendall Southerland, *the 7th of December 1784, with interest from that time; and except also as to the costs in the action at common law.

From this decree the plaintiffs appealed.

The PRESIDENT delivered the opinion of the court.

The first question which presents itself in this case, is, whether the agreement of

1776, shall stand as the basis of settlement between the parties, or, if that should be set aside, because Mr. Braxton superseded and reversed the judgment, for want of a declaration as it is said, but for what cause, does not appear?—

If the judgment had been entered up immediately, and Mr. Braxton had reversed it for want of form, there might have been reason in the objection. But since it was kept up until the year 1784, (I will not say fraudulently, because the evidence does not warrant it,) and considerable payments intervened, which, Mr. Southerland himself admits, reduced the balance of £778: 7: 4, principal in 1776, and interest, to £361: 6: 10, principal in 1784; surely, fair dealing required, that these payments should have been mutually adjusted, previous to the entry of the judgment; or at least, that Mr. Braxton should have had notice, that the judgment was then to have been entered. If the judgment thus entered, was for too much, according to the agreement of 1776, surely, Mr. Braxton might complain of it, without violating that agreement. The proper remedy, was certainly in equity; but perhaps he was advised to seek redress in a court of law, as being the most expeditious. Be this as it may; what is a Court of Equity now to do? to set aside an agreement, (of the fairness and justice of which, neither party complains,) because subsequent disputes have arisen, about payments made in execution of the agreement, and so, subject Mr. Braxton to 10 per cent, instead of 5, from 1776, and to 40 per cent exchange, instead of 15, on the final balance.—This would be, for that meliorating court, not to relieve against penalties and forfeitures, but to assist in enforcing them. For after all negotiation of a bill is at an end, and forbearance, the only object, the additional 5 per cent must be considered as a penalty, being beyond the legislative compensation allowed for the use of money. On the contrary, that court, applying one of its fixed principles, namely, "that what ought to have been done, shall be taken as done," will consider the judgment as having been entered up, immediately after the agreement in
132 *1776, for the £778: 7: 4, current money, and interest at 5 per centum per annum, and on that ground will adjust the subsequent disputes.

In doing this, we shall have two points to consider—the first, and most important is, the application of Butler's bonds, paid and received in 1783. Whether the whole, amounting to £955: 15: 1, ought to be applied to the credit of the bill, (and which will with other specie payments reduce the balance to £44: 0: 11, in 1790?) or whether £205, part thereof, ought to be applied to the bond, in which Mr. Claiborne was security for Braxton, and to an account, the balance of which is in favor of Braxton, more than the £44: 0: 11, if his paper money account is to stand at the nominal, and not at the reduced value?

The rules, respecting the application of payments, are not disputed; but the question is, how they are to apply, under the circumstances of the present case? How Mr. Braxton intended it, appears from his declaration to Mr. Butler, made recently after the payment. It was natural, that he should apply them to the relief of his friends, who stood bound as his securities; and in the choice between them, he might have motives, for prefering the endorsers of his bill; and accordingly, when these bonds were paid in 1783, Mr. Braxton, sent a message to the indorsers, that he had made this payment on account of the bill. This message, was not delivered in the absence of, nor was it communicated to Mr. Southerland, so as to fix his assent to that application. But the appellants suppose, that this assent is to be inferred, 1st, from Southerland's declaration, (which is proved,) that he should lose by taking those bonds—and 2dly, from Mr. Southerland's application to Mr. Claiborne in 1784, (which is also proved,) warning him of his danger, and preparing him for the expected payment: and tho', he afterwards said, that he believed this bond might be paid, yet he refused to give it up, and never did do so, 'till 1786, when the judgment was reversed; then by the advice of his counsel, he sent it with other papers to Mr. Braxton.

On this view of the evidence, the auditors, and the master thought, that the whole should be applied to the credit of the bill. The chancellor thought otherwise, and applied part of it to the bond and account. Whether he was right in doing so, this court is to decide; and upon this question it depends, whether Mr. Hill be at all concerned with the other parts of the dispute; or is liable beyond the £44: 0: 11, in case that was not paid off by Mr. Braxton?

133 *Although, if the debtor neglect to make the application at the time of payment, the election is then cast upon the creditor, yet it is incumbent upon the latter, in such a case, to make a recent application, by entries in his books or papers, and not to keep parties and securities in suspence, changing their situation, from time to time, as his interest, governed by events might dictate. The endorsers, were made easy by the message from Mr. Braxton, "that the payment was applied to their relief," and might in consequence of it, have declined asking for counter security. On the other hand, Claiborne was not deceived, because it does not appear, that he considered his debt as discharged by those bonds.

Besides, it is more probable, that so large a payment would be applied to the credit of a still larger liquidated debt, than that it should be split, and placed, part of it to the credit of a small bond and account, and the residue to this large bond.

Upon the whole, we are of opinion, that the payment should be applied to the bill: and consequently, that the balance due upon that account, is but £341: 17: 9¼, with

interest from the 7th of December 1784.—Respecting the mode of stating the interest, a doubt arose, which induced one judge to decline giving his opinion, and he would have retired from the discussion, considering himself affected in the question, in his character of administrator; but the other judges, not considering the point as important in its operation, in this case, chose to pass it over, on the ground of the master's report not having been excepted to, or the point argued in court, rather than by a decision, either way, to establish a precedent in a bare court, which in other cases might be important.

The next question, arises between Braxton and Southerland, respecting the articles of their account, and principally, on Braxton's account, for goods sold to Southerland. It is to be considered at what rate those goods shall be estimated.—The account begins in September 1777, in which year it amounted to £ 8:
In 1778 to 97: 1: 6.
and ends in 1780,—one article 142: 10:

247: 11: 6.

The court is of opinion, that an account for goods, not delivered nor accepted as a payment, nor liquidated between the parties, ought not to be taken as a payment in paper, so as to stand at the nominal value, according to the strict words of the 134 *act of Assembly, but should be viewed in the light of a set off, and to be adjusted, (especially in equity,) upon just principles. In this proceeding, we are of opinion, that the legal scale, so far as it operates in the years 1777 and 1778, is not a just rule in itself, not corresponding with the general opinion of the citizens at the time, as to depreciation, nor does the scale at any period, give a proper rule for fixing the price of imported goods, which was influenced by the expence and risque of importation, as well as by the depreciation of the paper money. The account therefore, for goods delivered by Braxton to the end of the year, 1778, ought, at the nominal value, to be set off against the principal and interest of Claiborne's bond, and Southerland's account; and so much of the residue of his account, as will pay off the interest of the balance remaining due to Southerland, ought also to be set off at the nominal sum; but the residue of the amount of this account, ought to be subject to the legal scale of depreciation, for May 1780, of 60 for one, and at that reduced rate, to be set off against the principal of Southerland's debt:—a precedent for this distinction, between the principal and interest, is supposed to have been furnished in this court.

Upon the whole; the decree is right in sustaining the suit for relief, but is erroneous in the relief afforded, not only in the adjustment of the quantum, but in the application of it, as between the appellants.—It is to be reversed with costs—and upon payment by the appellant Hill, of the first mentioned sum of £34: 17: 9¼, with interest from the 7th of December 1784, 'till payment, and the costs of the judgment at law, (the said appellant, retaining thereout, his costs in chancery, and in this court,) the injunction is to stand and be perpetual. But on failure in such payment, the injunction is to be dissolved as to so much, and the appellee to be at liberty to sue out execution for so much as he is entitled to by this decree.

The court, then proceeded to correct the account of the master commissioner, (upon the principles before stated), as to the residue of the dispute, between the appellee, and the appellant Braxton; and find a balance due from the latter to the former, of £70: 0: 4, on the 30th April 1783—and since Braxton by applying to a Court of Equity for an account, has subjected himself, though plaintiff, to a decree for the balance found due from him; we must decree him to pay to the appellee the sum of £70: 0: 4, with interest from the 30th of April 1783, retaining thereout his costs in chancery and in this court.

Decree reversed.

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135 *Smith v. Walker Executor of Mickie.

October Term, 1792.

Pleading and Practice—Defective Pleadings—Effect of Verdict.—Declaration upon a marriage promise, by which the defendant agreed to give to the plaintiff, if he should marry the defendant's grand daughter, as much of his estate, (land excepted,) as he should give to any of his own children. The declaration ought to aver the quantity and quality of the estate given by the defendant to his own children, and when the gifts were made. The omission to make such averments might be cured by verdict, if that be rendered upon a proper issue; but not so where all the pleadings are defective.

Same—Statute of Limitations—To What Time Refers.*—The plea of non assumpsit within five years, if general, will refer to the time of the plea pleaded; whereas, it ought to refer to the institution of the suit, and should conclude with an averment.

Same—All Pleadings Faulty—Repleader.†—If all the

***Pleading and Practice—Statute of Limitations—To What Time Refers.**—The principal case holds that, the plea of *nonassumpsit within five years*, if general, will refer to the time of the plea pleaded; whereas, it ought to refer to the institution of the suit. On this question it is cited in Austin v. Jones, Gilm. 354; Rice v. White, 4 Leigh 481; Backhouse v. Jones, 5 Call 462, and *note*; Henderson v. Foote, 3 Call 252, and *note*. See monographic *note* on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 591.

†**Same—Repleader—When Awarded.**—On the question as to when the court will or will not award a repleader, the principal case is cited in Cabell v. Hardwick, 1 Call 355, 356; Shelton v. Pollock, 1 Hen. & M. 427; Hite v. Wilson, 2 Hen. & M. 285; Hord v. Dishman, 2 Hen. & M. 603; *note* (in original edition) to Hill v. Harvey, 2 Munf. 526; Laughlin v. Flood, 3 Munf. 258; Green v. Bailey, 5 Munf. 251; Robertson v. Robertson, 3 Rand. 71; Baltimore & O. R. Co. v. Gettle, 3 W. Va. 384.

pleadings, including the declaration, be faulty, the Court will dismiss the suit, and will not award a repleader.

Appellate Practice—Judgment of Lower Court Reversed.—If the judgment of the inferior Court be reversed, the appellate Court ought to render the proper judgment.

This was an action upon the case, brought by the appellant in the County Court of Albemarle, in the year 1787. The declaration states, that the plaintiff in 1773, being disposed to engage in matrimony with a grand-daughter of the testator of the defendant, the testator promised the plaintiff, that if he should marry the lady, he would give him as much of his estate, (except land), as he should give any one of his own children—avers that he did marry her, relying on the said promise, yet the said testator did not give the plaintiff as much of his estate, (land excepted) as he gave to some of his children, tho often required &c.

Pleas—1st, That the testator did not assume, &c. 2dly, that he did not assume within five years, concluding to the country.

The jury found, that the testator did assume upon himself, in manner and form as set forth in the declaration, but that he did not assume within five years, and assess the plaintiff's damages to £240: 14, upon which the court gave judgment.

The defendant filed exceptions, stating, that on the trial, the defendants offered as conclusive evidence, a decree of dismission in a suit in chancery brought by the plaintiff, against the defendant, for a specific performance of the contract laid in the declaration—That the plaintiff's counsel, opposed the admission of this evidence as conclusive, to which opinion the defendant excepted. It is not stated that the court admitted the evidence.

The judgment of the County Court, upon an appeal to the District Court, was reversed, because the evidence offered by the defendant, was rejected.—From this judgment, an appeal was prayed to this court.

The PRESIDENT. There appear to be many imperfections in this record, from the institution of the suit, to its final decision in the District Court. The declaration states a promise by the testator, to give the plaintiff as much, as he should give to any of his own children; and a breach of this promise is alledged, without avering, how much he gave to either of his own children, or to what the plaintiff's claim amounted.

The plea is non-assumpsit within five years, without saying before the institution of the suit; so that strictly, it must refer to the time of the plea, which was in October 1787: and it concludes to the country, instead of the court; by which, the plaintiff is precluded, from bringing himself within the benefit of some of the exceptions from the act of limitations, by a replication.

136 *The jury find one issue for the plaintiff, and the other for the defendant, and yet give damages to the plaintiff, upon which judgment is rendered by the court.

The bill of exceptions, (which is not sealed by the court,) states very imperfectly, the record offered in evidence, and does not state, that the court gave any opinion upon the subject.

The District Court merely reverse the judgment, without dismissing the suit, directing a new trial, or awarding a repleader.

The latter, this court would have directed, if they had found in the record, any good pleading to begin at. But the declaration is too faulty to be sustained. The breach assigned, is not sufficient, as it does not aver the quantity, or quality of the gifts made by the testator to his own children, or at what time they were made, so as to reduce the demand to some kind of certainty.

This might have been aided by verdict, if that had been rendered upon the trial of a proper issue; but when we are seeking for a good foundation, upon which to erect future pleadings, and find all defective, including the declaration itself, the uncertainty cannot be cured. In giving the judgment therefore, which the District Court ought to have given, we must dismiss the suit with costs.

Nelson v. Nelson.

October Term, 1792.

Specific Performance—Agreement between Children as to Diversion of Estate after Death of Parent.*—An agreement between the children of a family, in the lifetime of their parents, to divide his estate equally between them at his death, whatever distribution he might think proper to make of it by his will, may, under circumstances, be enforced in a Court of Equity, if it be made out clear by proof.

This was a suit instituted in the High Court of Chancery, by the appellant, for the specific execution of a parol agreement made between himself and the defendants, his brothers, in the life-time of their father, that whether their father should die testate or intestate, they would make amongst themselves an equal distribution of his estate. The bill states, that the father made a will and gave to the plaintiff a very unequal portion of his estate, tho' his eldest son and heir.

The Chancellor dismissed the bill, and the plaintiff in that court appealed.

The PRESIDENT delivered the opinion of the court.

The great objection made to the relief prayed for by the appellant is, that agreements of this sort, are opposed to the rules of society, carrying with them strong

137 marks of disrespect *and irreverence to the parent. and ought therefore not to be countenanced in a Court of Equity.

*See Lewis v. Madisons. 1 Munf. 303; also, monographic *note* on "Specific Performance" appended to Hanna v. Wilson, 3 Gratt. 243.

It is true, that obedience to parents during infancy, and respect through life, is not only a natural duty, but one, on which depends the peace and happiness of families, and consequently of society; and therefore if the present agreement could by any means produce effects like those stated at the bar, however strong the evidence might be that such an agreement was made, it would meet with no favor with us, as being leavened with moral turpitude, and unfit for discussion even, in a Court of Equity. Yet we cannot say, that a case may not exist, where such an agreement might be acquitted of those objections—and the present is a strong instance of such a case.

The parent, had always declared a settled intention to make an equal distribution of his estate amongst his sons. As he approached to the weak and infirm state of old age, when the mind, having lost its wonted vigor might be easily susceptible of any impressions; it was to be apprehended, that he might be induced to make considerable changes in the disposition of his estate. His eldest son having left the family and settled himself elsewhere, leaving his brothers around the father, might justly, or unjustly entertain suspicions, that they might derive advantages from this circumstance. A jealousy of this sort tho' unfounded, might produce heart burnings, and domestic feuds amongst them. To prevent this, might have been the prevailing motive which governed the brothers, and an agreement founded upon such a motive could not be objected to, as tending to produce public, or private inconvenience. To effect this end, we should expect to see a written agreement, ascertaining clearly the intention of the parties, deposited with some common confidential friend, under injunctions of secrecy, which would certainly answer better the object of the parties, than by making it the subject of conversation to house-keepers and overseers, as in this case. Tho' a written agreement might have been more proper, as being thereby less liable to misconstruction, yet a parol agreement, made before the act against frauds and perjuries took effect, might be enforced in this court.

In this case, the proof of the agreement is too slight. A casual conversation amongst the parties is heard, not respecting the agreement, or the particular terms of it, but the division of the father's estate. The agreement was made in March 1787, a few months after the act of frauds took effect; but as this is not noticed by the parties, or the counsel, it may not be
138 *important, and all events it is not necessary to consider it; for there is no serious, solemn agreement proved, upon which a decree can be founded.

The decree must be affirmed.

Keel & Roberts v. Herbert's Executors.

October Term, 1792.

Death of Defendant after Supersedeas—Scire Facias.—If after a supersedeas obtained the defendant in error die, a scire facias must be awarded against his executors, or administrators, and not a new writ of supersedeas, because the latter could not be considered as a continuing process, and consequently, the executor could not sue upon the supersedeas bond first given.

A supersedeas in this cause, was obtained against Herbert, who afterwards, and before service of the writ, died. This court, on motion, awarded a new supersedeas against the executors, which was executed, but afterwards quashed it, and awarded a sci. fa. to hear errors against the executors; being of opinion, that the second supersedeas, could not be considered as a continuing process, but a new one, and therefore, that the executor could not sue upon the bond first given for prosecuting the supersedeas.

Thornton, Executor of Champ v. Jett.

October Term, 1792.

Pleading and Practice—Effect When Plaintiff Submits to a Nonsuit.—If the Court direct the plaintiff to be nonsuited, and he submit to it, (which he is not bound to do.) he deserts his cause, and cannot by an exception, avail himself of any legal objection to the opinion of the Court.

Same—Assumpsit to Executor*—Costs.—If the declaration lay the assumpsit to the executor, instead of the testator, and the judgment be against him, he must pay costs.

This was an action brought by the appellants in the District Court of Northumberland, laying an assumpsit to themselves. At the trial, the court, thinking the action not sustainable upon the evidence given, directed a nonsuit, to which the plaintiff submitted, but filed a bill of exceptions to the opinion, and obtained a supersedeas to bring up the record before this court.

The PRESIDENT. Whether the action was sustainable or not, it is unnecessary for the court now to decide—the plaintiff having submitted to the nonsuit, which he was not bound to do, he has deserted his cause, and therefore, he cannot now avail himself of an objection to the opinion of the court, in awarding it—the writ of supersedeas must be quashed.

139 *As to the costs, the court (except the President) were of opinion, that the assumpsit being laid to the plaintiffs themselves, they ought to pay the costs.

The PRESIDENT said, that the reason why executors pay no costs, is, that they are in pursuit of their duty; and therefore he could see no reason, why this case should be distinguished from others, where the action is brought upon an assumpsit to the testator.

Catharine & Benjamin Turner v. Clear Turner, Executrix of Sampson Turner Deceased.

October Term, 1792.

Slaves—Gift of, Not by Deed or Will—Effect under Act

*The principal case is cited in Carr v. Anderson, 2 Hen. & M. 369. See also, monographic *note* on "Exec-

of 1758.†—Under the Act of 1758, entitled, "an Act for preventing fraudulent gifts of slaves," a gift of a slave, not made by deed, or will, though possession was delivered, is void.

Fraudulent Gift of Slaves—Statute Preventing—Effect of.‡—The Act passed in 1787, entitled, "an Act to explain and amend the Act for preventing fraudulent gifts of slaves," is prospective in its operation, and cannot effect gifts of slaves made prior to its passage.

The appellee, brought an action of detinue against the appellants in the County Court, in 1783, for the recovery of two slaves. The declaration states a possession in the testator, and in the plaintiff as executrix. Upon the general issue, the plaintiff offered to give in evidence, a parol gift of the slaves in dispute to Sampson Turner, by his father, a few years previous to the institution of the suit; which being admitted by the court, an exception was taken to the opinion, and a verdict being rendered for the plaintiff below, at a court held in the year 1789, the defendant appealed to the District Court of Suffolk, where the judgment being affirmed, an appeal was prayed to this court.

The PRESIDENT. The court are of opinion, that the judgment of the County Court is erroneous, in admitting the appellee, to give evidence of a parol gift of the slaves in dispute, supposed to have been made by Joseph Turner, the father, to his son Sampson Turner, the testator of the appellee; since if such gift had been really made, it being subsequent to the year 1758, no estate in the slaves passed to the said Sampson thereby, for want of a deed, or will in writing, according to the act of Assembly, passed in the year 1758, intituled, "an act to prevent the fraudulent gifts of slaves." And although it should appear, that the gift in this case was such, as was meant to be declared valid, either by the act passed in the year 1785 intituled,
140 *"an act to prevent frauds and perjuries," or the act passed in the year 1787, intituled, "an act to explain and amend the acts for preventing fraudulent gifts of slaves;" yet nevertheless, the proof in the present case, was inadmissible, and the gift void; both of those acts, being prospective in their operation, and not retrospective of cases happening before; especially as to this supposed gift, on which the suit was commenced in 1783.

The judgment of the District Court is therefore erroneous, and must be reversed. The judgment of the County Court must also be reversed, the verdict set aside, and a new trial awarded; upon which, no evidence is to be admitted, to prove a gift of the slaves in dispute, except a deed in writing, or last will as the said act of 1758 required.

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utors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

†**Slaves—Gift of, Not by Deed or Will—Effect under Act of 1758.**—See the principal case cited in Jordan v. Murray, 3 Call 86, and *note*; Newby v. Blakey, 3 Hen. & M. 59; Merrit v. Smith, 6 Leigh 493; Beasley v. Owen, 3 Hen. & M. 456; Cross v. Cross, 9 Leigh 251. See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348; monographic *note* on "Gifts" appended to Barker v. Barker, 2 Gratt. 344.

‡**Statutes—Construction.**—The principal case is cited in Com. v. Beaumarchais, 3 Call 168; Elliott v. Lyell, 3 Call 283; Duval v. Malone, 14 Gratt. 29.

Wilcox v. Rootes and Others.

October Term, 1792.

Wills—Implied Revocation—Marriage and Birth of Issue.*—A subsequent marriage, and the having of a child, is an implied revocation of a will, and in such a case, the will ought not to be admitted to probate.

This cause, came on before the District Court of Prince Edward, upon a summons issued by the order of the court, on the motion of Mrs. Wilcox the widow, and of Susannah Wilcox, the heir at law of Edmund Wilcox against Philip Rootes and others; requiring them to produce the will of the said Edmund Wilcox; and on a cross motion of the said Rootes and others, against Mrs. Wilcox, and the heir at law, to admit the said will to record.

The will being produced, it bore date the 25th of April 1781, and contained bequests of his whole estate to the appellees. The probate was contested by the appellants, who produced evidence, to prove the marriage of the testator, with the appellant Susannah, the widow, after the making of this will, and the subsequent birth of the other appellant.

The whole of the evidence is spread upon the record, as well that, which proves the execution of the will, as that, relating to the subsequent marriage of the testator, and the birth of a child. The record further states, that the testator married in 1783, had a child, and died in May 1785. That there were strong reasons to believe, that one of the devisees in the will, was the natural son of the testator—That the testator, the night before his death, expressed a desire to make a provision for his said supposed son.

The court admitted the will to record, from which order, the widow and heir at law appealed.
141 *The question made was, whether the will ought to have been admitted to record, since it was revoked by the subsequent marriage of the testator, and his having a child. It was contended for the appellant, that no principle of law was bet-

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***Wills—Implied Revocation—Marriage and Birth of Issue.**—On the question of the implied revocation of wills, the principal case is cited in Yerby v. Yerby, 3 Call 342; Bates v. Holman, 3 Hen. & M. 527, 533; Jones v. Mason, 5 Rand 588; Duff v. Duff, 3 Leigh 529; Hansbrough v. Hooe, 12 Leigh 324; Phaup v. Wooldridge, 14 Gratt. 334, 337. See also, Hughes v. Hughes, 2 Munf. 209. The principal case is cited in Coalter v. Bryan, 1 Gratt. 94, on the question of costs in the probate of wills.

ter established, than this; that marriage and the birth of a child is an absolute revocation of a will, made prior to the happening of those events. If so, it is, as if it had never been made, and of course, it is improper that it should be proved as a will.

To this it was answered by the council for the appellees, that let the doctrine concerning implied revocations be, as it is stated on the other side, yet on a collateral motion like this, the court have nothing to do with inquiries of this sort. If all the requisites of the law, which give validity to the will, have been complied with, the court, on a motion to receive the probate of it, are bound to admit it to record; leaving the parties to contest the force and validity of it, upon collateral points, in some other form. The only questions before the court on such a motion, are, whether the will was duly executed by the testator, is it his last will, and was he capable of making it at the time?

Besides, tho' subsequent marriage and having a child, be a revocation of the bequests in a will, it does not render the party intestate; and if the will be not proved, the executor cannot qualify. The will may be good to some purposes, and void as to others; but because the bequests are revoked, it does not follow that the appointment of an executor, should also be revoked, which must be the case, if the will could not be proved and admitted to record.

The PRESIDENT delivered the opinion of the court.

The subsequent marriage, and having of a child, was clearly an implied revocation of the will, and ought to operate as such; since the testator did not after those events took place, republish his will, or signify an intention, that it should be established, or have any force or effect after that period: that his mind upon this subject, was otherwise inclined, appears clearly from the evidence stated in the record. The judgment must therefore be reversed, without prejudice to any written or nuncupative will, made after the marriage and birth of the child, which may be offered, and proved according to law.

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142 *Thornton Executor of Thompson and Gray and Wife v. Spotswood.

October Term, 1792.

Wills—Equity Practice—Case at Bar.—A, upon his marriage, settled an annuity of 500l. on his wife, charged on a certain tract of land, with power of distress, and nomine pœnæ. By his will he devised all his estate to his son B, in tail, who, after his fathers death, entered. B gave to his mother, the annuitant, his bond and two bills of exchange for the amount of her annuity then due, and died indebted to his mother for a part of her annuity afterwards accrued, having, by his will, devised all his estate, not intailed, to his second son. The bills were negotiated by T, who intermarried with the annuitant, upon which an action was brought and judgment obtained against the executors of B, upon which an execution was issued, and returned nulla bona. T, by his will, devised to the plaintiff all the debts due to him from the estate of B. To recover the amount of the aforesaid bond, bills, and residue of annuity, a bill in Equity was filed against the issue in tail, under the will of A. Decided, that whether the annuity was extinguished or not at Law, by the bond and bills it was so in Equity, and that the plaintiff had mistaken his right as well as his remedy.

This was a suit in equity, instituted originally by the appellants against the appellee, in the County Court of Spotsylvania. The material facts in the case are as follows viz.

A. Spotswood the grandfather of the appellee, on his marriage, settled an annuity of £500 on his wife payable quarterly, and charged his Mine tract of land therewith; with power of distress, and nomine pœnæ. By his will, he devised all his estate to his son John, the father of the appellee, in tail. After the death of the G. father, John entered upon the estate devised to him; and his mother, by deed, released to him one half of her annuity, and then intermarried with Mr. Thompson, the father of Mrs. Gray, and the testator of the other appellant. John Spotswood previous to his death, gave to Mr. Thompson two bonds, and drew two several bills of exchange in his favor, for the amount of the arrears of the annuity then due, and shortly after died. The bills were negociated by Thompson, and finally came by assignment into the hands of a Mr. Walker, who commenced suits thereon, against the executors of John Spotswood, and having obtained judgments, took out execu-
143 tions, *which were returned "nulla bona."—It does not appear, in whose possession those bills are. The plaintiffs have them not. Mr. Thompson, having by his will devised to the appellant Mrs. Gray, all the debts due to him from the estate of John Spotswood, also departed this life. The appellee, is the eldest son and issue in tail of John Spotswood.

The County Court, decreed to the appellants Gray and Wife, the full amount of the bills of exchange, with 10 per cent. damages; also the amount of the two bonds, and nearly one years annuity, which became due after the bills and notes were given; (deducting therefrom, a sum due from Thompson, for land of the appellees, sold to him by John Spotswood the father,) with interest thereon: and the Mine tract was decreed to be sold, to satisfy this decree, unless discharged by the appellee, within a limited time.

John Spotswood the father, by his will, devised all his estate (not intailed) to his son John.

The decree of the County Court was upon appeal to the High Court of Chancery reversed, from which, the present appellants appealed to the Court of Appeals; and a majority of that court not chusing to sit in the cause, a Special Court was summoned.

Warden for the appellants. There are

two questions to be considered.—1st, Whether the mine tract is liable to satisfy the appellant's demand.—And 2dly, Whether a Court of Chancery has jurisdiction of the case.

The first point is dependent upon another, to wit, whether the annuity be extinguished or not, by the bills and bonds? I am to contend that they are not. The annuity, being of as high dignity as a bond, and higher than a bill of exchange, cannot be extinguished by them at law, or in equity: they are only additional securities. If the annuity exist at law, surely a Court of Equity will not assist, to take away the security, so long as the debt continues unpaid.

Upon the second point; it is the peculiar province of a Court of Equity, to assist in cases, where there is not a compleat remedy at law. This is to be presumed in the present case, as the defendant in his answer, hath not set forth; that there was property on the premises subject to distress, sufficient to satisfy the annuity.

Washington for the appellee. A Court of Chancery has not jurisdiction in this case, whether the annuity be extinguished or not.

If the latter, then the executor by
144 the 32 Hen. 8, *might have distrained on the land, in the possession of any person, claiming by, or from the G. father; or, he might have maintained an action of debt at common law, against the executors of John Spotswood, for the rent accruing in his life-time. Co. Litt. 162 b. 5 Co. Rep. 118, 4 Co. Rep. Ognels case. Fairfax v. Lord Derby, 2 Vern. 612, which last case, is in point as to jurisdiction. A Court of Chancery will never interfere in cases of this sort, unless the remedy be lost at law, by fraud in the tenant, as by depasturing the land &c. 1 Eq. Ca. Ab. 32.

If the annuity be extinguished, then it is too clear to be argued, that the remedy was only at law against the executors of John Spotswood. But if the appellants do come into a court of equity, then I contend, that though the annuity might not be extinguished at law, yet it will be considered as being so in that court, and of course, the remedy could only be against the executors, and not against the issue in tail. After so long an acquiescence on the part of Thompson; his absolutely negociating the bills; and of course receiving the amount of them, long ago, this court, will presume an agreement between the parties, that the bonds and bills, should be accepted as a discharge of the annuity, and as an exchange of the security. In any point of view then, the decreed of the County Court against the issue in tail, was erroneous.

But this is not the only error. The decree, is for the amount of the bills of exchange, in favor of the legatee, although neither the legatee, nor the executors of Thompson are in possession of the bills, nor entitled to the benefit of the judgments recovered upon them, by assignment from Walker, or otherwise; and although Thompson, has once received the value of them, from the person, to whom he endorsed them, (as is to be presumed,) and neither he, nor his executors have been called upon by Walker to pay them, and probably, never may be called upon.

The most which the appellants could ask for, would be security, to indemnify them in case the amount of those bills should be hereafter recovered of them, and even this, could not with propriety be required of the heir.

But if the appellee be liable, to pay the amount of these bills, Mrs. Gray has no right to it, since this is not a debt due to Thompson from Spotswoods estate, and therefore is not included in the devise to Mrs. Gray.

The court was unanimously of opinion, that the appellants remedy, if any he had, was at law. That whether the
145 *annuity was extinguished or not, at law, it was so in equity, under all the circumstances of this case, and that of course the appellants had mistaken their right, as well as their remedy.

The decree of the High Court of Chancery was affirmed.

Executors of Hunter and Executors of Herndon, v. Spotswood.

October Term, 1792.

Jurisdiction of Equity.—As to the jurisdiction of a Court of Equity.

Officers of Court—When Liable for Interest on Money in Hands.*—Under what circumstances an officer of a Court, having in his possession money raised by the sale of attached effects, which the Court had forbid him to pay over, shall be decreed to pay interest.

Statute of Limitations—When Not Applicable in Equity.†— In what cases the act of limitations will not bar a right in Equity.

***Officers of Court—When Liable for Interest on Money in Hands.**—On the question as to when officers of the court are liable for interest on money in their hands, the principal case is cited in Miller v. Beverleys, 4 Hen. & M. 416; Tazewell v. Barrett, 4 Hen. & M. 262; Templeman v. Fauntleroy, 3 Rand. 447; Union Bank v. Smith, 24 Fed. Cas. 557; Darby v. Gilligan, 37 W. Va. 69, 16 S. E. Rep. 511. See also, Ross v. Austin, 4 Hen. & M. 502; White v. Johnson, 2 Munf. 285; Lomax v. Pendleton, 3 Call 538; Beverleys v. Miller, 6 Munf. 99; McCall v. Peachy, 3 Munf. 288.

†**Statute of Limitations—To What Cases Not Applicable.**—Cases of fraud, trust and mistake, are not within the statute of limitations. Massie v. Heiskell, 80 Va. 804, citing *Hunter v. Spotswood*, 1 *Wash.* 145; Redwood v. Riddick, 4 Munf. 222. The principal case is also cited on this question in Lamar v. Hale, 79 Va. 164, which case cites in addition Rankin v. Bradford, 1 Leigh 171; Turner v. Campbell, 3 Gratt. 77; Rowe v. Bentley, 29 Gratt. 763. See monographic *note* on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 591.

Equity Practice—Order of Publication—Decree—Recitals.—See, citing the principal case, Moore v. Holt, 10 Gratt. 291, and *note*; Craig v. Sebrell, 9 Gratt. 133; Hadfield v. Jameson, 2 Munf. 58; McCoy v. McCoy, 9 W. Va. 445; Amiss v. McGinnis, 12 W. Va. 374; Scott

This was a suit brought by the appellee in the High Court of Chancery, against the appellants. The case, as extracted from the bill, answer, depositions, and exhibits, was shortly as follows, viz: John Spotswood the father, died sometime in the year 1758, seized of a considerable entailed estate, part of which, consisted of very valuable iron works, and leaving a widow, (who afterwards intermarried with John Campbell,) as also the appellee his eldest son and heir at law, and one other son. Campbell, after his intermarriage, agreed with the said Hunter, to sell him the proportion of the iron made at the works, to which he would be entitled, in right of his wife's dower in the same; and Bernard Moor, the guardian of the appellee, and executor of John Spotswood, agreed to deliver the same to Hunter, upon his undertaking to pay for Campbell, a debt due from his wife to the executor, for property belonging to the estate; and sold to her before her intermarriage; and also one third of the expenses, which might be incurred in carrying on the iron works. In consequence of this agreement, the iron was delivered to Hunter, who paid to the executor, the debt due from Campbell on account of his wife, and part of the expences. Campbell having
146 left this country, attachments *were sued out against his effects by Hunter, who had a considerable claim against him; as also as by Bernard Moor, to recover the amount of the expenses due from him on account of the iron works, which then remained unpaid. B. Moor obtained a judgment in the County Court, which was reversed in the General Court, and the attachment quashed, "it appearing to that court, that Campbell had given public notice of his intention to leave the country, which was known to his creditors." But Herndon (the sheriff,) having levied the attachment upon property belonging to Campbell, the court directed, that he should sell the same, and pay the money to Hunter, he giving security, to be accountable for it, in such manner as the court should thereafter direct.

At the sale of the attached effects, Hunter purchased to the amount of £650, but failed to give security, according to the direction of the court. He declined receiving the balance of the money, amounting to about £750, which with interest, is now claimed from Herndon's executors.

The appellee also claims from Hunter's executors, the £650 with interest, and also about £300, the balance of Campbell's debt, due for the expences of the iron works.

Hunter's executors answered, and also put in three pleas; to wit: 1st, to the jurisdiction—2d, the act of limitations; and 3d, want of right in the plaintiff to sue.

Herndon's executors in their answer say, that the money died in the hands of their testator, and therefore it ought not now to be paid in specie.

The bill being taken for confessed, as to Campbell, for £1717: 0: 10¾, the court decreed the same to be paid by that defendant. That £697: 3: 11½ part thereof, in the hands of James Hunter, should be paid by his executors, and £722: 13: 7½ other part thereof, remaining in the hands of Herndon (both sums bearing interest from the 3d of May 1770,) should be paid by his executors to the plaintiff, after deducting the costs of those defendants; the plaintiff to give such bond and security as the law requires.

Washington, for the appellee began.

The plea to the jurisdiction cannot be sustained.—This suit is brought for the purpose of enforcing a settlement, of a long and complicated account, subsisting between different persons, but the whole so interwoven, that compleat justice could not be done, unless all those persons were before the court. In cases where an action of account may be brought, a suit in equity may properly be sustained. 1 Eq. Ca. ab. 5.

147 *Much stronger is this case, when, by resorting to this tribunal, multiplicity of suits are prevented. Thus, if Spotswood had sued B. Moor and recovered, Moor would recover against Hunter. So, if he recover against Herndon's executors, they must recover against Hunter's executors. All the parties being before the court, a decree is made against Herndon's executors, for the money retained by the testator, and against Hunter's executors, for the money received by theirs.

The next objection to a recovery, is the act of limitations—as to the £650 received by Hunter, from Herndon, there can exist no doubt. Hunter was not only a trustee for that money, in the same manner as Herndon would have been, had he retained it, but he is guilty of a fraud, in obtaining the possession of Campbell's property, from an officer of the court, against the order of that court; and that too, under a promise to give bond and security, as the order required, which he afterwards refused to do. Cases of trust, or fraud, are without the operation of the act of limitations.

As to the remaining sum of £300, respecting which an account is directed, there is more difficulty; but I am inclined to think, that there are sufficient circumstances in the case, to take it out of the operation of the act.

Hunter, having received the profits of an infant's estate, he is a trustee for those profits, and therefore cannot protect himself by length of time. Again—the iron in the hands of Hunter, was a deposit, placed there by Campbell, chargeable with the payment of a certain debt to Spotswood, which places him in the situation of a trustee, bound to execute the trust for which the pledge was placed in his hands. But I principally rely, upon the particular circumstances of this case. The appellee after

v. Ludington, 14 W. Va. 391; Steenrod v. R. R. Co., 27 W. Va. 12; Yates v. Stuart, 39 W. Va. 128, 19 S. E. Rep. 424.

his arrival at age, appears to have been totally in the dark as to his affairs, which had been conducted by his guardian, until a few years before the late war commenced; and this suit was brought shortly after its conclusion. There are many cases, which do not come within any of the exceptions from the act of limitations, and yet are construed to come within the equity of them, as if the time has elapsed during a period when no executor has qualified, or where there is a contest respecting the right of administration.

As to the right of the appellee to sue, it is clear that if he cannot, no other person can. He is entitled to the subject of recovery, namely, the profits of the land, and whatever objection might have been made to him at law, in this court none can exist.

148 *Objections are made to the depositions of two of the witnesses, on the ground of interest. To one of them, because he is the executor of one of the securities of B. Moor, in his capacity of guardian; to the other, because he was security for B. Moor, on his suing out the attachment against Campbell. As to the first, the record does not shew that he is executor. But if it did, the interest is too remote to preclude him from giving testimony—4 Burr. 2255—1 Str. 575 are stronger than the present. Again—both witnesses were cross examined by the objecting party, which estops him now, to impeach them on the ground of incompetency—Vern. 254—2 Bac. Ab. 289—4 Burr. 2252—1 Ld. Ray 730.

As to the objection to the other witness, there is no colour for it, because, whether Spotswood succeeds, or fails in this cause, it will not bar Campbell of his action, on the attachment bond, if the attachment issued illegally.

As to Herndon's executors, the principal objection is, to the claim for interest on the money retained by him. I admit, that if he actually kept the money by him during the whole time, he ought not to pay interest. But the answer admits, that this was not the case; for if it were, the money could not die in his hands, but would at this day, be specifically the same, that it was when received. A tender will not even in equity prevent interest from running, unless the money were kept, and no profit made of it; and this should be sworn to by the party. 2 Ch. Cas. 206—2 P. Wms. 378—2 Vern. 192.

For the appellants, it was argued by Marshall, Warden, and Stark.

They contended that this was a stale demand, putting the act of limitations out of the question, and ought not to be countenanced in a Court of Equity. The plaintiff came of age in 1768, and this suit was not commenced until 1784. It appears, that within a short period after his taking possession of his estate, he had a schedule of it delivered to him. Even if Hunter, is to be considered as a trustee of the profits, received during the infancy of the plaintiff, still, the act of limitations will run, against a suit to recover those profits. 1 Eq. Ca. Ab. 304—if the iron is to be considered as a deposit in the hands of Hunter, and so like to goods pledged, there cannot exist a case of a sale, where the same argument may not be urged. The truth is, that the iron was sold by Campbell, to Hunter, and he, assumed to pay so much to B. Moor for it. As to the fraud charged upon Hunter, there is not more, than

149 exists in every *case of a breach of promise to pay money, or to perform any act. But if it were a fraud, still the act of limitations will begin to run, from the time it is discovered.

The objection to the jurisdiction was not relied upon.

They observed that the order of the General Court, directing Herndon, to pay the proceeds of the attached property to Hunter, was very unusual and improper, upon attachments of this sort, and could be accounted for in no other way, than by supposing, that the money was intended to be paid to him as a creditor of Campbell: the General Court at that time, having an equitable jurisdiction in cases of attachments against absentees.

The cases cited to prove, that the cross examination of a witness, amounts to a waiver of all exceptions to his competency, must have been decided upon the principle, that the party knew of the objection at the time of the examination, otherwise the doctrine would be unreasonable and absurd.

As to Herndon's executors, it was contended to be a settled rule, that a sheriff, or a stake holder, pays no interest. Interest is a retribution for the use of money, and therefore, if the person having the principal money in possession, is not permitted to use it, (being liable at any moment to be called upon for it,) he ought not to pay interest.

The answer (it is said,) does not state that the money was unemployed by Herndon: if it had, it would not have been evidence, since the contrary not being charged in the bill, such an allegation would not have been responsive to it. Herndon was not bound to keep the identical money by him. He might have deposited it with a friend for safe-keeping, by which means it might have been lost. The money might well have died in his hands, as the answer states, without his having parted with it, when it is recollected, that this country, was at that time full of James river bank notes, which were totally lost to the holders, by the war.

The Court, were just about to deliver an opinion, when it was observed by Mr. Marshall, that it did not appear in the record, or by the decree, that publication against Campbell, had been made in the Gazette, which ought to have been done, he being an absent debtor, and not served with the process—that without a publication, Campbell was no party to the suit: and therefore a decree, against persons called upon to pay his money, would

be as improper, as if he had been personally decreed to pay it. And tho' the Chancellor ordered, that publication should be 150 *made, yet the execution of that order is not to be presumed, unless there be evidence of it in the record.

A certificate, was then produced from the clerk of the High Court of Chancery, stating, that due publication had been made; but this was not considered as sufficient, by a majority of the court.

In answer to the objection, it was argued, that no person could take advantage of this omission, but Campbell, who had not appealed.

But the court, for this reason only, reversed the decree, and sent back the cause to the High Court of Chancery.*

APRIL TERM, 1793.

Hoyle v. Young.

April Term, 1793.

(1 Am. Dec. 446.)

Demurrer to the Evidence—When May Be Tendered.†—A demurrer to evidence may be allowed at any time before the jury retire, although the party demurring may have examined witnesses, (the whole evidence on both sides being stated, which ought always to be done,) unless the Court think the case clear against the party; and then the Court may refuse to receive the demurrer.

Same—Joinder in—When Not Compelled—Case at Bar.—In slander, the declaration states that the defendant, with intention to injure the reputation of the plaintiff as a merchant, falsely and maliciously spoke of him, (then being a merchant,) the following words, viz: "Mr. Young, I must tell you that you have received more tobacco than you have accounted for to the house," meaning the mercantile house of which the plaintiff and defendant were partners. No colloquium is laid. The case being clear against the defendant, the Court was right in refusing a demurrer to evidence offered by him.

This was an action of slander, brought by the appellee, in the District Court of Petersburg. The declaration states, that the plaintiff was a merchant of good fame, and free from the crime of embezzlement or keeping false and unjust accounts, and that the defendant not ignorant &c. but maliciously intending to deprive him of his reputation as a merchant, and to subject him to infamy &c. falsely &c. spoke of the plaintiff then being a merchant, certain false &c. words to the following pur- port, viz. "Mr. Young I must tell 151 you, that you have received *more tobacco than you have accounted for to the house, (meaning the mercantile house of which the plaintiff and defendant were partners.") No colloquium is laid. Plea not guilty. At the trial, the defendant offered a demurrer to the evidence, stating the testimony given at the trial on the part of the plaintiff, which was objected to by the plaintiff, because the defendant had given evidence on his part, tho' he admitted, that that testimony was only offered in mitigation of damages: what that evidence was, does not appear. The Court refused to receive the demurrer after the defendant had introduced testimony on his side, to which opinion the defendant excepted.

Verdict and judgment for the plaintiff from which the defendant appealed.

Campbell and Wickham for the appellants. As to the point relied upon in the exceptions, it must be given up.

The question will then be, whether the words laid in the declaration, be actionable, or not? Some words, are actionable in themselves, if spoken of any person—as to charge him with the commission of such a crime, as might endanger his life &c. others, are actionable only, when spoken of a person, whose office or profession distinguishes him from others; with respect to such persons, some words are actionable, without any averment, or explanation whatever: as to call a merchant a bankrupt. Others, are not of themselves actionable, unless spoken of the person, in his official or professional character, any more than they would have been if spoken of a person not bearing that character. In cases of this sort, therefore, the words ought to be made to apply to the person in that particular character, by laying a colloquium. 2 Esp. 235. The words as laid in this declaration, do not necessarily impute any crime, or improper conduct to the defendant: besides, they are too general, 2 Espinasse, 252.

The PRESIDENT.—Although the appellant's counsel in their argument of this cause, abandoned the exception taken to the opinion of the Court, refusing to receive the demurrer to evidence, yet we have considered it, thinking it important to the practice, and necessary to be settled. We have been able to derive but little aid upon this subject, from the English books, and have therefore taken it up, on principle. To permit a party to go fully into the trial, and after demurring to the evidence, take his chance with the jury, and failing there, to try the court, would be highly improper, and repugnant to the spirit of the law, which prevents a plaintiff from suffering a

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*The Chancellor having corrected the error, by stating in his decree, that evidence of publication was proved to him, the cause went back to the Special Court of Appeals, where the decree was affirmed in toto.—Note in Original Edition.

†**Demurrer to the Evidence.**—On this subject, the principal case is cited in Hyers v. Wood, 2 Call 588; Green v. Judith, 5 Rand. 9, 11; Hansbrough v. Thom, 3 Leigh 156; *foot-note* to Trout v. Va. & Tennessee R. Co., 23 Gratt. 619; Bank v. Evans, 9 W. Va. 383; Adkins v. Fry, 38 W. Va. 556, 18 S. E. Rep. 740. See monographic *note* on "Demurrer to the Evidence" appended to Tutt v. Slaughter, 5 Gratt. 36.

Slander.—The principal case is cited in Harman v. Cundiff, 82 Va. 249; Cave v. Shelor, 2 Munf. 194, 195. See monographic *note* on "Libel and Slander" appended to Bourland v. Eidson, 8 Gratt. 274.

nonsuit after the jury have retired. On the other hand, it would be equally improper to preclude him from a demurrer, because
152 he had examined *witnesses. We think the proper rule, is to allow a demurrer to evidence at any time before the jury retire, altho' the party demurring may have examined witnesses on his part, the whole evidence on both sides being stated; (which in all cases ought to be done) unless the court think the case clear against the party. In which case, the books agree, that the court may refuse to receive the demurrer. In this case, the opinion of the court as to this point was right, 1st, because the whole evidence was not stated, and 2dly, because we think the case was clearly against the defendant.

To consider the main question relied upon in this court, upon principle. The law has liberally provided remedies for every person injured in his person, property, or reputation. The plaintiff in this case, complains of a wrong done to his character. The jury think his complaint well founded, and that he has sustained damage thereby to a certain amount. Yet the court is applied to, to set aside the verdict, by declaring that the words charged in the declaration are not actionable. If a man be injured in his property to the value of five shillings, he may recover reparation therefor, and yet, if the injury tho' an hunderd times more grievous, be offered to his reputation, it is said he is without redress by the principles of law, tho' the fact be established by a jury. If the books be consulted, it will be found, that in ancient times, the judges to discourage actions of slander, were very rigid indeed in their decisions, from whence arose the doctrine (long since exploded) that words should be taken in mitiori sensu. Discovering afterwards, that slanders were by this mean encouraged, a more rational and just principle was introduced, viz. "That words should be understood in the sense they were understood by the bystanders." In the case of How v. Prinne, 2 Lord Ray 812, it was decided, that to charge a man with evil principles was actionable. In the present case, the words laid in the declaration, clearly import a charge against the defendant in his mercantile character. The declaration states him to be a merchant, and the whole of it taken together shews, that the words were spoken of him as such. It was contended, that the words, do not in themselves import a charge against his reputation. We admit that they might have been innocent. One man may properly say to another in private, by way of asking for information, or in the necessary discussion of a disputed point, that that other had not accounted for property placed in his hands. The case is quite different here—the charge is made publicly—it is laid to have
153 been maliciously *spoken, with intent to injure the plaintiff, and so the jury have found it. After this it would be highly improper in the court to set aside the verdict.

The judgment must be affirmed.

Williams & Roy Executor of Corrie v. Campbell.

April Term, 1798.

Writs—Failure to Endorse True Nature of Action of Trover—Office Judgment—When Motion for Dismissal Must Be Made*—Case at Bar.—In an action of trover, the plaintiff omitted to indorse upon the writ, the true nature of the action. The Court may, upon inspection of the writ, dismiss the suit, if the motion be made during the term next after an office judgment has been entered, but not afterwards. As to the Sheriff, he was not bound to take bail, and therefore, judgment could not be entered against him, either for want of a bail bond returned, or for insufficient bail.

This was an appeal from the District Court of King and Queen. The appellants, on the 12th of October 1787, sued out of the General Court, a writ, in case, against the appellee, without any indorsement of the nature of the action. The sheriff executed the writ, and took appearance bail, and so returned the writ. At the rules in July 1788, a declaration in trover and conversion was filed, and a common order entered against the defendant, and sheriff, which was confirmed in July.—There were then continuances for five or six terms, in the General and District Courts, at two of which, the plaintiff and defendant, obtained commissions for examining their witnesses.

At the April term 1791, on the motion of the defendant, the District Court upon inspection of the writ, dismissed the suit with costs, it appearing, that the cause of action was not endorsed on the writs; to which order, the plaintiffs excepted, and filing a bill for this purpose, appealed to this court.

The PRESIDENT delivered the opinion of the court.

By the law, as it formerly stood, the sheriff was often perplexed to decide, in what cases, he ought to require appearance bail. To remedy this, the act of 1777 describes the actions, in which it should, or should not be required, and as a direction to the sheriff, the plaintiff, on pain of having his suit dismissed with costs, is to endorse on the writ, the true species of action. Trover is one of those actions, in which appearance bail is not required.

It is contended, 1st, That the court could not dismiss the suit, (if in other respects it were proper,) upon inspection of the writ, without a plea in abatement.

This objection cannot be sustained.—If the motion had been made in proper time, the court, might have directed a dismis-

*Writs—Appearance—Effect.—On the question of the effect where the defendant appears and pleads to an action, where he has been served with a defective writ, the principal case is cited in *foot-note* to Hickam v. Larkey, 6 Gratt. 210; Valley Bank v. Berkeley Bank, 3 W. Va. 391; Dunbar v. Long, 4 Hen. & M. 220; Steele v. Harkness, 9 W. Va. 24; Mahany v. Kephart, 15 W. Va. 618; Shepherd v. Brown, 30 W. Va. 18, 3 S. E. Rep. 189.

sion, upon inspection of the writ.
154 *2dly, That the motion was made, at an improper stage of the cause.—

As to the defendant himself, the motion was certainly made too late. He might have made it, during the term next after the judgment was confirmed in the office, but not after; and even if he had not been precluded by this omission, he would have been so, by his appearance afterwards in the District Court, without then making the objection.

As to the sheriff, he was not bound to take bail, and therefore, there was no pretence for entering judgment against him, either for want of a bail bond returned, or for insufficient bail. Of this judgment, it does not appear he had any notice; he might conclude the contrary, by hearing of the defendant's appearance, and that the contest was going on between the parties.

This being disclosed, before executing the writ of enquiry, the court, ought to have set aside the judgment against the sheriff—they might also have set it aside as to the defendant if moved for, without bail, on his pleading to issue.

The judgment must be reversed with costs, and the suit remanded; with directions to the District Court, to set aside the judgment as to the sheriff, and to proceed to execute the writ of enquiry against the defendant, unless he shall move to set aside the office judgment which he is to be allowed to do upon pleading to issue, and proceeding to trial immediately, without delay to the plaintiffs on that account.

Daniel v. Robinson's Executors.

April Term, 1793.

Appeal*—Death of Appellee—Trial without Scire Facias.—The appellee being dead, an appearance was entered for the executors, and, on the motion of their counsel, the cause was tried without waiting for a scire facias.—Contra Wood v. Webb.

The appellee, being dead, Warden moved, to enter his appearance for the executors, without waiting for a sci. fa. which he said was only necessary to force an appearance. The court granted the motion, and tried the cause, at the instance of the counsel for the appellee, altho' it was objected by Mercer, J. that a trial at this term would be a surprise upon the appellant, who might consider the appeal as abated until regularly revived. But it was said by the court, that the appellant ought to follow the cause.†

*See Meek v. Baine, 1 Hen. & M. 338; also monographic *note* on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

†In the case of Wood v. Webb, determined afterwards in October 1795, the court, upon a similar motion, refused to revive the appeal upon an appearance being entered, and directed a writ of sci. fa. to issue, saying, that the above case had not been duly considered, at the time the motion was granted.—Note in Original Edition.

155 *Stevens v. Taliaferro, Administrator of Thornton, Deceased.

April Term, 1793.

Pleading and Practice*—Replication Bad—Repleader—Case at Bar.—Debt on a bond against the executors of one obligor. Plea, that J. S. was jointly bound with the testator in the bond, and survived him. Replication, "that it is not expressed in the bond that the said J. S. was jointly bound with the testator, and, if it were, by the Act of 1786, entitled an Act, &c. it is declared, that the representatives of one jointly bound with another, may be sued as well as the surviving obligor, and insists, therefore, that the action does not survive, &c., and this the defendant is ready to verify," &c. The record states, "and thereupon issue was joined by the parties." The plea is good, and the replication faulty, and a repleader from the plea awarded.

Same—No Issue Joined—Effect.*—The judgment upon the verdict rendered in this case for the plaintiff, is also erroneous, there being no issue joined.

This was an appeal, from a judgment of the District Court of Fredericksburg, reversing a judgment of an inferior court, and awarding a repleader from the plea.

It was an action of debt, brought by the appellant, against the appellee, upon a

*Pleading and Practice—No Issue Joined—Effect.—In State v. Douglass, 20 W. Va. 777, it is said: "It is well settled, that if a verdict has been rendered without any issue being joined, it is a mere nullity, and no judgment can properly be rendered upon it, whether it be a civil or a criminal action. See *Stevens v. Taliaferro*, 1 *Wash.* 155; Grymes v. Pendleton, 4 Call 130; Taylors, etc., v. Huston, 2 H. & M. 161; Kerr v. Dixon, 2 Call 379; Wilkinson v. Bennett, 3 Munf. 316; Sydnor v. Burke, 4 Rand. 161; McMillion v. Dobbins, 9 Leigh 422; Rowans v. Givens, 10 Gratt. 250; Baltimore & O. R. Co. v. Gettle, 3 W. Va. 376; Baltimore & O. R. Co. v. Faulkner, 4 W. Va. 180; Gallatin v. Haywood, 4 W. Va. 1; Baltimore & O. R. Co. v. Christie, 5 W. Va. 325; State v. Conkle, alias Swank, 16 W. Va. 736."

In Henry v. Ohio River R. Co., 40 W. Va. 238, 21 S. E. Rep. 865, it is said: "There is no statement in this record either of a replication or that issue was joined on the plea. Some cases hold that even where there is a statement that issue is joined, though there is none that the plea or other pleading was filed, there is still no issue, and the defect is fatal. Wilkinson v. Bennett, 3 Munf. 314; *Stevens v. Taliaferro*, 1 *Wash.* (*Va.*) 155; Lockridge v. Carlisle, 6 Rand. 20. Others hold, not that there is an issue in such case, but that it is merely misjoinder, and cured by statute of jeofails after verdict. Moore v. Mauro, 4 Rand. 488; Huffman v. Alderson, 9 W. Va. 616; Railroad Co. v. Daniel, 20 Gratt. 344. There is conflict in these cases. See 1 Bart. Law Prac. 482."

See, citing the principal case on this question, Hite v. Wilson, 2 H. & M. 285, 288; *foot-note* to Rowans v. Givens, 10 Gratt. 250; Southside R. Co. v. Daniel, 20 Gratt. 360, and *note*; Preston v. Salem Imp. Co., 91 Va. 585, 22 S. E. Rep. 486; Ruffner v. Hill, 21 W. Va. 158; Brown v. Cunningham, 23 W. Va. 111; Hickman v. B. & O. R. Co., 30 W. Va. 305, 4 S. E. Rep. 659; Simmons v. Trumbo, 9 W. Va. 363. See also, *foot-note* to McMillion v. Dobbins, 9 Leigh 422; monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

bond given by the testator, and a certain John Pattie. The defendant, without taking oyer, plead in bar, "that the said John Thornton, was jointly bound with a certain John Pattie, in the said identical writing obligatory in the declaration mentioned, and that the said John Pattie, survived the said John Thornton, and this he is ready to verify wherefore, &c." To this plea, the plaintiff replied, that he ought not to be precluded &c. because he says, in the said writing obligatory, it is not expressed, that the said John Thornton was jointly bound with the said John Pattie, as is alledged in the plea, and if they were jointly bound, that by an act of Assembly passed in the year 1786, "intituled, an act concerning partitions, and joint rights and obligations; it is therein declared, that the representative of one, jointly bound with another, may be sued, as well as the surviving obligor himself; and he insists therefore, that the said action does not survive against the said Pattie, but is maintainable against the said John, &c. and this he is ready to verify—wherefore, &c." the record then proceeds thus, "and thereupon an issue was joined by the parties."

Verdict and judgment was rendered for the plaintiff, in the County Court, and an appeal prayed to the District Court, where that judgment was reversed as above stated.

Marshall for the appellant.

The plea in this case. is faulty in two respects, and therefore, could oppose no legal bar to the plaintiff's recovery. 1st, It does not state, that the obligors were not severally bound, which they might have been, altho' they were also jointly bound. 2dly, It does not set forth, at what time John Thornton died; for if that event happened, after the law mentioned in the replication took effect, which was in 1787; then I conceive, that this case would come within the operation of that law, altho' the bond was executed long before. The same inconvenience, *which is generally, and properly chargeable upon retrospective constructions of laws, would not exist in this case; for the two obligors, if they were both alive when that law took effect, stood upon equal ground, as to the chance of survivorship. If there had been a demurrer in this case, (let it have come from which ever side it might,) there could have been little doubt, but that judgment must have been given for the plaintiff; because the first fault in pleading being committed by the defendant, the demurrer would have reached it, however defective the replication might be.

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Tho' there may be an objection to the informality in joining the issue, yet it is cured by the statute of Jeofails, and the verdict will not on that account be set aside.

The court informed Washington, who was about to argue the cause for the appellee, that there was no necessity to say any thing, as there was no difficulty in the case.

The PRESIDENT.—The plea is certainly sufficient, and if the act of 1786, were material in the case, the plaintiff might have set forth the time of Thornton's death in his replication, by way of avoiding the bar, relied upon by the defendant. What would have been the opinion of the court, upon the operation of that act, if the time of the death had been stated in the replication, need not be mentioned. The replication is certainly faulty, and containing the first slip, the District Court did right in reversing the judgment, and in setting aside the pleadings subsequent to the plea.

We are also of opinion that the judgment of the County Court is erroneous, there being no issue joined in the cause.

Judgment of the District Court affirmed.

Pleasants, Shore & Co. and Anderson v. Ross.

April Term, 1798.

(1 Am. Dec. 449.)

Issue Directed—Waiver of Jury—Submission to Arbitrators.—The Court of Chancery having directed an issue, the parties agreed to wave the trial by jury, and to submit the question to certain persons mutually chosen by them, whose report should be certified to the Chancellor, in lieu of a verdict.

Report of Arbitrators—How Considered by Court.—The Court must consider the report as an award, to be governed by the same rules and principles which prevail in cases of awards.

Awards—When Set Aside for Mistake*—Affidavits—For What Purpose Introduced.—To authorise the setting aside of an award, for a mistake in the arbitrators, either as to law or fact, the mistake must appear on the face of it. Or, if the arbitrators will certify the principles on which they decided, the Court will set aside the award if they appear to have acted under a mistake. Affidavits may be introduced, but they must go to prove partiality or misbehaviour in the arbitrators.

Issue Out of Chancery—Supervision of Court—Verdict against Evidence.†—When an issue is tried, it is un-

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***Awards—Setting Aside.**—On this question the principal case is cited in the following: Brickhouse v. Hunter, 4 Hen. & M. 368; Kincaid v. Cunningham, 2 Munf. 8; *foot-note* to Adams v. Hubbard, 25 Gratt. 129; *foot-note* to Portsmouth v. Norfolk County, 31 Gratt. 727; Tennant v. Divine, 24 W. Va. 392; Scott v. Trents, 4 Hen. & M. 359; Dandridge v. Harris, 1 Wash. 326; Lewis v. Chicago R. Co., 49 Fed. Rep. 710; Elliott v. Railroad Co., 74 Fed. Rep. 712. The principal case is reported in Wythe 10, and 1 Am. Dec. 449. See monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684. The principal case is cited in Lightfoot v. Price, 4 Hen. & M. 431, on the question of the proper mode of calculating interest on partial payments.

†Issue Out of Chancery—Rule Where Trial Court Certifies Verdict to Be against Evidence.—In Henry v. Davis, 7 W. Va. 716, it is said when an issue is tried it is under the superintendence of the court, which will prevent the introduction of improper testimony; and if the verdict be against evidence, the court will so certify, and the chancellor will not be

der the superintendence of the Court, who will prevent the introduction of improper testimony; and if the verdict be against evidence, the Court will so certify, and the Chancellor will not be satisfied with it. If no certificate be given, still the Chancellor may direct a new trial, on affidavits tending to prove misbehaviour in the jury, but not that their verdict is against evidence.

This court, upon an appeal formerly taken in this cause from a decree of the High Court of Chancery, having ordered an issue to be directed by the Court of Chancery, to try, "what was the current and average price, in sterling money, on the 18th day of April 1781, of tobacco
157 passed at the *inspections of Page's Richmond, Manchester and Petersburg;" the issue was made up accordingly, and directed to be tried in the District Court of Richmond.*

The parties waving the trial by jury, consented, to submit the decision of the decision of the issue to five persons appointed by them for that purpose, or to any three of them, and that their report should be certified, and returned into the High Court of Chancery, in lieu of, and to have the same effect as the verdict of a jury, directed to be taken.

The referees made their report, and determined, that the current and average price in sterling money, on the 18th of April 1781, of tobacco passed at the inspections of Page's Richmond, Manchester and Petersburg, was 17s. 6 one third per cwt.

This report being certified into the Court of Chancery, the appellants filed a bill, praying to set it aside, and stating, as the ground of their objection to it, that the referees had gone upon a palpable mistake in the rule adopted by them, in ascertaining the current and average price in sterling money, or the tobacco (mentioned in the issue,) on the 18th of April 1781. That instead of taking the current and average sterling price of the tobacco, as it was bought and sold, just previous and subsequent to the 18th of April 1781, (for on that very day tnere was no proof of any purchases having been made) the referees, had first fixed a paper money price to the tobacco, and then applied the scale of depreciation to that sum, in order to obtain the specie value, which they again converted into sterling money, according to the rates of exchange in a Northern state, where it varied very considerably, from what it was in Virginia. That by this circuitous and uncertain mode of calculation, a result was produced, in no manner corresponding with the real sterling value of tobacco about that time.

This bill was accompanied with affidavits, proving, that the sterling price of tobacco just before, and after the time mentioned in the issue varied from 6s. to 12s. sterling.

No answer was put in to this bill, and the court being satisfied with the report, entered a decree pursuant to what the Court of Appeals had prescribed, making the current and average price of the tobacco, as reported by the referees, the rule, by which the money was turned into that commodity.

158 *From this decree, Pleasants, Shore & Co. and Anderson appealed.

The PRESIDENT delivered the opinion of the court.

The issue directed in this cause, was intended to satisfy the conscience of the Chancellor. It appears that his conscience was satisfied, and there is no doubt, but that his decree was formed in strict conformity with the conviction thereby produced. But as this court has the power of examining and correcting his decrees, we must be guided by the same conscienscious principles; and if we are not satisfied with the award, we must pronounce, that he ought not to have been satisfied. For myself, I am so far from being satisfied that the price is rightly fixed, that I feel the fullest conviction on my mind of the contrary.

But the difficulty is, how we are to discover the principles upon which the decision of the referees was really made; and how the subject is to come before the court? If we consider the persons chosen by the parties in the light of arbitrators, and that the objection is made on the ground of mistake, as to facts, or principles, the answer is, that this mistake must appear upon the face of the award; and in this case, there is no such ground of objection. Affidavits may be introduced, but they must tend to prove partiality, or misbehavior in the arbitrators, and not mistake in law, or fact. When an issue is to be tried, it is under the superintendance ot the court, who will prevent the introduction of improper testimony; and if the verdict be against evidence, they will certify this together with the verdict, and the Chancellor will not be satisfied. If no such certificate be made, still the Chancellor will in some instances direct a new trial, on affidavits proving misbehavior in the jury, afterwards discovered: but this he will not do, upon affidavits tending to prove that the verdict is contrary to evidence. The parties, have in this instance substituted referees for the court and jury; and the question is, whether the party objecting to the report, is bound by it, as if it had been a verdict certified without exception, and must abide the consequence of his own act, in taking the case out of its legal course? or whether, he may bring the mis-

satisfied with it, citing *Pleasants v. Ross*, 1 *Wash.* 156; Southall v. McKeand, 1 Wash. 336. See also, citing the principal case on this question: *foot-note* to Ross v. Pynes, 3 Call 568; Grigsby v. Weaver, 5 Leigh 205, 210; Lavell v. Gold, 25 Gratt. 476; Miller v. Wills, 95 Va. 351, 28 S. E. Rep. 337. See monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 476.

*See the Chancellor's Rep. p. 147, where this case, from its commencement in the Court of Chancery, to its termination there, is very fully stated.—Note in Original Edition.

taken principles on which the referees proceeded, before the court, as a ground for a new trial of the issue?

If the referees had certified the principles upon which they proceeded, there would seem to be no difficulty: it would come within the reason of those cases, where the mistake is apparent upon the face of the award. If the paper annexed to 159 *the bill, were really evidence of those principles, it would produce the question, whether the mistake was thereby rendered apparent; and in that case, I should feel no difficulty. But, there is no proof of the ground upon which they proceeded. They once agreed to give a certificate, but afterwards refused. Whether they were right or wrong in doing so, is immaterial. The plaintiff having alledged that this paper contains the ground of the report, the only difficulty is, whether the Chancellor ought not to have suspended the confirmation of the report, until that fact was ascertained. On a thorough consideration of the subject, and of its consequences as a precedent, we think he was right, and affirm the decree.

White v. Johnson.

April Term, 1793.

Sheriffs—Liability for Acts of Deputy.*—The high Sheriff alone is liable for the official acts of his deputy, unless in those cases where the law provides a special remedy against the latter.

Deputy Sheriff—Return on Process—Liability.—The law requires the Deputy Sheriff to add the name of his principal, as well as his own, to the return of all mesne process executed by him. But if he fail to do so, it does not authorise the entering of a judgment against him, for failing to take a bail bond, though, individually, he is liable to a penalty for the omission.

This was a supersedeas to a judgment of the General Court. The case was—Johnson brought an action on the case in the General Court, against one Watson, and the writ, which was directed to the sheriff of ————county, was returned executed, by White, thus, "executed, W. White d. s." without mentioning the name of his principal, or of the county in which he acted as deputy sheriff. No appearance being entered for Johnson, a common order was entered against him, and against William White, deputy sheriff of————county, which was afterwards confirmed against the defendant and sheriff, and a writ of enquiry was thereupon executed. The jury found damages for the plaintiff, and the judgment was entered up, against the defendant Watson, and W. White, deputy sheriff of Louisa county. To this judgment, a writ of supersedeas was awarded by this court.

Ronold for the plaintiff in error. The judgment is not warranted by any of the proceedings, which appear in the record. The writ is not directed to the sheriff of any county; it is not executed by the deputy sheriff of any county; nor is the interlocutory judgment, rendered against the deputy sheriff of any county; and yet, final judgment is entered against W. White deputy sheriff of Louisa county. How did it judicially appear, that White who executed the writ, was deputy sheriff of Louisa county? There might be two persons of that name, each of them deputy sheriff of different counties.

160 *But if this objection could be removed, there is another, which must be fatal: the judgment is rendered against the deputy instead of the high sheriff.

By the General Court law, passed in October 1777, C. 14, § 14, if bail be not returned with a copy of the bail bond, the remedy is against the sheriff; and that the principal is intended, when the legislature speak of the responsibility of the sheriff generally, will appear evident, by referring to other laws upon this subject. Thus, by the act of the 27th George II. C. 1, § 36, a remedy is given against the sheriff, for not paying money received by him on an execution: and by the 3d Geo. III, C. 5, a specific remedy is provided in such a case, for the creditor, as well as for the high sheriff, against the deputy. And this is exactly consonant with the principles of the common law, by which, the high sheriff alone, is liable for any breach of duty in the office of sheriff, and no action will lie against the deputy. Cowp. Rep. 43.

Duvall, for the defendant in error.

The act of 3d Geo. III, C. 3, § 3, requires, that where the deputy executes any writ, he shall endorse thereon, the day and month when the same was executed, and subscribe, as well the name of his principal, as his own. If the deputy in the present case, had pursued this direction, it might have been known, against whom to enter the judgment; and he ought not, by having omitted to perform this part of his duty, to be permitted to take advantage of his own misconduct. The declaration states the county in the caption;—and therefore, it ought to be presumed, that White was the deputy sheriff of that county. As to the blank in the writ, that is cured by the act of Jeofails 5, Geo. I. The deputy sheriffs in this country, are very different from those officers in England, who act under a special authority from their principles. They qualify in open court, with the same formalities which are observed in respect to high sheriffs, and in many cases, they are recognized by our laws.

Ronold in reply.—Though the deputy be punishable for a false return, in omitting

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***Sheriffs—Liability for Acts of Deputy.**—On the question as to the liability of the sheriff for the acts of his deputy, the principal case is cited in *foot-note* to James v. McCubbin, 2 Call 273; Mosby v. Mosby, 9 Gratt. 604 (see *foot-note*); Garrett v. Hutchinson, 86 Va. 875, 11 S. E. Rep. 406. See *foot-note* to Sangster v. Com., 17 Gratt. 124; monographic *note* on "Sheriffs."

Same—Return—Appearance Bail.—The principal case is cited in Ruffin v. Call, 2 Wash. 183.

to endorse on the writ, the name of his principal, yet this omission cannot warrant the entering up a judgment against him.

The PRESIDENT delivered the opinion of the court.

The cases all prove, that in England, the remedy is against the high sheriff only, (in whose name every thing is done,) for the official acts of his deputy; unless in 161 instances, where by *particular statutes, a remedy is given against the deputy. The same principle of law prevailed in this country, and was general, until the year 1763; when a law was made, giving to the creditor, a remedy by motion against the deputy sheriff, for money received by him on an execution. By the same law, the deputy was directed under a penalty, to put the name of his principal, as well as his own, to all mesne process executed by him. But if he failed to do so, neither this, nor any other law, authorized the entering of judgment against him, for not taking appearence bail upon such mesne process. The General Court law passed in 1777, warrants a judgment against the sheriff, which certainly means the principal, and not the deputy. The practice in the General Court, both before, and since the revolution, was to enter up judgment in such cases, against the deputy sheriff. But we are of opinion, that such practise was wrong, and unwarranted by any law.

The judgment therefore must be reversed, and the proceedings subsequent to the declaration set aside. The cause is to be remanded to the General Court, to be proceeded in de novo, from the return on the writ.

Irvin, Galt, and Company, v. Eldridge & Brackenridge.

April Term, 1793.

Forthcoming Bonds—What Condition Should State.*—The condition of a forthcoming bond ought to set forth, with certainty, the time and place of sale; but it need not state that the day mentioned, is that appointed for the sale.

This was an appeal, from a judgment of the district Court of Prince Edward. The appellant, moved that court for judgment upon a forthcoming bond, executed by the appellees, the condition of which, (after reciting the execution, seizure, and re-delivery of the property by the sheriff in the usual form,) is, "that if the said Eldridge and Brackenridge do deliver to the said sheriff, the said property, taken in execution and restored, at Buckingham courthouse, on the 26th day of this month, or pay the said sum of £75: 8, then the obligation to be void, &c." The court over-ruled the motion, considering the bond to be informal and defective, in not stating, that the 26th day in the condition mentioned, was the day appointed for the sale of the property.

162 *The PRESIDENT. The act of 1769, C. 3 § 2, declares, "that if the owner of goods taken in execution, shall tender sufficient security, to have the same forthcoming at the day of sale, the sheriff shall take a bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount of the money, or tobacco due thereon, and with condition, to have the goods forthcoming at the day of sale appointed by such sheriff, and shall thereupon suffer the goods to remain with the debtor at his risk, 'til that time." But this court, in the case of Wood and Davis, determined, that it was not necessary for the bond to state, that the time when the property is to be produced, is that appointed for the sale of it: that it is more proper, and more beneficial to the parties, that the bond should ascertain the time, and place of delivery, than that it should pursue the literal words of the law, which, do not require either to be inserted in the condition, but merely, that the property should be forthcoming, at the day of sale appointed by the sheriff. It is remarkable, that the next clause of the law, which gives the remedy, drops the expression of the day of sale, and says, "if the property be not delivered, according to the condition of the bond," a motion may be made. The court are therefore of opinion, that the bond in question, is neither defective nor informal.

The judgment must be reversed, and we should now proceed to enter it up for the appellant, as the District Court ought to have done, if it appeared to us, that the appellee had no other objection, or defence to make against it, than that, upon which we have decided. But as it is possible, that the defendants may have made payments, or may have other objections, which were not brought forward, in consequence of the opinion of the court being in their favor, it will be most proper, to remand the cause to the District Court, that they may proceed to render judgment upon the bond, open however, to the defendants, to make any other objection thereto, than such, as respect the legality, or formality of the bond.

Kennedy v. Baylor.

April Term, 1793.

Equity Practice—Cause Heard on Bill and Answer—Effect.*—If a cause is heard on bill and answer, the latter must be considered as true in all its parts.

***Bonds.**—The principal case is cited in Anderson v. Leitch, 1 Leigh 464. See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

***Equity Practice—Cause Heard on Bill and Answer—Effect.**—If there is no replication to an answer in a chancery cause everything stated in such answer is admitted to be true. Martin v. Rellehan, 3 W. Va. 482, citing 2 Dan. Pleading and Practice 966; Pickett v. Chilton, 5 Munf. 467; *Kennedy v. Baylor*, 1 *Wash.* 162. See monographic *note* on "Answers in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

Same—Estimation of Damages to Land by Commissioners.†—Bill to foreclose.—The Court appointed Commissioners to ascertain the damages which the land sustained, whilst in the possession of the mortgagee, and deducted the amount reported from the payments made by the mortgagor.—Decree affirmed.

This was a suit originally brought in the County Court of Berkeley, by Baylor, to foreclose the equity of redemption, which Kennedy had in a tract of land. 163 Kennedy in his *answer, claimed certain credits, and the court directed an account to be settled by commissioners, which being done, and returned, the record states, "that it appearing to the court, that the mortgagee had had possession of the land for some time, during which, it had sustained damage," other commissioners are appointed, to value the same—a second report, pursuant to the last order being made, the court, after deducting the amount of the damages so ascertained, from the sums found to be due by the first report, decreed the balance to the plaintiff—no replication was made to the answer, nor were any exceptions taken to either of the reports.

This decree was affirmed in the High Court of Chancery, from which an appeal was prayed to this court.

Marshall for the appellant, insisted upon the following errors in the decree.

1st, The cause coming on, upon bill and answer, the latter must be considered as being true in every part of it; and therefore, the payments alledged by the defendant to have been made, ought to have been allowed by the commissioners, two of which were not.

2d, The commissioners do not state when, or where they met to settle the accounts, or whether, the defendant had notice of their meeting.

3d, The decree is for more than the commissioners report to be due.

4thly, and principally.—The rents of the land, and the injury it sustained, during the plaintiff's possession, are referred to commissioners, instead of a jury to ascertain.

The PRESIDENT.—As to the first objection, there is no doubt, but that the answer in this case, must be considered as being perfectly true. But the counsel mistakes, when he supposes, that the payments insisted upon in the answer, have not been allowed. All of them are, except a credit of wheat, the price of which the defendant could not ascertain, and perhaps did not, for that, or for some other reason bring before the commissioners.

The third objection is, that the decree is for more than the balance stated to be due by the report, and that too, with accumulated interest. But it does not appear, that the interest upon interest, amounts to a greater sum, than that, for which a deduction is made by consent of parties, on 164 account of miscalculation *of interest.

As to the principal sum, it does by no means appear, that the decree is for more than the report makes it.

The decree therefore must be affirmed.*

†**Same—Estimation of Damages by Commissioner.**—For the proposition that commissioners appointed by the court may ascertain the damages which land has sustained, whilst in the possession of the mortgagee, and deduct the amount reported from the payments made by the mortgagor, the principal case is cited and followed in Roberts v. Stanton, 2 Munf. 138.

But in Eustace v. Gaskins, 1 Wash. 188, it is held that, the value and profits of land being in the nature of damages, must be ascertained by the jury, and not by commissioners.

*The court took no notice of the other objections.—Note in Original Edition.

*Equity Practice—Contracts—Fraud—Relief.—In Wigglesworth v. Steers, 1 Hen. & M. 71, upon the authority of the principal case, it is held that, a contract may be avoided by the legal representatives of a party thereto, on the ground of his having been drunk when it was made, although such drunkenness was not occasioned by the procurement of the other party. See also, citing the principal case, Thackrah v. Haas, 7 Sup. Ct. Rep. 312, 119 U. S. 499.

†**Suit for Certificates—Measure of Damages.**—The principal case is cited in *foot-note* to Groves v. Graves, 1 Wash. 1; Alexander v. Morris, 3 Call 103; Austin v. Winston, 1 Hen. & M. 50.

Reynolds v. Waller's Heir at Law, and Administrator.

April Term, 1793.

Equity Practice—Fraud in Purchase of Certificates—Restitution—Damages.*—If a man fraudulently purchase from another, certificates, by taking an improper advantage of the vendor, Equity will set aside the sale, and decree restitution of the identical certificate, or, if the purchaser has parted with it, will decree him to furnish others of the like kind, or pay in specie the value of them, at the time the cause is tried.

The appellees instituted this suit in the High Court of Chancery, in order to recover back certain warrants, and the interest received upon them, also warrants for about 5000 acres of land, which their testator had obtained for his services during the war, and which had been unfairly purchased from him by the appellants, for the trifling consideration of £20, at a time when, the testator was intoxicated with liquor, and incapable of contracting. The purchase was made by Valentine, on account of himself and Reynolds, the latter of whom, afterwards became the sole proprietor, by purchase from the former of the whole interest. The fraud, was clearly proven to the satisfaction of the Chancellor, who decreed; that Reynolds should restore to the plaintiff, the military certificate received by him from the auditor, for the pay, and depreciation of pay due to Waller, with interest thereon from the 1st of January 1782; or if that certificate could not be restored, to deliver to the plaintiff other certificates, of the

same kind, and of equal value, with like interest. And (part of the land warrants having been assigned by Reynolds, to Waller, in his life-time,) the court directed an issue, to ascertain what damages the plaintiff had sustained, by his intestate's not receiving the military land warrant, for the remainder of the land, to which he was entitled.

From this decree an appeal was prayed.

The PRESIDENT delivered the opinion of the court.

A more palpable imposition, was never practiced, or better established, than in this case. Reynolds, though not a party in the fraud, was nevertheless, a partner with the person who committed it, and is therefore answerable.

165 *The decree, so far as it annuls the contract, is therefore right: it is also right in the relief afforded, as to the land. As to the certificates, the relief granted is not exceptionable, so far as it compels restitution of them in specie, or others of equal value, in case, the identical certificates cannot be returned. But, if he can do neither of these things, to compel him to purchase at market, or to pay in specie, the nominal amount of the certificates, is in our opinion improper. The true period, at which to estimate their value, (in case the certificates cannot be restored,) is that, at which the cause is tried—this, is not like the case of Groves and Graves, which was a contract to deliver a certificate at a future day; after the day had passed, the party who was to have received the certificate, not being compellable to accept it, was entitled to its value on that day. But in this case, there was no contract. The bill is, for a specific restitution of the certificates fraudulently obtained, and therefore, if the appellant had at any time offered to restore them, or will now do so, the other party must receive them, or its value; of course, the present value ought to be the rule of compensation, if the certificates themselves cannot be restored.

The opinion and decree, was entered in the following words, viz. there is no error in so much of the decree, as sets aside the contract, pretended to have been made by Edward Valentine, with Edward Waller, decd. for the purchase of the latter's claim on the public, for pay and depreciation, and a bounty in lands, nor in the relief afforded, so far as it relates to the land.

But, that the said decree is partly improper, and in some instances defective, so far as it respects the certificates, for the pay and depreciation. It is therefore decreed and ordered, that so much of the said decree, as sets aside the contract for the purchase, and directs the mode of relief as to the land, and costs, be affirmed, and that the residue of the said decree be reversed. And this court, proceeding to make such decree as to that part so reversed, as the said High Court of Chancery should have pronounced, it is further ordered and decreed, that the appellant restore to the appellee, the military certificate or certificates received by him from the auditor for public accounts, the 4th day of April 1785, for the pay, and depreciation of pay, due to the said Edward Waller, amounting to £283: 16: 7: or if those certificates cannot be restored, that he deliver to the

166 appellee other certificates, *of the same kind, and of equal value, if such he hath, to be ascertained, by an examination before the master commissioner of the said court, on the oath of the appellant upon interrogatories; but if not, then, that he pay to the appellee, the present specie value of such certificates, to be ascertained by the said commissioner, or by a jury, if either party shall require it. That the appellant also account before the said commissioner, for the specie value of all interest arising on the said certificate, as the warrants for such interest were worth, at the time he, or his assignee received, or might have received the same; and pay the amount thereof in specie to the appellee, discounting therefrom, the sum of £20, paid for the purchase, on the 23d of December 1784, with interest thereon from that day, until the money shall appear to have been repaid, by the receipt of interest as aforesaid.

White, Whittle, and Company v. Bannister's Executors.

April Term, 1793.

Executors*—Judgment against—Effect—Rule in Equity.—Although a judgment at law against an executor, amounts to an admission of assets, and a Court of Equity will not relieve against that consequence, yet it would not, by an original decree charge an executor on that ground.

Same—Lease of Lands—Right of Tenant to Set Off Debt from Testator against Rent.†—A tenant having leased land from an executor cannot set off debts due to him by the testator against the rent. It might be otherwise, if the executor has acknowledged that he had a sufficiency assets.

The principal case is cited in Nicolson v. Hancock, 4 Hen. & M. 499, 500.

***Executors—Creditors—Bill of Discovery.**—A creditor may file a bill of discovery against the personal or real representative of the estate of a decedent to discover the assets liable to the payment of his debt. Poling v. Huffman, 39 W. Va. 323, 324, 19 S. E. Rep. 422, 423. Citing *White v. Bannister*, 1 *Wash.* 168; Duval v. Trent, 6 Munf. 29; Clarke v. Webb, 2 Hen. & M. 8. The principal case is also cited for this proposition in Gordon v. Justices of Frederick, 1 Munf. 20.

†**Same—Settling Accounts—Set-Off.**—For the proposition that, a tenant having leased land from the executor cannot set off debts due him by the testator against the rent, the principal case is approved in Pulliam v. Winston, 5 Leigh 327; and in Washington v. Castleman, 31 W. Va. 834, 8 S. E. Rep. 604, it is said: "But if the contract out of which the debt sued on arose was made with the decedent and the set-off was acquired before his death, then they may be set off against each other in an action on such contract by or against the administrator. *White v. Bannister*, 1 *Wash.* (*Va.*) 167; Brown v. Garland, 1 Wash. 221." See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

The appellees, as executors of Bannister, under a power in his will, leased certain mills called Battersea, belonging to the estate of their testator, to the appellants, who having received an assignment of a judgment obtained against the executors, insisted upon retaining so much of the rent, as was equal to the amount of the said judgment, they having fully paid up, what was due on account of rent, except as to this sum.—The executors, refusing to admit the offset, distrained for the balance of the rent due, and the appellants filed their bill, praying an injunction, a discovery of assets, and that they might be permitted to retain, and be acquitted of so much of the rent. The ground of equity is, that the Battersea mills are subjected to the payment of debts by the following clause in the will, viz, "my will is, that my estate be kept together, and worked for the payment of all my just debts, which I wish to have done, in fair, and equal proportions,"—that the assets are thereby rendered abundantly sufficient to pay all the debts, as the executors had acknowledged.

167 *The executors by their answer, insist, that under another clause in the will, the profits of the Battersea mills are specially devised, for the maintainance, and education of the three younger children of the testator, and contend, that they are not made liable to the payment of debts.

They say that all the estate has been sold, and applied to the payment of debts, superior in dignity to that, assigned to the plaintiffs. That there are claims yet unpaid, for several thousand pounds, more than they expected; and that, if the residue of the profits of the Battersea mills, beyond the dower, be subject to the debts, present and ensuing rents, will not be more than sufficient to discharge debts, which have a preference to the plaintiff's; that they cannot ascertain the amount, or dignity of the debts yet unpaid, but are confident, they will exceed, what is yet due from the sales of the estate, and from separate debts owing to the testator.

The cause coming on to be heard, on the bill, answer, exhibits and examination of witnesses, the court dismissed the bill, from which the plaintiffs appealed.

The PRESIDENT delivered the opinion of the court.

A bill, to retain, and to set off a debt against rents due, has an unfavourable appearance. If creditors, purchasing from the executors, or, as in this case, renting an estate from them, shall be permitted to bring forth their claims against the testator, in discount, they might thereby gain an improper advantage over other creditors. The executors, might be involved in the trouble of accounting for the assets on every purchase, and in case of mistakes, might subject themselves to a devastavit.

The objection, has additional weight in this case, where the plaintiffs were not original creditors, but purchased up the debt for the purpose of a discount; or if in fact, they are not the real owners of the debt, a point not clear,) they are endeavoring to gain a preference for another, by taking an assignment in trust, whilst they complain that the executors are preferring favorite creditors.

The appellants, aware of these objections charge, that the executors were assured, and had acknowledged that the estate would be sufficient to pay all the debts, in which case, no objection could be made to the reasonableness of the discount. But this being denied by the answer, that foundation fails, and the injunction should be dissolved.

But another question occurs, and that is, whether the bill cannot be sustained as an original one, for a discovery of assets?

168 *1st, A creditor may at law, either sue out execution upon a judgment obtained against the executors, and levy it on the visible property of the testator, if any,—or, if none to be found, 2dly he may proceed against the executors, as for a devastavit, on account of a misapplication of assets, or for that, which amounts to an admission of assets. Or 3dly, a creditor may not know the state of the assets, the amount, nor the claims against the estate. He may therefore file his bill in equity, to have a discovery of those matters, and on that discovery being made, may either proceed at law, or that court may retain the cause, and determine disputes between the parties.

Now, although at law, the judgment in question would be considered as amounting to an admission of assets, so, as to charge the executors, and a Court of Equity, would not interfere, to relieve against the consequence of that judgment, yet it would not by an original decree, charge an executor on that ground.

The bill in this case appears to be for a discovery. After charging, that the profits of the Battersea estate are assets, which would make the estate fully solvent, it calls upon the executors, to set forth the amount of the assets, and of the debts due from the estate; prays to be allowed to retain for this judgment, against the rent, and for general relief. The executors, answer very properly as to the Battersea estate, insisting, that the profits are not assets, but are made (by the will,) a fund for the education and maintainance of the three younger sons, who are entitled to the proceeds of the estate when sold.

But as to the discovery sought for, the answer is not so proper. The executors speak of sales, but do not specify the amount; they say, they have paid all that has come to their hands, in discharge of debts of superior dignity to the plaintiffs, without stating the amount, or even the names of the creditors, and the nature of the debts: thus, taking upon themselves, to judge of the dignity, and preference to which they were entitled, and thereby precluding, not only the court, from deciding upon those points, but the plaintiffs, from

contesting that preference, by making those creditors parties. They say further, that there are claims against the estate, for several thousand pounds more than the testator thought he owed, the accounts respecting which, are not liquidated. They cannot ascertain the amount, or dignity of the debts due from the testator, but are confident, they will exceed the sums yet due for sales, as well as the separate
169 debts; but of these, they give *no account. "They add, that if the residue beyond assets, be subject to debts, as much is due by specialties, and judgments entitled to a preference, as the present and ensuing years rents will discharge." The answer was filed in October 1791, so that it speaks of the two first years rents only, and there are consequently, three years, which may be clear of those superior demands. It does not appear (as the appellant's counsel contended,) that debts of inferior dignity had been paid.

Upon this view of the case, three questions arise. 1st, Whether the plaintiffs had a right to retain, or to set off. 2dly, Whether the answer is so satisfactory, as to entitle the executors to a dismission of the bill? and 3dly, whether the profits, are in part, or in the whole, assets, under the will.

The first question, is clear against the appellants, and therefore the injunction ought not to have continued.

The second question, has been shewn to be against the executors, and therefore, the bill should not have been dismissed, but a decree for a settlement of the executors accounts, should have been made.

The third question is a difficult one, yet we should have decided it, if there had been a full court. Upon a settlement of the accounts, the decision may be unnecessary.

The decree must be reversed with costs, and the injunction dissolved. An account is to be taken of the outstanding debts due to the testator at the time of his death, what have been collected since, and the balances yet due, distinguishing in the latter, such as are separate, from such as are supposed to be desperate. An account is also to be taken of the sales of all the estate, real and personal, stating when sold, and the profits made from each tract of land, and of the slaves, until the sale thereof, and what hath been received, or is yet due of the amount of such sales. Also an account of any estate real or personal remaining unsold, and the profits thereof, (the Battersea estate excepted) also an account of administration as far as the executors have gone, shewing the application of what money hath come to their hands; also a state of liquidated debts yet due from the testator, with their dignity, and of the nature of such claims as are unliquidated; and also an account of the profits of the Battersea estate, distinguishing those of the mills, and tradesmen from each other and from those of the plantation. When these accounts are returned to the High Court of Chancery, it is to be decided, if necessary, whether the profits of the Battersea estate, beyond the widow's dower be subject in the whole, or in part to satisfy the demands of the appellants.

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170 *Baird & Briggs, v. Blaigrove Executor of Blaigrove.

April Term, 1793.

Scrolls—Failure to Mention in Body of Instrument—Effect.*—Declaration in case, stating that the plaintiff having obtained a judgment against one J. G., and being willing to give the said J. G. an opportunity to sell his property to advantage, an agreement was entered into (which is set forth verbatim) between the plaintiff, the testator of the defendant, and the said J. G., whereby the said testator bound himself to sell the balance of the debt, which should remain unsatisfied by the sale of the property, paid by a certain day. That the intention was to favor the said J. G.; in consideration whereof, the said testator assumed to pay such balance;—avers a sale made, and that a balance still remained unsatisfied. To the agreement are three scrolls annexed, opposite to each signature, but it is not said to be sealed in the agreement, the attestation, or declaration. This is not to be considered as a sealed instrument. But if it were so, the agreement is only inducement to the action, the real foundation of which is the subsequent assumpsit, and therefore, it is sustainable.

Sealed Instruments—Subsequent Parol Agreement.†—A parol agreement made subsequent to one under seal, may be declared upon, though it should alter the terms of the written agreement.

This was an action on the case, brought by the appellants in the District Court of New London. The declaration states, that the plaintiffs having obtained a judgment against a certain Jeremiah Glenn, and being willing to give to the said Glenn, an opportunity of disposing of his property to the best advantage, to enable him to satisfy the judgment, an agreement was entered into between the plaintiffs, the said Glenn, and the testator of the defendant, (which is set forth verbatim) whereby, the testator of the defendant bound himself to see the balance of the aforesaid debt, interest, and costs, (which should remain unsatisfied, by the property which the said Glenn might sell, for that purpose,) paid by

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***Scrolls—Failure to Recognize in the Body of the Instrument—Effect.**—For a discussion of this question see, citing the principal case, Clegg v. Lemessurier, 15 Gratt. 112, 113, and *note*; Parks v. Hewlett, 9 Leigh 515, 519, and *note*; Austin v. Whitlock, 1 Munf. 492; Cromwell v. Tate, 7 Leigh 304, 305, 306; Bradley Salt Co. v. Norfolk, etc., Co., 95 Va. 462, 28 S. E. Rep. 567; Smith v. Henning, 10 W. Va. 631; Keller v. McHuffman, 15 W. Va. 78.

†**Sealed Instruments—Subsequent Parol Agreement Changing.**—For the proposition that, a parol agreement made subsequent to one under seal may be declared upon, though it should alter the terms of the written agreement, the principal case is cited in Shepherd v. Wysong, 3 W. Va. 52; State v. Harmon, 15 W. Va. 125.

October 1775: that the intention of the said agreement was, to favor the said Glenn, by enabling him to sell his property at the highest price. That in consideration thereof, the said testator, afterwards, &c. assumed upon himself, to pay such balance when required. The declaration then avers, "that the sale by G. was made, and a balance still remained unsatisfied, of which the testator had notice; whereby an action accrued to the plaintiffs, to have of the said testator; the said balance, nevertheless," &c.

The agreement stated in the declaration, has three scrolls, opposite to each signature; but no part of the agreement, either in the beginning, conclusion, or attestation, says any thing, about its being sealed. The conclusion is thus "as witness our hands" &c. The attestation thus "teste."

Upon the general issue, the plaintiffs had a verdict, and upon motion, the judgment was arrested. From this judgment, the plaintiffs appealed.

Ronald for the appellant. The error stated as the ground for arresting the judgment is, that this action is not sustainable, being founded upon an instrument under seal. This might have been a serious objection, if the fact had been true: but it is not, or at least it does not appear to be so, upon the face of the record, for in the first place, the court cannot say, that the agreement was sealed, and if they could, then 2dly, the action is not brought upon the agreement.

171 *It is true, there are scrolls to the agreement, which might, or might not have been intended for seals; but it cannot be considered as a deed, unless it be mentioned to be sealed.

But if it were sealed, the agreement is not the foundation of the action. It is true, the declaration states the agreement, but yet, it avers, that the testator assumed in consideration of the indulgence given to G. not in consideration of the agreement.—This consideration is sufficient to maintain the action, since it might produce loss to the plaintiffs.

Marshall for the appellee—Whether this instrument be sealed or not, the court must determine upon an inspection of it, and if so, there can exist no doubt, that there are three seals to each signature. The calling it a sealed instrument, cannot make it one, unless it be actually sealed, which is the substantial part.

It is not easy to read this declaration, and not consider the agreement, to be the very foundation of the suit. It is set out in hæc verba, and the cause of its being made, is mere tautology, that being expressed in the deed, and would have resulted without the averment—the consideration is plainly referable to the agreement and to nothing else.—If it be to any thing else, it is to the intention of making it, which would certainly be an insufficient consideration—an assumpsit, in consideration of an intention in the other party to do a thing, would be clearly a nudum pactum.—The assumpsit is not stated to have been made, in consideration of an indulgence actually granted. Of course, it must refer to the intention, or to the agreement—if to either, the plaintiff cannot recover—if to the first, there was no right for want of a valid consideration, if to the second, the remedy was misconceived.

The PRESIDENT. The court are not satisfied, that this is to be considered as a sealed instrument. It is in no part of it expressed to be sealed—the attestation is the same, as in common simple contracts, not under seal, nor does the declaration speak of it, as being of that dignity—it is true, there are scrolls annexed, but it may nevertheless remain a matter of doubt, whether they are to be considered as the seals of the parties?

However, it is unnecessary to determine this point, as we are of opinion, that if it were a sealed instrument, this action is sustainable. The agreement is only stated as inducement to that, which forms the real ground of the consideration afterwards alledged. The foundation of the action, is the subsequent assumpsit which is stated in the declaration, and there is

172 *no doubt, but that a parol agreement made subsequent to one under seal, may be declared upon, tho' it should alter the terms of the written agreement.

Judgment of the District Court reversed, and entered for the plaintiff upon the verdict.

Kerr & Co. v. Love.

April Term, 1793.

Evidence—Account Books—When Not Admissible.—The book of accounts and oath of the party, are, in no case, admissible to charge a person with goods delivered, by order, to a third person, unless the order be otherwise proved.

Same—Same—Same.—If there be no other evidence to charge a person with a particular item but his admission and consent to be charged, on certain conditions, it can only be made upon the terms of that concession.

Same—Same—Same—Case at Bar.—An entry on the books of the party, made by his clerk, who is not then to be found, together with the oath of the party as to the quantity of the article charged, though admissible as evidence in the case of a sale and delivery of goods, is not proper to charge the other party with those articles, delivered to the master of his vessel for safe keeping.

Interest—Unliquidated Accounts.*—Interest ought not to be allowed upon accounts unliquidated and disputed, but from the institution of the suit.

This was an appeal from a decree of the High Court of Chancery, in a suit brought by the appellee for an account.

***Interest—Unliquidated Accounts.**—On this question the principal case is cited in *foot-note* to Skipwith v. Clinch, 2 Call 253; *foot-note* to McConnico v. Curzen, 2 Call 358; Stearns v. Mason, 24 Gratt. 494. See generally, monographic *note* on "Interest" appended to Fred v. Dixon, 27 Gratt. 541.

The PRESIDENT delivered the opinion of the court.

The debt claimed by the appellee, originated before the year 1776. The only evidence produced by him, respecting a quantity of molasses delivered by him, to the distillery at Norfolk, on account of the appellant, is, his own books, and oath.

The appellant in his answer, having denied, that this article was delivered by his direction, the oath, and books of the appellee, (in no case admissible, to charge a person with goods delivered by order to a third person, unless such order be otherwise proved,) ought not to have been admitted as evidence, to prove that article. And as there is no other testimony, to charge the appellant therewith, except his own admission, and a consent to be charged upon certain conditions, it ought to be made upon the terms of that concession, and should operate only so far against him.

Another charge exhibited by the appellee, is of sugar and wine, delivered on board a vessel of the appellant's, to the master thereof, for safe keeping; and this, is proved by an entry on the books of the appellee, made by his clerk, who is not now to be found; together with the oath of the appellee, to ascertain the quantity. This sort of evidence, tho' admissible in the case of a sale and delivery of goods, is not proper in this case, to charge the appellant with those articles, delivered for safe keeping, to the master of the appellant's vessel; since there is no evidence, that any part of them, came to his hands, except, what the answer admits—and therefore, this admission ought to be the rule by which the charge should be regulated.

As to the question of interest, this court, without controverting the general principles stated in the decree, are of opinion, that as the accounts in question were unliqidated, and disputed
173 *between the parties; they might have been adjusted, (notwithstanding the absence of the appellant,) with George Kerr his partner, or agent; or if such a connection were doubtful, an attachment bill might have been filed, at any time, for that purpose.

Under these circumstances, interest ought not to commence, but from the institution of this suit.

Decree reversed.

Bannister's Executors v. Shore.

April Term, 1793.

Husband and Wife—Private Domestic Conversation—Binding Effect upon Husband in Favor of Future Husband of Daughter.*—A private domestic conversation, between a husband and his wife, wherein the former speaks of an intention, once formed, but then relinquished, of giving a certain portion to his daughter, shall not bind the father to give that portion to the future husband of the daughter.

*See monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

This was a bill filed in the High Court of Chancery, by the appellee, as administrator of his wife, against the appellants, to recover £1000, which (the bill states) Bannister had agreed to give as a marriage portion with his daughter the appellee's late wife. The evidence of this promise, was the deposition of the widow of Mr. Bannister, who proved, that her husband in different conversations with her previous to the marriage, had declared his intention once to have been, to give his daughter £1000. But upon a particular occasion, and previous also to the marriage, he told her, his embarrassments would oblige him to substitute 500 acres of land on Hatchers Run, in lieu of money. Also a letter from Bannister, addressed to his daughter, after marriage, in substance as follows, viz. "I mean to give my daughter in lieu of £1000 her intended portion, and I do hereby give to my said daughter, and her heirs, 500 acres of my Hatchers run tract, and 5 slaves, as her dowry in marriage, subject to her husband's legal claim, whose unconditional right thereto is plain. And if I should be prevented from executing a conveyance to this effect, this shall stand as one—as witness my hand and seal:" to this paper a seal was annexed. This letter was sent to Shore, and in his bill, he acknowledges that he received, and retained it, without any act proving his dissent; but says, that he did not mean to assent to it, supposing that there would be time enough afterwards, to shew his disapprobation. One of the defendants in his answer states, that previous to the mar-
174 riage, he informed *the appellee, at the request of Bannister, that he intended to give his daughter land, instead of money, with which the appellee seemed well satisfied—another witness proved, that he had seen Bannister and the appellee, upon the land mentioned in the above letter, searching out a fit place, whereon to erect buildings. Shore had a child by his wife, after which, the wife, and then the child died. After this, Bannister conveyed the land befor mentioned to his son John, but upon what consideration does not appear.

The Chancellor decreed the £1000 to the plaintiff, from which the executors appealed.

Wickham for the appellants.

If Shore be entitled to the £1000, his remedy is entirely a legal one, and he might have recovered in an action upon the case. If so, a solid objection will lie to the jurisdiction of the court of Chancery.

Upon the substantial merits of the case, there seems to be but little difficulty.—Because a father from the particular situation of his estate, may at one time intend to give a certain portion to a child, will it be contended, that he is afterwards bound to pursue that intention, whatever changes may take place in his fortune, and however inconvenient it may prove to him? Surely it cannot—besides, this intention, if it can be called a promise in the present case, is

merely an intended testamentary disposition, which is at any time revocable. The answer states, that Mr. Shore was informed of this alteration of Mr. Bannister's intention, before his marriage, and was satisfied.

This fact, is compleatly established by the retention of the letter or deed, without dissenting from the terms contained in it.

He ought not after circumstances are altered, to be permitted to say, that he did not assent to those terms, or to complain, of being deceived by them.

If then, Shore has no title to the money, the next question is, whether he can have any to the land?

The letter from Bannister, tho' it may not have all the forms, most certainly contains the substantial parts of a deed. It is signed, sealed and delivered.—Of course, the daughter was entitled to an immediate seisin in fee, in the land, and the husband to the enjoyment of it during her life, and of his own also, as tenant by the curtesy, in consequence of the after birth of a child. But Shore, not having obtained a seisin in fact, during the life of his wife, is not entitled to his curtesy.

175 *But if he be entitled to his curtesy, still the objection first made occurs; which is, that he has an adequate remedy at law, to recover the possession, and damages. Upon every principle therefore, it would seem, that the decree for £1000 is erroneous—since, if Shore has any title whatever, it can only be to the land, or its value, for his life, to ascertain which, an issue ought to have been directed.

Ronold and Marshall for the appellee.

The objection made to the jurisdiction of the court, is now too late, after answer filed, and no plea in abatement, or demurrer put in; see the act of 1787, C. 9. Besides, this court has concurrent jurisdiction with the law courts, in cases of marriage agreements, 1 Vern. 110.

As to the merits;—after the father hath declared an intention, to give his child a certain marriage portion, in consequence of which a third person is induced to make his addresses, and thus engage his affections, it would be monstrous if the father could change, or diminish that portion, by any subsequent secret declaration. —2 Vern. 499, 764. The declaration therefore of Mr. Bannister to his daughter, is an underhanded agreement, and void.

The proof of Mr. Bannister's promise to give £1000, could not have been more compleat, unless Mr. Shore had demanded it in writing; an indelicacy, which the law did not require him to commit. As to a supposed waver of the money portion, in consequence of his assent first given, and his subsequent acquiescence, the first, is not proved, and the second. is the result of a false deduction from the fact. The answer of one of the defendants, which states the assent of Shore, is not evidence of the fact, because not responsive to any allegation in the bill. And if it were, yet Mr. Shore may have conceived, that he was to enjoy the same interest in the land, which he would have had to the money; else, it is not probable, that he would have given up £1000 for a life estate in land, which was worth no more in fee. His conduct in retaining the deed, can furnish no presumption of acquiescence, since there was no necessity for expressing his dissent from the terms of it, until the promised conveyance was tendered to him. Besides, the contract contained in that letter, was made with the daughter, at that time a married woman, and was therefore void: it could not operate, to deprive the husband of an antecedent vested right—a right which cannot be considered as surrendered, but for a real, valuable consideration. But admit that Bannister had an election to substitute land, in the place of money; yet having deprived

176 *himself of the power to do the one, he shall be compelled to perform the other.

Wickham in reply.

It is true, that in England, Courts of Equity exercise a jurisdiction in cases of marriage promises, because they can, and always do compel the husband, to make a suitable settlement thereout upon his wife. But this is never done in this country. The act of 1787, which has been relied upon, can only apply to cases, not strictly within the jurisdiction of the Court of Chancery, as to the person or property. But surely, this court may dismiss a bill for the want of that equity, which can alone entitle it to jurisdiction, altho' no plea in abatement is put in. If the construction contended for be right, then it will follow, that the courts of law, may by the combination of the parties, be entirely ousted of their jurisdiction, and every subject of controversy, may be transferred to, and decided in Chancery.

I do not contend, that the express promise of a father, to give a certain portion to the person who shall marry his daughter, is not obligatory upon him. But I insist, that it would be mischievous in the extreme, if general declarations of his intention, and more especially those, made (as in the present case,) in the bosom of his family, should bind him, whatever inconveniences might result from it.

The PRESIDENT, (after stating the case, and observing that the clerk had certified, that the infant child of John Bannister the son had been made a defendant. tho' no process was prayed against him,) delivered the opinion of the court.

There is no evidence in the cause, that the appellee was ever entitled to any thing, except the paper referred to in the bill, addressed by Mr. Bannister to his daughter. This was received by the appellee, and retained by him, without any evidence of his dissent from the terms of it. Independant of this tacit acquiescence, it is in proof, that Mr. Bannister and the appellee, went to view the land, spoken of

in that letter, and that the former, in the presence of the latter, informed the witness, that they had been to examine it, for the purpose of fixing upon a proper situation for a house.

The executor in his answer, states, that he was sent by Bannister, to inform the appellee of his intention to give his daughter land, with which the appellee appeared well satisfied.

But independant of this—there is no proof at all, where on the claim of the appellee can be founded. Mr. Bannister's public declarations are relied upon.
177 These are denied by the *executors—

But whether this denial be evidence or not, is of little consequence, because that which is relied upon, to sustain the claim, falls very short of its object. What is it?—a private, confidential, domestic conversation, between a husband and his wife, wherein the former, speaks of an intention once formed, and then for influential reasons altered. And because it was once formed, it is supposed to be irrevocable.

The claim if at all founded, is merely a legal one; and if a suit at law should be brought for the land, it may then be discussed with propriety, whether any act of the appellee, amounted to such a seisin, as to secure his right to be tenant by the curtesy.

It was objected, that the conveyance of the land to John Bannister the son, put it out of the power of the father, to perform his engagement respecting it. But the fact is, that by the death of Mrs. Shore, and of her child, in 1784, the land descended to John Bannister, the brother, as her heir at law, to whom it was afterwards conveyed by the father.—But this deed does not appear in the record.

The decree therefore must be reversed, and the bill dismissed.

John Clayborn Executor of A. Clayborn v. Hill.

April Term, 1798.

Mortgage of Personalty—When Continuing in Possession Not Evidence of Fraud—Failure to Record Deed of Release of Equity of Redemption—Effect.*—Continuing in possession by a mortgage of personal property, is not an evidence of fraud, if the mortgage appear to have been made upon a bona fide consideration, and was duly recorded. But the mortgagor having afterwards by deed released, the equity of redemption to the mortgagee, (which deed was not duly recorded) and still retaining the possession, such deed is void against creditors.

This was an appeal from a decree of the High Court of Chancery, in a suit commenced there by the appellee, to set aside a conveyance from Herbert Clayborn, to Augustine Clayborn, his father and the testator of the appellant, as being fraudulent. The prayer of the bill is, that the appellee may be let in to have the estate of an execution, issued against the estate of the said H. Clayborn.

The bill states, that the plaintiff sued out an execution against the estate of Herbert Clayborn, which in November 1784, was served upon certain slaves, some corn, stocks of cattle and tobacco, then being on a plantation in King William county, in the possession of the said Herbert Clayborn, who exercised over the whole property, every act of ownership. That the property was claimed by Augustine Clayborn, under certain deeds of conveyance to him, from the said Herbert. These conveyances are charged to be fraudulent.

The answer states, that long previous to the 11th of June 1780, A. Clayborn, and Carter Braxton, having engaged in a
178 *commercial connection, the former being entitled in right of his wife, to an estate in England, did with her consent sell it to Braxton for £6000, which formed his part of the stock in trade. That A. Clayborn, some time afterwards, withdrew himself from the business, which had been profitable, and on the 11th of June 1780, relinquished his share of the profits, to his son Herbert, for the consideration of £3000, which Herbert, by articles in writing of that date, (reciting, that those profits had been made from a capital, furnished by the wife of A. Clayborn), agreed to pay to the said A. Clayborn and his wife. That H. Clayborn becoming afterwards indebted to C. Harrison, in a considerable sum of money he, on the 1st of February 1783, by indenture, conveyed to his father, and to the said Harrison, jointly, and to their heirs, 60 slaves by names, some horses, described by names, colour, and the use made

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***Mortgage of Personalty—Retention of Possession—Fraud.**—In Davis v. Turner, 4 Gratt. 446, it is said, *Clayborn v. Hill*, 1 *Wash.* 177, was the case of a sweeping sale by an embarrassed debtor of his slaves and other personal property to his son, to whom the same had been previously mortgaged for a debt of a dubious character, and the bill of sale recorded, after the creditor's levy of his execution upon the property in the possession of the son, by whom, notwithstanding the alleged sale, it had been held, used and enjoyed as his own. It was a suit in equity in which the whole question of law and fact was to be decided by the court, and the sale was held to be fraudulent. The question whether the mere fact of the grantor's retaining possession rendered the transaction fraudulent was neither discussed nor decided; and there were no proofs in the case to repeal the *prima facie* presumption of fraud, but on the contrary strong circumstances to confirm it. In this case though it was held that the retaining possession of personal property by the vendor, after an absolute sale, is *prima facie* fraudulent; but the presumption may be rebutted by proof.

Mortgages—Recordation.—On this question the principal case is cited in Moore v. Auditor, 3 Hen. & M. 235; Beasley v. Owen, 3 Hen. & M. 458; Glasscock v. Batton, 6 Rand. 82; Rose v. Burgess, 10 Leigh 196; Bond v. Ross, 3 Fed. Cas 845. See monographic *note* on "Mortgages" appended to Forkner v. Stuart, 6 Gratt. 197.

of them—sundry articles of household and kitchen furniture, together with sundry other articles of household furniture; also 36 head of cattle, 40 of sheep, and 100 of hogs; to have, and to hold, all the above property, as per list delivered in, and a charriot and harness, unto the said A. Clayborn, and C. Harrison, &c. in trust, that after default in the said H. Clayborn, in paying the £3000 to the said A. Clayborn, and the debt due to the said Harrison, they, or either of them, or the survivor, or their heirs, to take and sell the property thereby granted, or a sufficiency thereof to pay the same, and the surplus, to be paid to said Herbert. This deed was recorded in the court of New Kent county, on the 14th of August 1783.

In April 1783, H. Clayborn, by deed of trust, conveyed to said A. Clayborn, C. Harrison, and another, three tracts of land lying in King William and New Kent counties, to be by them sold, and the proceeds thereof, applied to the discharge of debts, due from him to the trustees, and of engagements entered into by certain other persons on his account, the surplus to be paid to the said Herbert. This deed was proved in New Kent County Court, on the 14th of August following, and was recorded.

On the 20th of November 1783, Augustine Clayborn, assigned the two deeds above mentioned, so far as he had an interest in the lands, slaves, and other property conveyed by them, to John Nash, in trust, as a provision for the wife of the said Augustine; this was done, in consideration of her interest in the English estate, which her said husband had sold. This deed of assignment, was recorded in Sussex County Court.

179 *On the 12th of August 1783, Herbert Clayborn (to satisfy an execution, the benefit of which belonged to C. Braxton,) sold and conveyed to Braxton, 30 slaves, part of those before conveyed to Clayborn and Harrison, but with the assent of Griffin, a prior mortgagee. The debt due by Herbert Clayborn, to Braxton, being on the same day, paid by A. Clayborn, Braxton assigned, over to him and his wife, this bill of sale for the 30 negroes; and this assignment, was proved in New-Kent County Court two days afterwards.

The answer states, other claims of Augustine Clayborn against Herbert Clayborn;—and admits the possession of Herbert, (of all the property conveyed to his father,) on the day, when the plaintiff's execution was levied.

On the 5th of May 1784, an account was stated, between Herbert, and Augustine Clayborn, commencing in October 1783; wherein Augustine is charged, as of that day. for slaves (by name,) that day sold £445: 0

sundries as by account settled 20th November,	540: 8:
negroes [by name] then sold	500:
May 5th 1784, personal estate then sold	303:
	1788: 18:

And on this day a bill of sale was executed by H. Clayborn, to A. Clayborn, for the above property; the amount to be credited him on his agreement with the said Augustine and his wife, dated the 11th of June 1780. This bill of sale is proved, and admitted to record in New Kent County Court, on the 14th of April 1785. The property conveyed by this bill of sale, is the same, which had before been mortgaged to the said Augustine Clayborn.

The court decreed the deed of the 1st of February 1783, to be fraudulent, and void as to the creditors of Herbert Clayborn; and that the defendant, out of the assets of his testator should pay to the plaintiff, the amount of his judgment and costs. From this decree, the defendant in chancery appealed.

Duval, for the appellant. The first decision we meet with, upon the subject of fraudulent conveyances of personal estate, is Twine's case 3 Co. Rep. 80. But it is to be recollected, that the English cases are for many reasons too high toned, to apply in this Country. The bankrupt laws, which forbid one creditor from being preferred to another, have excited a desire in the courts of that country, to make the same principle as general as possible; and consequently a jealousy is entertained against all conveyances, which give

180 such a preference: *and thus it is, that small circumstances are caught at, to set them aside—again, in that country, deeds respecting personal estate are not registered, and of course, possession is the highest evidence of property. But by our law, mortgages of personal property, and of slaves, are required to be recorded; see the act of 1748, C. 1. So that there is not the same danger of fraud, as to subsequent purchasers and creditors, in this, as in that country. That the consideration in this case, was bona fide, is completely established; and if so, all the arguments of inconvenience, which can be urged, may be repelled by the maxim, caveat emptor, which strictly applies to this case—he cited 2 Durnf. and East 375—3 Atk. 44.

Marshall for the appellee. Whether the reason assigned, why the English cases, do not apply in this country be a substantial one, or not, will depend upon the just construction of the act of 1748, which is certainly very obscurely expressed.

The first clause of that law declares, that no lands, tenements or hereditaments, shall alter, pass, or change, whereby any estate of freehold shall be made to take effect, unless the same be recorded in the General Court, or court of that county, where the land shall lie, within a certain time.—Now, this clause cannot possibly apply to slaves, because the deed is to be recorded in the county where the land lies. The fourth clause declares, that all deeds of trust, or mortgage, must be recorded according to the directions of this act. But the directory part of that act, as to the place of registration, is applicable to land only, for the reason before given.—

But, if slaves are meant by the law, then by analogy to land, this deed, ought to have been recorded in King William County Court, because, the slaves were in that county, at the time the deed was made, and the execution served upon them. So that, either a mortgage of slaves is not comprehended within the law, or if it be, then, this deed has been registered in an improper county.

Lyons, J., requested Mr. Marshall, to read the tenth section of the law, which requires, that a memorial of all mortgages, containing the number, and names of the slaves, and the description of the personal estate, if any be mortgaged, shall be registered in the General Court.

Mr. Marshall. I contend that if the law apply to a mortgage of slaves, the deed in question, was not recorded in the proper County.

181 *It is also an important question, whether the mortgagor of personal property, can retain the possession of it. The English cases lay it down, that a security upon personal property, is not properly a mortgage, but a pledge, or deposit, and remains in the pawnee's possession. What influence, the custom of this country (which is otherwise,) may have upon this point, I will not pretend to determine. But, if all these points be against me, I rely with confidence, upon the many badges of fraud which attend this case.

In the first place, consider the connection between the parties; a mortgage by a son, to the father.—The time;—just previous to the affairs of Herbert Clayborn becoming desperate, and whilst his creditors were pressing him. A conveyance too, of every thing he possessed, down to a knife case, with a sweeping clause, that nothing might be omitted. It is remarkable too, that only that species of property is conveyed, which might be resorted to by his creditors: for his real estate (not encumbered) was considerable, and is not conveyed.—If the transaction were bona fide, would he deprive himself of all the comforts of life, and the means of deriving profit from his lands? or would he not rather have retained a part of his personal, and in its room, substituted some of his real estate. All the cases agree, that a total disposition of a man's estate, or the remaining in possession, are certain badges of fraud—there is also something remarkable in the consideration stated—to wit, that the father, and Braxton, in 1777, had formed a commercial connection—the father's capital was £6000. —In 1782, it is decided to have been a losing business; and yet, in 1780, the father sells the profits of this trade, to the son, for £3000 sterling, which is the consideration of the mortgage. But again: in 1784, the son makes an absolute conveyance to the father, for £1788: 18, after which, it must be agreed, that the son's retaining the possession is so strong an evidence of a secret trust, as not to be fairly accounted for. The property continues in his possession, when the execution is served, he receives the crops, disposes of them, converts the cattle, hogs, &c. to his own use, and in short, exercises the most compleat ownership over the whole.

Warden on the same side. No case can come more compleatly up to Twine's case, than this. The conveyance is general, and possession is retained by the mortgagor. In Powell on mortgages is laid down, that the possession of personal property, which is mortgaged, should remain with the mortgagee; or if it do not, the reason should appear, from the nature and import of the mortgage; from p. 1 to 66.

182 *So, where a supercargo on a voyage, mortgaged by way of Bottomry and Hypothecation, the vessel and cargo, and proceeded on the voyage, and sold the cargo, and bought other goods with the proceeds, and so bartered it two or three times; this was determined not to be fraudulent, because from the very nature of the transaction, it was understood, that the supercargo was to make the most of the property. But where in a mortgage of personal property, it was stipulated, that the mortgagor should retain the possession, and receive the profits, it was adjudged fraudulent against creditors—so that, even an express agreement to retain possession, will not save such deeds from being fraudulent, unless the transaction itself, necessarily accounts for, and justifies it.

Marshall. There is but one possible way of construing the act of assembly, so as to make all its parts consist together, and at the same time, effect the purpose, for which deeds ought to be registered. The first section of the law directs, that deeds of land shall be recorded in the General Court, or Court of the County, in which the land lies.—The 4th section directs, that all mortgages, shall be recorded according to the directions of that act.—The 9th and 10th sections declare, that for the purpose of giving notice to purchasers of lands, slaves, &c. of prior incumbrances, memorials of all deeds of lands, slaves, &c. shall be registered, by the clerk of the General Court; and the clerks of the different County Courts, are also directed to furnish the clerk of the General Court, with memorials of all deeds, recorded in their respective courts, which are also to be registered in the General Court. If then, the deed be of lands and slaves, it ought to be recorded in the General Court, or court of the county where the land lies—if of slaves only, then in the General Court: In this way only, will there be compleat notoriety of all deeds—if it may be recorded in the county where the mortgagee lives, a purchaser must first know, who is the mortgagee, before he can know to what County Court to apply. If it may be recorded in any county, then, if the clerk should fail to send forward the memorial to the General Court, the registration will afford no notice whatever.

The PRESIDENT requested Mr. Marshall, to read the act of 1758, respecting the fraudulent gifts of slaves, observing, that

this question might perhaps be determined by analogy to that.

Mr. Marshall.—That act relates to positive gifts, the act of 1748, to mortgages—that, to conveyances without consideration.

—This, to conveyances with consid-
183 eration.—The deeds *spoken of in that law, may be proved by two witnesses. Those mentioned in this law must be proved by three.—That is passed ten years after, and has no reference to this: there can therefore be no analogy between them.

Campbell for the appellant in reply.

This case, depends entirely upon principle, and its own peculiar circumstances—no aid can be derived from English cases, because the reason, which has produced them in that country, do no exist in this.

I contend 1st, that the deed in question, is valid under the act of 1748, and 2dly, that the circumstances attending the transaction, cannot invalidate it upon the principle of fraud.

First, the law of 1748, is not creative of the right to mortgage personal property, because it existed at common law, but it directs the manner of giving notoriety to such deeds. The notice intended, is to be obtained, by referring to the registration of the memorials of them, in the General Court. It is therefore unimportant, in what county they are recorded, since the General Court is the place, where information is to be obtained, respecting the county in which the deeds were recorded. And if the officer, whose duty it is to forward these memorials fails to do it, the parties are not thereby to suffer.

Secondly, Before the English cases are considered, let us recollect how this subject stood, at the time when Twine's case was decided; and it will be found, that the facility, with which secret conveyances might be made, rendered it proper for the judges, to exercise a strictness (in order to defeat every attempt to commit a fraud,) which would have been unnecessary, if a mean had been adopted, whereby creditors and purchasers might have guarded themselves against it. This inconvenience, produced that statutes of Elizabeth, respecting fraudulent conveyances. The preamble, recites the mischief which resulted from the possession remaining in one person, whilst the property was transferred to another, whereby creditors, and purchasers were defrauded; and the judges stretched as far as they well could, to carry this statute into full effect. The cases referred to in Powell, furnish a satisfactory reason for the distinction, between real, and personal property, continuing in possession of the mortgagor. In the first, purchasers may obtain notice, by recurring to the vicinage in cases of feoffments, or to the records, in cases of bargains and sales. But in the latter, possession is the highest evidence of property. Attend to the difference between the statute of Elizabeth, and our law. The former, only punishes the fraud, which it did not attempt to prevent. The
184 *latter, prevents its commission, by directing the deeds to be recorded. The principle of caveat emptor therefore, cannot with propriety apply in England, because there is no possible mode, by which a purchaser can guard himself against prior, secret conveyances; it is otherwise in this country.

Under all the inconveniencies above pointed out, Twine's case came forward. The conveyance was absolute and was of all his property. No inventory of the particular articles; and want of notoriety; is there stated as the foundation of the decision. This, is the case of a mortgage, which from its nature imports, that the possession is to remain with the mortgagor. There is a specification of the property conveyed, and an appraisement annexed. As to the inconveniences arising from the want of notoriety, see 2 Blac. Com. 338—342—Pow. on Mortg. 2 Ed. p. 286—290.

If then, possession remaining with the mortgagor, be not in this country, an evidence of fraud, what are the other circumstances relied upon? relationship—if the transaction be otherwise fair, the preference given by a son to a father, can be no evidence of fraud. The time,—Since there are no bankrupt laws, or principles growing out of them in this country, which prohibits a debtor from prefering one creditor, to another, the circumstance of time is unimportant, if it be antecedent to the execution delivered. But the strongest proof that this transaction was real, and not colorable, is, that in April 1784, H. Clayborn, mortgaged his land (which his creditors could not have touched,) to his father, Harrison, and William P. Clayborn, whose claims were found to exceed the value of the property first mortgaged. If he found himself safe in the power of a father, would he also have thrown himself upon the mercy of strangers, if the transaction had not been real?

The PRESIDENT pronounced the following opinion and decree, viz. "The deed of mortgage, dated the 1st of February 1783, from Herbert Clayborn to Augustine Clayborn, in the decree mentioned, if made for a valuable and bona fide consideration, was not void by reason of Herbert Clayborn the mortgagor, retaining possession, of the slaves and other estate thereby mortgaged to the said Augustine, as the said deed was duly recorded, and that therefore the consideration should have been enquired into, and accounts taken and settled between the parties, before the deed was declared void on that principle, which could not be
185 properly done in this suit, as *Charles Harrison one of the mortgagees is not a party. But this court is of opinion, that as the said Augustine suffered the said Herbert to retain the possession of the slaves, and other estate, on which the appellees execution was levied, after the sales in October and November, for which bills of sale were made, (as referred to in the answer of the appellant, and filed among

the exhibits in this cause,) releasing the equity of redemption, and conveying the absolute property in the estate, thereby conveyed and confirmed, to the said Augustine, which bills of sale were not recorded until the 14th of April 1785; that they were fraudulent and void as to the appellee, and neither the said sales, nor the prior mortgage which had ceased to operate, did protect the estate, (then sufficient to satisfy his demand) from his execution, and that there is no error in the decree for the payment of the appellee's debt and costs.

Decree affirmed.

Tarpley's Administrator v. Dobyns.

April Term, 1798.

Surprise—When Equity Will Not Relieve.*—The plaintiff went to trial at Law in a case where he might have sued in Equity, and a verdict by surprise was given against him. He shall not afterwards resort to a Court of Chancery.

This was a suit in Equity, instituted in the County Court of Richmond, by the present appellant. The bill charges, that there were various specie dealings, between the intestate of the plaintiff, and the defendant; and that upon a settlement made in 1779, there being a balance found due from the defendant, he executed a bond for £54 current money, the amount thereof. That this was understood by the parties, to be a specie debt, and as a proof, that such was the meaning of the parties, the defendant, afterwards paid £6: 10, in specie, and still acknowledged himself further indebted to the plaintiff's intestate; which could not have been the case, if the debt had been subject to the legal scale of depreciation, which in 1779, was 10 for one. That the plaintiff, instituted a suit at law, against the defendant, and not suspecting that the defendant would attempt to contend, that the debt should be scaled, he was unprepared to prove the defendant's declarations, tending to shew, that he considered it as a specie debt.—In consequence whereof, the jury reduced the debt, to a smaller sum, than the defendant had actually paid,
186 *and found a verdict against the plaintiff. The bill prays, that the defendant may be decreed to pay the £54, in specie with interest, after deducting the above payments.

To this bill, the defendant demurred for want of equity. The demurrer being sustained in the County Court, as also in the High Court of Chancery where it was carried by appeal, the plaintiff below appealed to this court.

The cause, being argued here by Mr. Campbell for the appellant;

The PRESIDENT delivered the opinion of the court.

We feel no difficulty in declaring, that both decrees are right. Although the appellant might have resorted to a Court of Equity in the first instance, if his case would bear it, it is now too late, after having made his election, to take a trial at law. As to the surprise, which is made the pretext for this application to a Court of Equity it ought not to benefit the appellant in the present case; since, when he discovered a disposition in the appellee, to avail himself of his legal advantage at the trial, he might have suffered a nonsuit.

Decree affirmed.

Anderson v. Bernard.

April Term, 1798.

Nonpayment of Fees Due Deputy Clerk—Right of Sheriff to Distrain—Quære.*—If a Sheriff can distrain for nonpayment of fees stated in the Clerk's bill, as due to the Deputy Clerk.

This was an action of trespass, brought in the District Court of Prince Edward, by the appellant, against the appellee, for taking a saddle from his possession. Plea, not guilty. The defendant at the trial offered in evidence to the jury, a record of his qualification as a deputy sheriff, and also a witness to prove, that the defendant, as deputy sheriff, had seized the saddle in the declaration mentioned, to satisfy certain fees due in 1781, to the clerk of the General Court. The account of the fees due, and stated in the record to have been produced in evidence, is headed thus, "Dr. Thomas Anderson, to Adam Craig, deputy clerk, General Court." To this evidence the plaintiff filed a bill of exceptions. Verdict and judgment for the defendant, from which the plaintiff appealed.

Ronold for the appellant, contended, that the deputy clerk, was not entitled by law to demand fees from suitors, and therefore, the account offered in evidence, could not justify the sheriff in levying the distress.
That these summary modes of en-
187 forcing *the payment of debts, ought to be strictly pursued, to prevent oppression upon individuals.

The sheriff saw his authority, and ought to have known, that no fees could be distrained for, but such, as were due to the principle officers of the courts. The evidence therefore, was improperly admitted by the court.

Marshall for the appellee. By the act of 19th Geo. II. C. 1, § 12, the sheriff, if sued for levying a distress for officers fees, is permitted to plead the general issue, and to

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*Equity Practice—Surprise.—For the proposition that, where the plaintiff goes to trial at law in a case where he might have sued in equity and a verdict by surprise is given against him, he shall not afterwards resort to a court of chancery, the principal case is cited and approved in Harvey v. Fox, 5 Leigh 449; Oswald v. Tyler, 4 Rand. 32, 46, 47, 50.

See also, Terrell v. Dick, 1 Call 546, and *foot-note.*

*The principal case is cited in Mayor, etc., of Alexandria v. Chapman, 4 Hen. & M. 276; Greenhow v. Barton, 1 Munf. 593.

give in evidence the special matter of his justification.

As to the mode of stating the account, by which the deputy clerk is made the creditor, no advantage can now be taken of it; because the account, though it appears in the record, is properly no part of it, nor is it excepted to, as inadmissible testimony.

The court being divided in opinion, the judgment was affirmed.

Johnson v. Bourn.

April Term, 1793.

Joint Trespass—Separate Actions—Witnesses.*—If separate actions be brought against two for a joint trespass, one defendant is a competent witness for the other.

This was an action of assault and battery, brought by the defendant in error in the District Court of Charlottsville. There were two pleas put in, 1st not guilty: and 2dly, a justification. The defendant, at the trial, offered the testimony of a witness, against whom a separate action was then depending at the suit of the plaintiff for an assault committed at the same time. The court, refused to suffer the witness to be examined, considering him to be incompetent, on account of his being sued as a joint trespasser.

The defendant below filed a bill of exceptions to the opinion of the court, and a verdict and judgment being given against him, he obtained a supersedeas from this court.

Ronold for the plaintiff. There seems to be no good reason, for rejecting this witness upon the ground of incompetency. A person named in the simul cum, may give testimony for the defendant, in an action of trespass, Bull. Ni. pri. 285. Watson v. Shelly, 1 Term Rep. 301 is expressly in point. Hardw. Cas. 360 and 3 Term Rep. 27.—in the last case, this principle is laid down—that if the witness, is neither to gain, nor lose, by the event of the cause in which he deposes, or if the verdict cannot be given in evidence for, or against him, he cannot be objected to on the score of incompetency.

188 *Marshall for the defendant. My own opinion is, that the law is correctly stated by Mr. Ronold, but the point has been otherwise determined in the General Court, upon an indictment for an assault.

The PRESIDENT. The plaintiff, by bringing separate actions, has removed all objection to the testimony of the witness, since the verdict in one suit, cannot be given in evidence in the other. The objection therefore can only go to the credibility, not to the competency of the witness.

Judgment reversed—verdict set aside, and new trial awarded, with directions to admit the examination of the witness.

*The principal case is cited in Greeley v. Smith, 10 Fed. Cas. 1076.

William Eustace v. Gaskins Executor of Eustace.

April Term, 1793.

Right Unasserted—Presumption—How Rebutted.*—A right, for a length of time unasserted, is open to a presumption of its having been satisfied, sufficiently strong to defeat it. But this presumption may be opposed by circumstances accounting for the forbearance.

Profits of Land—By Whom Ascertained.†—The value and profits of land being in the nature of damages, ought to be ascertained by a Jury, and not by Commissioners.

Suit against Executor‡—Qualification of Another after Bill Filed—Parties.—After bill filed against one executor, if the other executor qualify, he ought to be made a party to the suit as soon as it is known that he has so qualified.

This was a suit in equity, instituted by the appellant in the County Court of Lancaster. The object of the bill is, to recover a compensation, for certain lands devised to the plaintiff, by his father, William Eustace, and afterwards recovered from him at law, by some person having a better title.

This claim, is founded upon a clause in the will of the said William Eustace the father, by which he desires, that in case the land given to his son William, should be recovered from him, his son John (the

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***Payment—Presumption—Lapse of Time.**—The presumption of payment is not a legal presumption absolutely conclusive, but it is a presumption of fact; which, though not conclusive, is yet *prima facie* proof of payment. If less than twenty years, though nearly that time, have elapsed, all the circumstances are considered, including lapse of time, and their natural weight as evidence is to be given to each circumstance, including lapse of time, but if twenty years has elapsed a legal presumption arises, which must be accepted as proof, unless the contrary appears by evidence. But this presumption may be rebutted by proof which is satisfactory that the debt has not been paid, such as the proof of payment of interest within the twenty years, the continued absence from the country of the obligee, the continued insolvency of the defendant or obligor, or other strong circumstances showing nonpayment, or showing good causes for longer forbearance. Hale v. Pack, 10 W. Va. 151, citing *Eustace v. Gaskins*, 1 *Wash.* 188. See also, citing the principal case, Criss v. Criss, 28 W. Va. 404; *foot-note* to Mulliday v. Machir, 4 Gratt. 1.

†**Profits of Land—By Whom Ascertained.**—In Cooke v. Wise, 3 Hen. & M. 463, the principal case is quoted from as holding that, the value and profits of land being in the nature of damages ought to be ascertained by the jury and not by commissioners.

On this question, the principal case is cited in Roberts v. Stanton, 2 Munf. 138, 139, and overruled, which case holds that, it is not error in a court of equity to direct *commissioners* instead of a *jury*, to state and report an account of the profits of land. The principal case is cited in *foot-note* to Kennedy v. Baylor, 1 Wash. 162.

‡**Executors and Administrators.**—See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

testator of the defendants, to whom he devised the principal part of his estate,) should purchase it for his said son William. In 1742, the recovery was obtained, and the testator of the defendants, died in 1785.

This suit was instituted in 1788, and the bill, accounts for the delay in bringing the suit, by charging, that the testator of the defendant amused the plaintiff, until his death, with promises of providing for him by his will. Some proof of such a promise, as well as an acknowledgment by John Eustace, of the plaintiff's forbearance, appears in the record. The defendant, in his answer, principally relies upon the length of time. Exceptions were taken, and filed by the defendant, on account of the court's refusing to receive the answer of Mrs. Eustace, who is stated in the exceptions to have qualified as executrix of John Eustace since the institution of this suit.

189 *The County Court, directed the value of the land in 1742, and the back rents, to be ascertained by commissioners, and decreed the amount thereof, to the plaintiff, the present appellant.

This decree, was reversed in the High Court of Chancery, and an appeal was taken from thence, to this court.

Washington for the appellee. The first objection which occurs to the decree of the County Court is, that there is not such testimony in the cause, as could warrant a recovery upon any principal. The will of William Eustace the elder, is not made an exhibit, nor admitted by the defendants in their answer; neither is there any other evidence of the recovery stated in the bill, but a judgment in ejectment against John Eustace, an infant, of some land; but whether of that, advised by the will of William the father, does not appear.

But I rely principally upon the length of time, which has elapsed, since the recovery stated in the bill. Substantial justice and wise policy demand, that in all cases, whether legal, or equitable, there should be a period, beyond which no claims should be litigated: such a length of time, as creates a presumption of payment, or of satisfaction made, is considered as much an equitable bar in this court, as if it came within any positive act of limitation. In the case of Standish v. Radley, 2 Atk. 177, where portions, which became due in 1673, were sued for in 1717, lord Hardwicke determined, that such a lapse of time, creates a strong presumption, that they had been paid, and amounts almost to the proving of a negative to induce the court to believe them still unpaid.

So, in the case of Smallman v. Hamilton 2 Atk. 71, an annuity devised by will, was considered, as being barred by length of time, on the presumption, tho' forborne to be sued for 10 years only—see also 3 Atk. 105—226, 1 Har. Cha. Prac. 375.

Marshall for the appellant. I admit that length of time, which induces a presumption, that the claim has been satisfied, will create an equitable bar. But this presumption, may be repelled by testimony accounting for the delay, and in this case, there is a sufficient reason assigned, and proved, for the appellant's not asserting his right, at an earlier day. It appears, that the testator of the appellee had been long married, without having children—that he acknowledged his brother's lenity, in not coercing satisfaction of his claim, and promised, to make him an ample provision at his death.

There is no room then, to let in a presumption of payment, upon which alone, this equitable bar can be set up.

190 *The PRESIDENT delivered the opinion of the court.

The judge, who pronounced the decree of reversal in this case, seems to have considered no other question, but the presumption against the demand, on account of its antiquity. It is undoubtedly true in general, that a right, for a length of time unasserted, is subject to a presumption of its having been satisfied, sufficiently strong, to defeat it. But it is equally true, that this presumption may be opposed by circumstances, accounting for the forbearance. In this case, we think a sufficient reason for the delay is assigned, and satisfactorily proved. The decree of the Chancellor is therefore erroneous, and must be reversed. As to that of the County Court, we have felt some difficulty in deciding, what ought to be done with it; it cannot be sustained upon any principle. The will not having been made an exhibit in the cause, and the only evidence of a recovery, of the land in question, being a judgment of the General Court, against John Eustace, for some land, (but what land does not appear,) the decree was certainly made, without sufficient testimony to warrant it. In the next place, Mrs. Eustace ought to have been made a party, so soon as it was known, that she had qualified as executrix to her husband John Eustace. Her answer might have disclosed something important, of her own knowledge. The court ought to have directed an issue, to try, whether any, and what part of the plaintiff's land, had been recovered, as well as the value and profits thereof, which being in the nature of damages, ought to be ascertained by a jury, and not by commissioners.

The decree of that court therefore, must also be reversed, as well as the proceedings subsequent to the answer. The plaintiff to have leave to amend his bill, so as to make Mrs. Eustace a party defendant, and the cause to be sent back to the County Court, to be there proceeded in.

Tomlin, Mitchell, and How v. Kelly.

April Term, 1798.

Limitations—Act of 1779—To What Applies.*—The Act of Assembly of October, 1779, c. 3, "for discouraging

***Limitations—Acts of 1779—To What Applies.**—For the proposition that the Act of 1779, ch. 3, for discouraging extensive credit applies only to store

extensive credit, and repealing the law prescribing the method of proving book debts," applies only to the store accounts of retail merchants.

This was an action upon the case, for goods sold and delivered, brought by the plaintiffs in the General Court,
191 *from whence it was sent to the District Court of Northumberland. The jury found a special verdict, in the following words to wit, "we find for the plaintiff, £100: 9: 6½ damages, if the court shall be of opinion, that an action can be maintained, for goods, wares and merchandizes, imported for sale by the plaintiffs, who kept no retail store, but who sold the same at public auction, on a wharf, and delivered them to the defendant twelve months before this suit was brought, otherwise we find for the defendant."—

Judgment upon this special verdict was given for the defendant in the District Court, and a writ of supersedeas was granted by this court.

Campbell for the plaintiffs in error.—The question is, whether this case shall be construed to come within the operation of the act of October 1779 Ch. 3, "for discouraging extensive credits, and repealing the act prescribing the method of proving book debts." I am to contend it does not.

The act passed in 1748, which is intended to be repealed, will serve to throw light upon the true intention of the legislature, in passing the law more immediately in question. The preamble to that law, as well as the enacting clause, is literally confined to the sale of goods by retail, and was intended to provide a species of evidence unknown to the common law; by which, retail merchants were permitted to prove their store accounts by their own oath. This law, not only opened a door to perjuries, and to infinite frauds, but tended to encourage extensive credits, from the facility of establishing such demands. To repeal this law, and to do away its effects as to extensive credits, was obviously the design of the act of 1779. The preamble recites, that the method of proving book debts, and the extensive credits formerly given by merchants and traders, had been found injurious to this commonwealth: the law then proceeds to repeal the law of 1748, and to enact, "that all actions, founded upon account for goods sold and delivered, or for any articles charged in any store account, shall be commenced within six months, after the cause of action accrued, and not after." The mischief stated in the preamble, existed only in the retail business, which, almost entirely formed the internal commerce of this country, before the war, and of course, must have been alluded to, by the legislature.

The law requires each item in the account, to be truly dated, which is an additional proof, that the retail trade was alone contemplated.

192 *Warden for the defendant. When a law is expressed, as this is, in general terms, reasons for forming constructive exceptions from it, ought to be so strong, as to leave nothing to conjecture—whenever we quit the plain expressions of a law, to wander at large in the wide field of construction, we should be sure, that the guides we take will not mislead us.

The legislature had two motives for passing the law of 1779—the one, to repeal the act of 1748, because it warranted an unsafe species of evidence—the other, to prevent extensive credits, as an evil independent of, and not growing out of the act of 1748—for if it had necessarily resulted from that law, it must have expired with the law, and need not have been stated as a primary mischief, intended to be cured. If it had been considered merely as a consequence, it was highly absurd to entitle the law, "an act for discouraging extensive credits, and repealing the law prescribing the method of proving book debts." The second clause of the act, creates a bar against all actions founded upon account for goods sold and delivered, or for any articles charged in any store account.

Now, is this an action for goods sold and delivered, or not? If the law only meant store accounts, why is the former part of this clause inserted? the latter would have answered the purpose.

If it were politic, to prevent extensive credits in the confined sales of a retail store, the reason applies a fortiori to extensive wholesale negociations; if it were wise to prevent it, when transacted in a house by private bargain, was it not equally so, if sold upon a wharf at public auction.

The PRESIDENT delivered the opinion of the court.

In discussing the case of Beale and Edmundson, it was agreed by the unanimous opinion of a full court, that the act of 1779, applied only to the store accounts of retail dealers; and we should feel ourselves bound by that opinion, unless it were over-ruled by as full a court, even if our sentiments at this time, respecting the principle then established were different from what they then were. But the present court retain the same opinion upon the subject; and must therefore pronounce the law to be in favour of the plaintiffs, upon the special conclusion of the verdict.

Judgment reversed, and to be entered for the plaintiff.

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193 *OCTOBER TERM, 1793.

James M'Alister v. John M'Alister.

October Term, 1793.

Arbitration—Admission of Improper Evidence by Arbitrators—Effect.*—If upon a reference by a rule of Court, the arbitrators admit improper evidence,

accounts of retail merchants, the principal case is cited in *foot-note* to Beall v. Edmondson, 3 Call 515; Wortham v. Smith, 15 Gratt. 491, 493, 494, 495, and *foot-note*; Radford v. Fowlkes, 85 Va. 852, 8 S. E. Rep. 817.

*See monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

such as the testimony of one of the parties, or of his wife, the other party ought to be permitted by the Court to prove that fact: and being proved, the Court ought to set aside the award, and direct a trial by jury.

The defendant in error brought an action upon the case against the plaintiff, in the County Court of Berkeley—Plea non assumpsit. By a rule of court entered in November 1789, the parties, submitted all matters in difference between them in this suit, to the final determination of two arbitrators, mutually chosen, and in case of their disagreement, they to chuse an umpire, whose award, or the award of such umpire thereupon, to be made the judgment of the court.

The two arbitrators not agreeing, named an umpire, who, "after examining the papers filed in the suit, and after considering the claim of the plaintiff, and the various charges exhibited in an account rendered by the defendant, in bar to the claim of the said plaintiff, declared his opinion; that the plaintiff should not recover his said claim, but on the contrary, his suit be dismissed at his own costs." This award being returned, was objected to by John M'Alister, the plaintiff below, whereupon a rule was made, to shew cause, why the award should not be set aside?

Upon this rule, a motion was made to set aside the award, and the plaintiff, in support of his motion, offered to prove by the arbitrators and umpire, that the umpire had admitted the depositions of James M'Alister, the defendant, and of his wife,
194 *to be read as evidence before him.
But the court, refusing to examine these witnesses, determined that the award should be made the judgment of the court. To this opinion, the plaintiff filed a bill of exceptions, which was sealed.

From this judgment, John M'Alister appealed to the District Court of Winchester, where it was reversed, the award set aside, and a new trial directed; the court being of opinion, that the oath of the party, was improperly admitted as evidence by the umpire.

The plaintiff in this court, obtained a supersedeas, to the judgment of the District Court, assigning for error, that that court reversed the judgment of the County Court, because the umpire admitted improper evidence, whereas, if the County Court erred in refusing to examine the witnesses, all that the District Court should have done, would have been to reverse that judgment, and to direct the evidence to be admitted to prove the admission of the improper testimony, if any there was.

The following is the opinion and judgment of this court.

"That the testimony of the defendant James M'Alister and Sarah his wife, was not proper in this suit, and ought not to have been admitted without the consent of the plaintiff; and that if the umpire on the proceedings mentioned, did receive and admit their depositions as evidence, in the matters in difference between the parties in this suit, submitted to him, his umpirage and award should have been set aside, and a trial by jury awarded by the County Court. The judgment of the District Court is therefore erroneous. The judgment of the County Court is also erroneous, in not allowing the plaintiff to prove, that the depositions of the said James and Sarah M'Alister were admitted as evidence by the said umpire, as (it is stated in the bill of exceptions filed in this cause,) the plaintiff offered to do."

Both judgments reversed with costs. The cause sent back to the County Court, to receive such proof, and for further proceedings.

Wilson and M'Rae v. Keeling.

October Term, 1793.

Paper Money—Scale of Depreciation*—Case at Bar.—In April, 1778, a sum of paper money was lent, not to be repaid in less than twelve months thereafter. The money was tendered shortly after the expiration of the twelve months, and was refused. A mortgage having been given to secure the debt, the mortgagee brought an ejectment, and recovered possession of the mortgaged premises. Upon a bill filed for relief, the mortgagee will be decreed to recovery upon payment of the debt according to the scale of depreciation, of the day when the money was lent (notwithstanding he had received the identical money in discharge of a specie debt, and notwithstanding the mortgagor employed the same in the discharge of a special debt) without interest from the time of the tender, to that of a new demand.

This was an appeal from the High Court of Chancery—Keeling, the plaintiff in that Court, borrowed from M'Rae in April 1778,
a sum of paper money amounting to
195 £422: 18, not *to be repaid in less
than twelve months thereafter, which money, (the answer states,) belonged to the ward of M'Rae, being so much received by him in discharge of a specie debt due to the ward. Keeling conveyed to Wilson as a trustee for M'Rae, certain property by way of mortgage, to secure this loan—after the money became due, but not on the very day, Keeling tendered the debt in paper money, to Wilson the trustee, who refused to receive it. An ejectment being brought, to recover possession of the mortgaged premises, a judgment was thereupon obtained. Keeling filed his bill in the High Court of Chancery praying an injunction, and liberty to redeem, upon paying according to the scale of depreciation, at the time when the money was lent. The answer states, that the money was borrowed by Keeling, for the purpose of discharging a specie debt, and that it was actually so applied.

The Chancellor being of opinion, that the

***Paper Money—Scale of Depreciation.**—On this question, the principal case is cited in Dearing v. Rucker, 18 Gratt. 465 (see *foot-note*); White v. Atkinson, 2 Wash. 103; Bierne v. Brown, 10 W. Va. 761; Gilkeson v. Smith, 15 W. Va. 60. See also, Nicholas v. Tyler, 1 Hen. & M. 332.

debt in question for money borrowed and secured by mortgage, might be discharged in the same manner, as a debt created and secured by a pact in any other form; and that by refusal of the money tendered, the right to interest, between the time when the tender was made and the time when the debt was demanded by M'Rae, was extinguished, decreed a reconveyance to the plaintiff upon his paying to the defendants, £84: 11: 8, with interest thereupon, from the time of the loan, until that of the tender, and from the 1st day of September 1784, (when a demand was made,) until payment of the principal debt, with the costs of the suit at law, and his costs in defending this suit; but upon his failing to do this, the court decreed a foreclosure and sale, in the usual manner.

Campbell for the appellants. The appellant M'Rae, having gained the legal title to the mortgaged property, has thereby obtained an advantage, of which a Court of Chancery will never deprive him, without forcing the party, who seeks its aid, to retribute the other party by doing compleat equity. This is an over-ruling maxim in that court. If the appellee shall be found to sustain no injury, or to be deprived of no equitable right by paying the nominal amount of debt in specie, what is it, that shall warrant the interposition of a court of equity to deprive the mortgagee of the full benefit of his judgment at law? Keeling cannot lose any thing, by paying the full amount of the loan in specie, because he made a specie use of the money. On the other hand, M'Rae is injured, by applying the scale of depreciation to the debt; 196 because the money *lent, tho' it consisted of paper bills, was the representative of so much specie, as it was received by him in discharge of a specie debt.

M'Rae is to be considered in this court, as standing in the shoes of the person, to whom Keeling paid the sum he had borrowed, in the same manner, as if that debt had actually been assigned to him. That the parties considered this as a specie contract, is evident, from the value of the property mortgaged.

But the decree is surely erroneous, so far as it stops the interest from the tender of the money, to the time of the subsequent demand, since the present case cannot be likened to that, of a tender made in specie. In the latter case, the money always continuing of the same value, no injury can arise, if it be not tendered on the day of payment. But in the case of paper money, its value was continually lessening, and therefore it ought to have been tendered on the very day, as the lender, (relying on the punctual payment of the money,) might have made contracts, providing for the immediate application of it, and might lose the benefit of such contracts by disappointment.

Marshall for the appellee, was stopped by the court.

LYONS J., delivered the opinion of the court. The case is too clear to be argued. This is a downright attempt to evade the law, directing the mode of settling debts contracted in paper money, without a single circumstance to countenance it.

In the case of Wily and Panky, in the General Court, it was determined, that the creditor who concealed himself in his house, to evade a tender, should sustain the loss by the depreciation of the money.

Decree affirmed.

William Payne, Executor of John Payne v. William Dudley Executor of Fleet.

October Term. 1793.

Equity Practice—When Plaintiff Will Not Be Deprived of Advantage at Law.*—Courts of Equity never interfere to deprive the plaintiff at law, of a legal advantage which he may have gained, unless the party, seeking relief, will do complete justice, by paying what is really due. Upon the same principle, that Court has refused its aid in relieving against a judgment obtained by fraud.

Insolvent Debtors—Property Acquired after Discharge—Liability.—The property of an insolvent debtor afterwards acquired, is not exempted from the payment of prior debts; it is his person only which is protected.

This was an appeal from a decree of the High Court of Chancery. The appellant filed his bill in that Court, stating, that his testator was indebted to the testator of the appellee by bond, upon which a judgment had been obtained in the year 1766, during the lives of the par- 197 ties. That the bond, *being afterwards found by the defendant amongst the papers of his testator, the defendant had instituted an action upon the same bond, against the plaintiff, in a different court from that in which the original judgment had been obtained: that the plaintiff, not knowing of this judgment, was prevented from pleading it in bar, in consequence of which, a second judgment was rendered in the year 1789, against the plaintiff. The ground of equity is, that the testator of the plaintiff had, in the year 1766, conveyed the greatest part of his property to John Semple, in trust for the payment of the debt in question, (amongst many others,) provided, the enumerated creditors would within a reasonable time accede to, and accept of that security. That Fleet was one of the acceding creditors, and had been fully satisfied for the above mentioned debt out of the trust estate. An injunction was prayed for and granted.

***Equity Practice—When Plaintiff Will Not Be Deprived of Advantage Obtained at Law.**—The principal case is cited in Lipscomb v. Littlepage, 1 Hen. & M. 467, to the point that courts of equity will not interfere to deprive a plaintiff at law of any legal advantage which he may have gained, unless the party seeking relief will do complete justice by paying what is really due; and they have upon the same principle refused to relieve against a judgment obtained by fraud. See monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

The defendant in his answer, denied any knowledge of the judgment in 1765, or that the debt had been satisfied either by Payne himself, or by Semple out of the trust estate; and insists, that the debt (for which the judgment sought to be injoined was rendered) being yet due and unpaid, it ought now to be satisfied by the plaintiff, whether Fleet was, or was not an acceding creditor.

The judgment in 1766 was entered upon confession; no declaration or bond was filed, and consequently, it was entered generally, without ascertaining any precise sum.

The Chancellor upon a hearing of the cause, dismissed the bill, being of opinion, that the equity stated, was neither admitted by the answer, nor supported by the evidence.

Campbell for the appellant. I am aware of an objection, which may be urged against the relief sought for by this bill; which is, that the defendant at law, having lost the opportunity of availing himself of a legal advantage, cannot expect the favor of a Court of Equity, unless he shew, that the judgment is an unconscientious one. But it should be observed, that this legal advantage being gained, (and that too by the ignorance of the appellant) he has lost the opportunity of availing himself of the presumption, that the first judgment (obtained so long ago as the year 1766) had been paid; a defence which he might safely have used if instead of improperly instituting a second suit upon the same bond, a sci. fa. had been prosecuted to revive that judgment. The presumption arising from length of time, is much stronger against a judgment, than against a bond; for in the first 198 case, a sci. fa. cannot be sued *out after 7 years, but by permission of the court. There are strong circumstances in this cause to strengthen the presumption. On the day when the first judgment was to be confessed, Payne executed a deed of trust, conveying his property to Semple, to secure such of his creditors as should accede thereto. That Fleet was one of the acceding creditors, appears from the circumstance of one of his sons being found in possession of a part of trust estate; after which it does not appear, that any demand of payment was made.

Marshall for the appellee. The principle stated and admitted by Mr. Campbell, furnishes a compleat answer to all the objections relied upon; for it is clear, that where a man has neglected to avail himself of an advantage merely legal, equity will not assist him, so as to defeat the justice of the case. Fleet by receiving part of the trust estate, is not thereby barred from recovering the balance of his debt, if other property can be found. It is like the case of a mortgagee, who if not fully satisfied by the sale of the property mortgaged, may proceed to recover the balance from the mortgagor.

LYONS J. in case of a foreclosure, how would it be, if there were no covenant for payment of the debt.

Marshall. In that case, the mortgagee must be satisfied with the security he has taken; but he may elect to have the property sold, in which case, he may proceed against the mortgagor for the balance left unsatisfied by the mortgaged property.

As to the presumption of payment, it was a fit subject to have been relied upon at law. But surely it cannot be seriously contended, that the acceding creditors are precluded from claiming such part of their debts, as remained unsatisfied under the trust.

The PRESIDENT. The presumption of payment arising from length of time, besides being defeated by the acknowledgments of the debtor in 1775 and 1779, is sufficiently repelled, by considering the delay necessarily incurred, whilst the creditor was waiting to see what the trust estate would produce. The creditors are not barred, by the terms on which they acceded to the deed of trust, from demanding any balance not satisfied under the trust—nor does it even appear, that the debtor had a letter of license, which on such occasions is generally given.

It never was supposed, that the property of an insolvent debtor, acquired after his discharge, was exempted from the claims of his creditors, until the debts before contracted were fully satisfied. It is his person only, which is protected.

199 *We come now to consider, the nature and extent of the relief sought for. Courts of Equity never interfere, to deprive the plaintiff at law, of any legal advantage which he may have gained, unless the party, seeking relief, will do compleat justice by paying what is really due. Indeed, they have (upon the same principle,) gone so far as to refuse their assistance, in relieving against a judgment, obtained by fraud.

The trust deed furnishes no equitable bar to the creditor, since he has waited, to know the result of that fund, as long as could have been expected. If Payne's executor had supposed, that a balance of the trust property were still remaining unapplied, he might have made the representatives of the trustees parties, and called for an account.

Decree affirmed.

William M'Williams v. Lewis Willis.

October Term, 1793.

Jockey Club—Liability of Agent on Contracts for.*—The defendant as treasurer of the Jockey Club, agreed to rent from the plaintiff a piece of ground, for the use of that Club, and by an agreement in writing, bound himself to pay the rent. He is individually liable.

***Societies—Liability of Persons Contracting for.**—Individuals who contract for the benefit of a company or a society, where the credit is given to them, and not to their constituents, are personally liable. Trustees of Presbyterian Church v. Manson, 4 Rand. 198, citing *McWilliams v. Willis*, 1 *Wash.* 199. See also,

Pleading and Practice—Variance—When Immaterial†—Case at Bar.—Declaration, as upon a parol agreement, made by the defendant, to rent of the plaintiff a piece of ground for the use of the Jockey Club. The plaintiff gave in evidence a written agreement, not under seal, corresponding with that stated in the declaration, except that in the former, the defendant is styled Treasurer of the Jockey Club. The written agreement was properly admitted in evidence, and the variance is not material.

This was an action upon the case, brought by the appellee against the appellant in the District Court of Fredericksburg. The declaration contains two counts. The first states; that a certain discourse was had between the plaintiff and the defendant, concerning the renting of a piece of ground of the defendant's, for the use of the Jockey Club, whereupon, the plaintiff, (called in the said agreement Colonel Willis) agreed to rent the said ground to the defendant, for the use of the Jockey Club, for the term of seven years, and the defendant agreed to pay for the same, the sum of £30, a year, the field to be enclosed by the plaintiff, with a good fence, and the defendant, in behalf of the Jockey Club, agreed to have the field restored to the plaintiff at the end of the term, with the fence in as good order, as when it was received, and the defendant, in consideration of the plaintiff's promise to do every thing &c. on his part agreed to be done promised to do every thing on his part to be performed: avers performance on the part of the plaintiff, and lays the breach, in the non-payment of 2 years rent, and in not restoring the field enclosed as he received it. The 2d count, is an indebitatus assumpsit for the use and occupation
200 of a race *field, and an assumpsit of the defendant to pay &c.—upon the general issue, the jury found a verdict for the plaintiff—at the trial, the plaintiff produced in evidence, an agreement in writing, corresponding with that stated in the declaration, except, that the defendant is stiled in the agreement, Treasurer of the Jockey Club, which description is omitted in the declaration. The court, having over-ruled the motion of the defendant that this agreement should not go in evidence to the jury,—an exception was taken to the opinion, and an appeal prayed.

Warden for the appellant.—The plaintiff having declared upon a parol agreement, the court ought not to have permitted him to give in evidence, an agreement in writing. The defendant, might probably have made a different defence from what he did, if the case had been truly stated in the declaration. He might have shewn that he was no longer treasurer of the Jockey Club; or that the plaintiff, was himself a member of that society.

But if this objection can be obviated, there is a material variance, between the written agreement offered in evidence, and that declared upon. The declaration does not charge the defendant as treasurer, although by the agreement, he had charged himself in that character. As treasurer, it is to be presumed he had funds in his hands, to indemnify himself; and he would therefore have been authorised, (if the judgment had been rendered against him in that capacity,) to apply those funds to the discharge of it. But as the case now stands, he can neither make such an appropriation of the funds, if he have them, nor can he have recourse against the members of the Club, if he have them not.

Upon the substantial merits of the case, the defendant is not chargeable at all. He acted as agent for a society, to whom alone, the credit can be presumed to have been given. It is like the case of a factor, who, when acting for a known principal, is never considered as being individually chargeable. 3 P. Wms. 299, 2 Str. 1168. The case of Macbeath v. Haldimand, 1 Term Rep. 172, is much like the present. Suppose the appellant had ceased to be treasurer, before the expiration of the seven years; it will not be contended that, he could have been liable under this contract, for rents accruing after that time, even if he were so, for rents antecedently due. But the declaration not charging him upon the written agreement, and in his true character, it was impossible for him to avail himself of such a circumstance, if the facts would have warranted it.

201 *If these observations be correct, the plaintiff could not, recover upon the first count; and if so, he could not go into proof, to enable him to succeed upon the second—Str. 648.

Washington for the appellee. The first point made by the appellant's counsel is, that the declaration being upon a parol assumpsit, the written agreement was improperly admitted as evidence.

No rule of law to warrant this objection is recollected. Where a deed is the foundation of the action, in ought to be declared upon; because the defendant may plead non est factum, and the court upon inspection, may determine, whether the instrument possess the necessary qualities of a deed. No such reason, and therefore no such necessity exists in the case of an agreement, not under seal. It may be pro-

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citing the principal case, Devendorf v. West Virginia, etc., Co., 17 W. Va. 151.

See monographic *note* on "Agencies" appended to Silliman v. Fredericksburg, etc., R. R. Co. 27 Gratt. 119.

†**Pleading and Practice—Declaration—Variance—Effect.**—In Butcher v. Hixton, 4 Leigh 529, it is said: "It is admitted that *assumpsit* on an *oral* contract may be sustained by an agreement in writing to the same effect, *M'Williams v. Willis*, 1 *Wash.* 199, 202, yet it cannot be pretended, that an action of *debt on a promissory note*, could be sustained by evidence of an oral acknowledgment of debt, or by any express promise by words, to pay the sum demanded in the declaration."

See also, citing and approving the ruling of the principal case, but distinguishing it, Brooks v. Scott, 2 Munf. 346, 348.

duced as evidence of the agreement stated in the declaration; but the plaintiff must prove the hand writing of the defendant, and must produce such an agreement, as substantially supports the charge, as laid. Doing this, the defendant is exposed to no sort of inconvenience, because the declaration gives him complete notice of the allegation, to which he must answer, and if it do not, the plaintiff must be nonsuited. The defendant is at liberty to give in evidence, upon non assumpsit, any thing material for his defence. In an action upon the case for money lent, the plaintiff may give in evidence a promissory note, 2 Str. 719. This is a very strong case, and not distinguishable, upon principle, from the present.

The second objection, is founded upon a supposed variance, between the declaration and the agreement.—It is true, that in a special action upon the case, the allegations and the proofs must agree; and so they substantially do, in the present instance. The naming of the appellant, treasurer of the club, in the agreement, is a mere descriptio personæ, not affecting his responsibility. It is as unimportant, as if he had been stiled, esquire, or yeoman in the agreement, and no notice had been taken of the title in the declaration.

The third point is more connected with the merits of the case. It is contended, that the appellant was not personally liable —This is by no means a novel case—It is no more, than the agreement of one man, to pay a sum of money for a third person. The agreement in question, is not made with the Jockey Club, nor with the treasurer of that Club, but with William M'Williams, for the benefit of the Jockey Club, and therefore, he makes himself personally responsible for them.

202 *The case of Cullen v. the Duke of Queensberry, Brow. Cha. Rep. 101, is by no means so strong a case against the appellant, as the present; and yet, it was there determined, that the individuals who contracted for the benefit of a company, were personally liable.

But at all events, we are entitled to recover upon the second count, notwithstanding the case of Weaver v. Boroughs, 1 Str. 648, which is not law at this day.

LYONS J. delivered the opinion of the court.

A parol agreement reduced to writing, does not in any manner change the nature of the contract; the writing is merely evidence of the parol agreement, and being the best evidence, ought to be produced, though not specially declared upon. We can discern no difference between this case, and that cited from 2 Str. 719, where in an action for money lent, a promissory note was allowed to be given in evidence, to prove the charge laid in the declaration.

The variance between the declaration and the agreement, in the former, omitting the addition of treasurer, is not material; and if it were, the defendant might have taken advantage of it, as well in the present mode of declaring, as if the written agreement had been specially set forth. It was as unimportant to name the appellant, treasurer, in the declaration, as it would have been, to give the appellee the title of colonel, because he was stiled so in the agreement. We cannot presume, that any circumstance existed, to do away the responsibility of the appellant, because none are proved, nor even pretended. The person with whom he contracts, cannot be presumed to give a credit to the members of a club, perhaps numerous, and dispersed through different parts of the country. The agreement is made with the appellant, and he binds himself personally to perform it. He is liable therefore, whether he receives the money subscribed by the individual members of the Club, (as in the case of Cullen v. the Duke of Queensberry, cited at the bar) or not. This is not like the case of merchants and partners, because, in contracts made by them, they are all jointly and severally bound for the whole.

In this, each subscriber is liable only for his proportion, and therefore an individual, contracting with the treasurer, knows nothing of the state or value of the fund, which the treasurer does; consequently, he cannot be supposed to go upon its credit.

Judgment affirmed.

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203 *Keel & Roberts v. Herbert.

October Term, 1793.

Evidence—Weight—Province of Jury.*—The Court has no right to instruct the Jury as to the weight of evidence, this being a subject proper only for the decision of that body.

The appellee brought an action of indebitatus assumpsit, for the moiety of a vessel, sold to the appellants. Plea non assumpsit —and non assumpsit within 5 years. Replication that the defendants did assume.

***Evidence — Weight — Province of Jury.** — For the proposition that it is the province of the jury to decide upon the weight of the evidence, the principal case is cited and approved in Brooke v. Young, 3 Rand. 112, 114; State v. Hurst, 11 W. Va. 75; Nicholas v. Kershner, 20 W. Va. 263; Neill v. Rogers Bros. Produce Co., 38 W. Va. 231, 18 S. E. Rep. 563; *foot-note* to Bogle v. Sullivant, 1 Call 561. The principal case is distinguished in Austin v. Richardson, 3 Call 206. See *foot-note* to Ross v. Gill, 1 Wash. 87; also, monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

Bills of Exception—Effect as a Demurrer to Evidence. —A bill of exceptions cannot be considered as a demurrer to the evidence. Wroe v. Washington, 1 Wash. 362, citing *Keel v. Herbert*, 1 *Wash.* 203. The principal case is also cited for this proposition in Smith v. Segar, 3 Hen. & M. 397; Lovell v. Arnold, 2 Munf. 176; C. & O. R. Co. v. Sparrow, 98 Va. 632, 37 S. E. Rep. 302; Hollingsworths v. Dunbar, 5 Munf. 199. See monographic *notes* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887, and "Demurrer to the Evidence" appended to Tutt v. Slaughter, 5 Gratt. 364.

Verdict for the plaintiff, that the defendants did assume, as declared against. The defendants filed a bill of exceptions, stating specially, what each witness, examined in the cause had deposed, and that not one of them, established an assumpsit within five years. This appears from the bill of exceptions to have been the case; but it does not state, that the testimony therein set forth was the whole evidence given in the cause. The court, upon the motion of the plaintiff's counsel, instructed the jury, that the evidence produced by the plaintiff, was good and effectual in law to maintain the issue on his part. From this judgment, the defendants below, appealed to this court.

Wickham for the appellants. The jury having found a general verdict, without taking notice of the second plea, have left the question arising upon that plea entirely undetermined, and the verdict is consequently inconclusive.

But I rely principally upon this—that the court exceeded the due exercise of their powers, when they undertook to decide upon the weight of the testimony given to the jury. It was certainly their duty, to see that the evidence was proper. But in estimating its weight, the jury were exclusively the judges.

If the defendant had demurred to the evidence, as stated in the bill of exceptions, there is no doubt but that he must have succeeded. Yet this is merely formal, and since the bill of exceptions states all the evidence, the court may with propriety decide, that the plaintiff, not supporting the issue on the second plea, ought not to have had judgment.

By the Court.

The District Court most certainly did wrong, in directing the jury, that the evidence was sufficient to maintain the issue.

This was a question, which belonged exclusively to the jury, and ought to have been left with them, without any such declaration, or direction, unless the court, (by a demurrer to the evidence having been filed,) had been compelled to decide upon it.

But the court mistook even upon the point which they improperly undertook to determine, for there appears no 204 *proof whatever, of the purchase of the sloop, by the appellants. The bill of exceptions, states an offer of £1100 by the appellant—a demand by the appellee of £1200—but no agreement as to the price. There is no proof of any contract, but such as is derived from the appellee himself.

The judgment must be reversed, and a new trial awarded.

John Hawkins' Executrix v. Nelson Berkley.

October Term, 1798.

Pleading—Bonds—Declaration—Breach—When Variance Immaterial after Verdict*—Case at Bar.—Bond, with condition, that the defendant would faithfully collect certain debts due to the obligee, and would pay the amount so collected, and return an account of his collection, and surrender all bonds not fully paid, when required, except such as might be lodged with clerks, or lawyers, to bring suit on, the obligor agreeing to perform the duty of a collector, and, in all things relative to the business, to act for the benefit of the obligee, to the best of his skill. The declaration on this bond lays the breach on the defendant's neglecting to bring suits for the recovery of the debts, &c. The variance is not material, particularly after verdict—if it was material, the defendant might have demurred.

This was an action of debt, brought by the appellee in the County Court, upon a bond, given by the testator of the appellant, with condition, that the said John Hawkins, would faithfully collect on commission, certain debts due to the appellee by bonds, (as by list annexed,) and would pay the amount so collected, and return an account of his collection, and also surrender up all bonds not fully paid, when required; (except such as might be lodged with clerks, or with lawyers, to bring suit on,) the obligor agreeing, to perform the duty of a collector, and in all things relative to the business, to act for the benefit of the obligee, to the best of his skill. The defendant pleaded, that he had performed the conditions of the said bond. To this the plaintiff replied, protesting that the defendant had not performed the conditions of the said bond, and assigned as a breach, that the said Hawkins, did not well and truly collect the several sums of money, due on the bonds contained in the list, to the said writing obligatory annexed, nor use his best endeavors to collect the same without delay; but that he omitted, to make timely application for those debts, and neglected to bring suits for their recovery, tho' often requested so to do, as also to render an account of his collection; but that on the contrary, he refused to account, or to pay the whole of the monies collected at any one period, and at all times, retained a considerable part thereof, as well as of the bonds, &c. to this the defendant rejoined generally. The jury found a verdict in favor of the plaintiff, for £5, which was set aside by the court, and a new trial awarded. The second verdict was in favor of the defendant, which being also set aside, the jury upon the third trial, found for 205 the *plaintiff, £914 in damages. The defendant then moved for a new trial, which was over-ruled. The judgment was affirmed upon an appeal to the District Court of Richmond, where judgment was entered for the damages and costs of that court, to be levied of the goods &c. of the testator, in the hands of the executrix, if so much she had, if not, then of her own proper goods. From this Judgment the executrix appealed.

Marshall for the appellant.—The objection relied upon in the District Court went

*The principal case is cited in Buster v. Wallace, 4 Hen. & M. 88. See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

principally to the number of new trials awarded by the County Court, but I do not consider that as a point which can be insisted upon.

I shall confine myself to the variance, between the breaches assigned, and the condition of the bond upon which the suit is founded; and if it should be considered as material by the court, it will of course be fatal to the judgment. The rule of law is well established, that if any one of the breaches assigned, be for the non-performance of a duty, which the obligor hath not undertaken to execute, and general damages are assessed, the verdict is bad. One of the breaches in this replication is, that the testator did not bring suits upon the bonds put into his hands, and there is no part of the condition of his obligation, which imposes this as a duty upon him. If I am right in this objection, the judgment of the County Court must be reversed.

The next error, which I think the record exhibits, is in the judgment of the District Court. The executrix is condemned, to pay the damages out of her own estate, in case of a deficiency of assets. I do not recollect any precedent of this court upon the point, and therefore, if I am not precluded by any such from making the objection, I shall contend upon principle, as well as upon the act of assembly, that the damages ought not in any event, to be paid by the executrix. Nothing could be more unjust, and unreasonable, than to punish an executor, for his endeavours to preserve his testator's estate, from the effects of a judgment, which he may suppose to be erroneous.

It would seem, to be a duty imposed upon him, from the very nature of his office. He would, (I conceive,) be highly reprehensible, were he to submit to a decision, (perhaps ruinous to creditors and legatees,) in his opinion erroneous.

The damages upon reversal, are given in lieu of all damages, or interest, which makes them a part of the debt due from the estate, and should therefore be chargeable upon the same fund, as the principal.

206 *Ronold for the appellee.—I admit the law upon the first point, to be as Mr. Marshall states it; but I deny the application of it to the present case. By the condition of this bond, Hawkins undertakes to use his best endeavours to collect the debts, and if coercive measures were necessary for that end, he was bound to make use of them. It was an essential part of his duty, which he was as much bound to perform, as he was to demand payment of the debts. So that the breach, tho' not assigned in the very words of the condition, is in strict conformity with the meaning and spirit of it.

As to the second objection, if it were to prevail upon the ground of hardship, it might go a great deal farther than Mr. Marshall expects; for it certainly is not more unjust that, the executor, should out of his own pocket, satisfy the damage occasioned by his own act, where his testator's estate is insufficient, than in cases, where he is charged for a false, or, perhaps unskillfully drawn plea.

Marshall in reply. The right of a collector, to institute suits indiscriminately, and thereby, to subject his principal to the possible payment of costs, must depend upon the special authority given him. A collector, may certainly be cloathed with such powers—or a man may collect, and yet not possess them. If they are meant to be delegated, it is easy to express such intention, and words of exclusion cannot be necessary. The agreement of the obligor, to return all bonds not in suit, proves nothing against me, because Berkley might chuse to direct the institution of suits himself.

LYONS, J. delivered the opinion of the court.

The variance between the condition of the bond and the breach assigned is not material. Agreements are always to be construed, according to the evident intent of the parties, appearing from the deed itself, without a rigid adherence to the letter. This rule is laid down in the case of Freshwater v. Eaton. Str. 49, and is certainly a correct one. It is plain, that the intention in this case, was to vest in the collector a power to bring suits, and that the exercise of such a power, was necessarily involved in the undertaking on his part.

The case of Bache and others against Proctor Dougl. 382, is stronger than the present. The condition of the bond was, to render a fair, just, and perfect account in writing, of all sums received. It was determined, that the obligor was guilty of a breach of the condition, by neglecting to pay over such sums. Besides, the objection in this case comes after a verdict.

207 The defendant, *if he had considered the variance as material, might have demurred.

Judgment affirmed.

Hooe & Harrison and Others v. Mason.

October Term, 1798.

Ships—When Entitled to Freight, Though Engaged in Battle.—A merchantman, having a letter of marque, and having taken goods on freight, may chase an enemy in sight, but cannot justify going out of her course to cruise. If, in the former case, she engage the enemy, and be so injured as to compel her to put into a port, other than that of her destination, she is entitled to freight. But if the goods be not afterwards sent by the ship owner to the port of delivery, she is entitled only to freight pro rata iteneris, unless prevented from doing so by the freighter.

This was an action upon the case, upon an indebitatus assumpsit, and quantum meruit brought in the District Court of Dumfries, by the appellants, owners and

masters of the ship General Washington for freight and primage. Upon the plea of non assumpsit, the jury found a special verdict, in substance as follows: That on the 31st of August 1780, the defendant shipped at Amsterdam, on board of the General Washington, a letter of marque, bound for Alexandria, in Virginia, and owned by the plaintiffs, two parcels of goods, and paid the freight and primage on the small parcel, before the ship sailed.

That the captain signed two bills of lading, binding himself to deliver the goods to the defendant, or to his assigns, at Alexandria, the danger of the seas only excepted; the defendant, paying, 12½ per cent. freight, upon the net proceeds, upon their delivery at Alexandria, and the captain's primage, at the rate of five per cent.

That the ship was a merchantman employed in transporting goods for hire, provided with a letter of marque and that by the ships articles, the captain was not to cruise or sail out of his way after the enemy, for the purpose of making prizes or in pursuit of an enemy.

That the captain, on his voyage, did change his course two or three points, and gave chase to a ship and brigantine belonging to the enemy, for three or four hours. That the ship was supposed to mount, 12, or 14, nine pound caronade guns, and the brig, 8 or ten four pounders; that the General Washington, mounted two nine pounders, and 16 double fortified six pounders.

That the Gen. Washington, out sailed the ship and brig; the two latter, after the action began, acting upon the defensive & offensive. That the attack was begun by the captain of the General Washing-
208 ton, *who after a long engagement had nearly made prizes of the enemy, and would probably have done so, if he had not been too much disabled to pursue.

That the captain, was then obliged to stop six or eight days to refit, and altered his course to Dartmouth, in New-England, a good harbor, for ships of the burthen of the General Washington. That the disabled situation of the ship, was produced by the action, and rendered it prudent in the captain to put into this port.

That the goods were all landed, and stored at Dartmouth, and that it was necessary to unload, in order to refit,—which being accomplished, the ship was fitted for a privateer, and sailed in about four months after her first arrival, and was taken.

That the defendant wrote to colonel Henly of Boston, a letter dated the 22d of November, 1780, informing him, that he had goods on board this ship, which were intended for his own use, and not for sale, and requesting him, in case the ship should not be directed to Virginia, or the managers should not bring part of the goods hither, to have all his goods stored, and forwarded by the first good vessel, to Potomack, or if none offered, then to send them to Philadelphia, or Baltimore: if the managers sent any part of the cargo to Virginia, then his goods were to come by that conveyance.

That in consequence of this letter, the agent for the owners, delivered the defendant's goods to col. Henly; that they were imported for the defendant's own use, and not for sale—That from Dartmouth, there was no opportunity to ship them to Virginia. —That they were removed from thence to Boston, from whence they were sent to Rappahanock river in Virginia, and from thence, by a circuitous land and water carriage, to the defendant.

That as soon as the arrival of the ship at Dartmouth was known, the plaintiffs sent on an agent, to fit her out as a privateer, and to sell their own goods, which being made known to the defendant, produced the above letter.

That it was frequently practised by merchants, during the late war, to receive and sell their goods, and to pay freight for them, tho' landed at other ports, than the port of delivery.

If upon the whole, the plaintiffs be entitled to full freight, they find for them £96: 3: 4½—if to freight pro rata, then they find £20—if the law be for the defendant, then they find for him.

209 *Upon this verdict, the District Court gave judgment for the defendant, from which the plaintiff appealed.

Lee for the appellants. I shall put out of the case, the articles of agreement, entered into between the appellants and the captain, which, tho' operating in our favor, are improperly brought into view, inasmuch as the defendant being no party to that agreement, they ought not in any manner to be affected by it.

Freight, is a compensation for the carriage of goods, and is deserved, in proportion to the trouble. The appellee, therefore, ought unquestionably to pay for the carriage to Dartmouth; and if the non-delivery of the goods at the port of destination should be found to have been caused by himself, he will be answerable for full freight. I admit, that from the terms of such engagements as the present, if the goods be not delivered at the port of destination, in consequence of a voluntary and faulty departure of the captain, he is not entitled to claim any part of the freight. This will lead to an enquiry, into the conduct of the captain of the General Washington. It is found, that he went out of his course, a few points, for the purpose of attacking, and this, I contend, he was justifiable in doing. A letter of marque, is not obliged to act upon the defensive. She may chace, may attack, may even go a few points out of her course to do this; but she cannot cruise. Park on Insu. 341—Dougl. Rep. 510. Thus far then the captain acted properly.

His next step, was to put into Dartmouth, and this is found by the jury, to have been dictated by prudence. Being there, the owners were entirely at liberty, either to refit, and compleat the voyage, or to transport the goods to Alexandria in some other vessel. It is a right, of which the freight-

ers cannot deprive the owners. Although the General Washington was not intended to bring the goods to Alexandria, yet, the owners might have sent them in some other ship, and in fact they did so with respect to a part of the cargo, belonging to other persons. The defendant's might have been also sent, if his agent had not taken them. He ought not therefore to avail himself of this act of his own, to deprive the owners of full freight.

Marshall for the appellee. I admit, that freight is a compensation for the carriage of goods, from one place to another. It is bottomed upon some contract, either written, or parol, and by the mercantile law it is considered, as being neither due nor demandable, until the service is performed. The performance *of the service, then, must be first established, before the reward can be claimed, and in strictness, it cannot be demanded, if from any cause whatever, the goods are not carried to the port of delivery agreed upon. I must admit that in some instances, the compleat fulfillment of the contract may be dispensed with; and yet, freight pro rato allowed. But as this is merely a matter of excuse, it must be proved by the owners, and must appear to be such an one, as fixes the blame upon them, or upon the captain. In this case, the conduct of the captain is attempted to be justified, and authorities for that purpose are relied upon. But it is easy to discern, that the cases cited by Mr. Lee, do not apply. They relate merely to disputes between the assurer, and assured, and not to the subject of freight, which involves quite different considerations.

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One party agrees to insure, provided the other conforms to certain rules, well established and known by both, and which are therefore calculated upon, in estimating the rate of hazard.

If the captain be not permitted to cruize, or to act offensively, the risk is the less, and of course, the premium diminished. A deviation therefore, avoids the policy, and the cases cited, define what is such a deviation, as to produce this effect. But the freighter, knowing that the ship is by contract, (as in this case,) prohibited from chasing, and that his property is on that account, more safe in her than in another vessel is induced to give her a preference. —A violation of this contract, is a plain fraud upon him, and consequently, deprives the owners of an excuse, for not strictly complying with their engagement. Were it otherwise, the captain would be thereby induced, to chace every vessel, of which there was a chance of making a prize, and thus not only prolong the voyage, but endanger the cargo. Though the defendant was no party to that agreement, yet as it is natural that his enquiries would go to every circumstance relating to the risk, it is to be presumed, that it was known to him.

As to the letter written by the appellee, to col. Henly, it appears to be very much misunderstood by the counsel who rely upon it. It is in the alternative; if the Washington should not bring the goods, or if the owners should not chuse to send them in some other vessel, then, and not otherwise, his agent is directed to take possession of them. As it is not presumable, that the owners would have delivered the goods to Henly, without an order from the appellee, it is plain, that this letter was shewn to their agent. The goods being delivered, amounts to a declaration, on the part of the owner, that the Washington was not *intended to come to Alexandria, and that they did not mean to send the goods, in some other vessel. A different determination, afterwards formed, and executed, could not justify their prior conduct. Upon the whole, I think it clear, that the conduct of the captain in the first instance, and of the owners in the second, was such, as to destroy all claim to freight, either upon principles of justice, or of law.

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Lee in reply—I willingly consent, that the agreement, between the owners and the captain, should be considered as part of the case. The second article of it, directs the mode of arming, and stipulates for a reward, to the mariner first discovering an enemy, which proves, that it was intended to chace, and to act offensively. Nor is it difficult, to reconcile this with the first clause, which was evidently meant to prohibit the captain from committing a deviation, which we find, from the cases cited, to mean cruizing and not going a few points out of the course to chace. In fact, it was intended to express, what would otherwise have been understood.

The PRESIDENT delivered the opinion of the court.

The deviation, and putting into Dartmouth, being found by the jury, to have been prudent and unavoidable, in consequence of the action, no objection against the payment of freight, can on that account be made, if the conduct of the captain, in attacking the enemy, were justifiable. The general principle of law, that a merchantman, having letters of marque, may chace an enemy in sight, but cannot cruize out of her course to look for one, is well established, and seems not to have been controverted at the bar. This is surely a very reasonable distinction; for since commerce is the principal object of such a vessel, it would be improper, that she should lose sight of this, and go in search of prizes.—On the other hand, as letters of marque are obtained at some expence, a vessel would have them to little purpose, if she could never act but on the defensive, and could not, whilst pursuing her great and primary object, embrace a probable chance of making prizes, so as to procure a reimbursement. But to this, two objections are made by the counsel for the appellee.—1st, That the doctrine, tho' applicable to cases of insurances, is not so, to those, where the question is about freight. The court cannot discern any distinction be-

tween them; for if the insurer be supposed to know the principles and rules of insurance, and to calculate the rates of hazard accordingly, why is not the freighter to be presumed equally well informed?

212 *The second objection is, that the captain was restrained by the articles, from giving chace. But upon a view of those articles, it is evident, that the parties well understood the distinction between cruizing, and chasing an enemy in, or near the course, the former of which is alone intended to be prohibited. We are therefore of opinion, that the conduct of the captain, has not deprived the owners of their claim to freight. We are equally clear, that the claim cannot go beyond a freight pro rata. The letter of the appellee, did not prevent, or in the most distant manner, intend to prevent the owners, from sending the goods to the port of delivery; on the contrary, he appears to have preferred their doing so, and only requested the interference of his friend, in case they should not take that step. The delivery of the goods to col. Henly, was evidence enough, that the owners had no intention of sending them, and that they had abandoned their claim to full freight.

Judgment reversed and entered for £20.

Hooe & Harrison v. Thomas Pierce, Administrator of Thomas Pierce.

October Term, 1793.

Escape of Slave to Enemy—Libel under Wrong Name—Effect upon Rights of Original Owner Where He Was Not Made Party.—A slave who went by the name of Taliver, the property of the defendant, fled from his master to the enemy, and was afterwards recaptured by an American vessel of war. He was libelled and condemned by the name of Jack Robinson, and being sold under the sentence, was purchased by the plaintiff. The defendant got possession of him under a warrant issued in virtue of the Act of Assembly, passed in 1782, c. 8, Rev. Laws, p. 157. Decided that the sentence and sale were not binding upon the former proprietor, as he was no party to the suit, and the slave was not libelled by the name he had usually borne. Aliter, if the condemnation had been by a foreign Admiralty Court.

Same—Prize—Insufficient Finding of Jury—Effect.—The above slave was not a lawful prize, the jury not having found that he belonged to an inhabitant of Great Britain, or that he was taken in war.

Bona Fide Sale—Effect upon Equitable Rights—Legal Rights.*—Though equitable rights may, in favor of a fair bona fide purchaser, for valuable consideration, and without notice, be lost by a sale; legal rights never can, unless there can be fraud.

Detinue—Case Agreed by Executor—Effect.†—In detinue, the jury found a verdict for the plaintiff, if the Law upon the facts agreed to be stated, be for him, otherwise for the defendant.—Before they were agreed, the defendant died, and a scire facias issued to his executors, to show cause why the facts should not be agreed. The executors appeared and agreed a case. This will bind them, though they might have refused to agree a case, and have insisted upon abating the suit.

This was an action of detinue for a negro, called Jack Robinson, alias Taliver, instituted by the appellants, and determined in the District Court of Suffolk. The jury found a verdict for the plaintiff, if the law, upon the facts agreed to be stated, be for him, if not, then for the defendant. Before these facts were agreed, Thomas Pierce the defendant died, and a sci. fa. issued against the appellee, his administrator, to shew cause, why the said facts should not be agreed, and the matter of law thereupon argued. The appellee appeared, and the parties agreed the following case.

That on the day of July 1779, the Bishop, an enemy's vessel, was taken on the high seas by the General Washington, an American vessel, belonging to citizens of the United States. That the slave in the declaration mentioned, was on board the Bishop at the time of her capture, and was then known on board by the name of Jack Robinson. That the vessel and cargo, together with the slave, was brought into Virginia, and condemned as lawful prize, and purchased under the sen-

213 tence *of the court, by the plaintiffs. That the slave in question, was once the property of the testator of the defendant, known by the name of Taliver, and so continued, until the year 1777, when he ran off from his master, and got on board a British vessel. That the slave, Jack Robinson, was taken from the possession of the plaintiff in September 1783, by the defendant, in pursuance of a warrant, granted according to an act of the General Assembly passed in 1782,‡ entitled, "An act for the recovery of slaves, horses and other property, lost during the war," and that he still detains him.

If the court shall be of opinion, that by the sale of the slave under the sentence aforesaid; the defendant lost his property therein, then judgment to be entered for the plaintiff, otherwise for the defendant.

The District Court gave judgment for the

***Equitable Rights—Effect upon Purchaser without Notice.**—*Equitable* rights may be lost by a sale to a *bona fide* purchaser without notice. Taylor v. Stone, 2 Munf. 315, citing *Hooe v. Pierce*, 1 *Wash.* 217. For this proposition the principal case is cited in Jones v. Roberts, 6 Call 197; Claiborne v. Henderson, 3 Hen. & M. 358; Jones v. Roberts, 3 Hen. & M. 441.

And in Green v. Price, 1 Munf. 453, citing the principal case, it is held that, a mortgagee without notice, shall be protected against a prior *equitable* title; if the person having such title, either encouraged him to take the mortgage, or, knowing of his intention to take it, stood by, and made no objection. See also, as bearing on this question, Applebury v. Anthony, 1 Wash. 287; Taylor v. Cole, 4 Munf. 351; Pollard v. Cartwright, 2 Hen. & M. 116; Biggers v. Alderson, 1 Hen. & M. 54; Cringan v. Nicolson, 1 Hen. & M. 429; Southall v. M'Keand, 1 Wash. 336.

†**Detinue.**—See monographic *note* on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

‡Rev. Laws, Page 157, Ch. 8.

defendant, from which the plaintiff appealed.

Lee for the appellants. The only difficulty on the part of the appellants, is created by the special conclusion of the jury, which would seem to confine our title, to the purchase made under the sentence of court, in a suit, to which Pierce was no party. And yet, hard as it may at first appear, that the rights of third persons should be affected by judgments, as to them, ex parte; yet, it is better, that a private injury like this should be sustained, than a public inconvenience produced, by discouraging persons from purchasing under the judgments of courts having competent jurisdiction: a consequence to be certainly expected, if the title of the purchaser could afterwards be questioned.

The appellants claim a right to the slave in question, under the acts of congress, passed in 1775, and 1776, making slaves, the subjects of lawful prize.

Wickham for the appellee. It appears from the facts agreed in the cause, that the enemy did not acquire the slave in dispute, by plunder, in which case only, the property, by the law of nations, is changed. On the contrary, it is agreed, that the testator's right was not divested by any act of his own.

But, if the slave had actually been seized by the enemy, in action, the recapture would revest the property in the original owner, by the right of postliminium, which extends to all kinds of property taken in war, except moveables; and these, 214 *on account of the uncertainty in identifying them, are never restored. It is true, that slaves are not mentioned in any modern cases, because they are a property, unknown in the greatest part of Europe. But Vattel states, that amongst the ancients the right of postliminium extended to them. However, a discussion of this point is rendered unnecessary, by the special conclusion of the verdict—I shall proceed then to consider the title of the appellants, as derived under the sentence and sale.

There is no principle more clear than this, that in Courts of Common Law and Equity, those only can be affected by their judgments or decrees, who are parties to the suit, or those who claim under them. I acknowledge, that the sentence of a court of admiralty is binding upon all persons, who are in possession of the property, or who claim under those who are; because, the parties interested are not known, and consequently not named. But in this case, Pierce was neither in possession himself, nor did he claim under any person who was: his title was adverse to that, claimed by the enemy and the captors.

If there be a decree for the sale of mortgaged property, it was never contended, that the rights of third persons, not parties to the suit, could be thereby affected.

I shall not acknowledge the authority of the resolutions of Congress, which have been read, because, that body were cloathed with no powers to legislate for the respective states; but if they were, these resolutions, being no more than private regulations, and not being found, cannot be noticed by the court.

I will beg leave to submit to the consideration of the court, another point, which tho' not connected with the merits of the cause, is certainly very important. The suit was abated by the death of Pierce, and ought to have been so entered. Detinue will not lie against an executor, for a conversion, or in consequence of a detainer by the testator, nor unless the property afterwards come into the possession of the executor. The judgment is for the slave, if to be had, if not, the value. Now the executor cannot perform one of the alternatives, if he never had possession of the property. Bro. Ab. 227—Cowp. Rep. 371, in which it was determined, that the action would not lie against the executor, for a finding and conversion by the testator.

The jury therefore, should either have found, or the parties have agreed a detainer by the appellee. It may perhaps be contended, that the act of 22 Geo. II, C. 5, § 5, which declares, that the death of either party between verdict and judgment, shall not abate the suit, furnishes an an- 215 swer to this point. But *that law must mean, a perfect verdict, and not such an one, as might be set aside, and a venire de novo awarded, or which either party, by refusing to agree the facts, must render ineffectual. Neither can I admit, that the appearance of the executor, and his actually agreeing the facts, will alter the case; because, he only did, what the writ of sci. fa. commanded him—besides, this agreement can extend no farther, than to the facts themselves, and cannot cure the errors before committed.

Lee in reply. The act of Assembly which Mr. Wickham has read, seems to apply strictly to this case, because, it speaks of verdicts generally, without distinguishing between perfect and imperfect verdicts. But if this were an imperfect verdict, the court, upon the trial of the sci. fa. would direct a new trial, and not an abatement. The intention of the law was, to prevent the operation of the act of limitations.

The PRESIDENT delivered the opinion of the court.

The first question to be considered is, whether the suit ought to have abated, by the death of the original defendant.

The act of Assembly declares, that the death of either party between verdict and judgment, shall not abate the suit, but that judgment shall be entered, as if both parties were living.

It is contended, that this is no verdict, and therefore, not provided for by the law. It is true, that verdicts must be certain in themselves, or such as may be made so, by reference to that which is certain.

It is common for them to refer to records or to other papers equally certain. On a demurrer to evidence, a conditional verdict,

dependent upon the opinion of the court as to the demurrer, is common and proper. So a verdict, to depend upon the opinion of the court, on a case stated on the record, is an usual and legal proceeding. Cases agreed, are sometimes substituted in the room of special verdicts. But it is very novel, to find both in the same record, and connected together. Even this might have been unexceptionable, if the verdict had referred to a state of facts before agreed to. But to supply the uncertainty of a verdict, by referring to that, which, so far from being certain, did not exist for five years afterwards, cannot possibly be right. Suppose the parties had refused to agree a case; or had in reality disagreed about the facts: this might well have happened, and what could have been done. The court could not coerce them to agree upon a case, nor could any thing be substituted in its room.

We can find no cases determined in England, upon the statute of the 8 and 9 Will. 3, C. 11, (from which our law was copied,) like to the present.

216 *Upon principle, we have no doubt, but that the administrator was not bound to cure the uncertainty in the verdict, by agreeing to a state of facts, of which he might be totally ignorant, because his intestate having more knowledge of them had consented to do so.—That he might therefore have abated the suit, if he had chosen it, is clear. But he certainly might wave this advantage, and prefer a trial upon the merits. This he has done, by agreeing to a state of facts. But then, the cause must rest upon the agreed case, independent of the verdict.

Upon the merits, there is not much difficulty. The condemnation in the court of admiralty, could not bind the intestate, who was no party to the suit. If the sentence of a foreign court of admiralty had condemned this slave, as a prize to the British, we should have regarded it, though Pierce had been no party; because it would not have been in his power to have become a party. So, if in this case, Pierce had put in his claim, and it had been decided against him, that decision, whilst unreversed, would have bound this, and all other courts. But the slave in question, was libelled, and condemned, by the name of Jack Robinson, instead of that, by which he was always called; and therefore Pierce could not be presumed to have had notice, that his interest was involved in the suit, so as to enable him to assert his right.

The first resolution of Congress, which passed on the 25th of November 1775, authorises vessels commissioned by that body, to capture and make prizes of all armed vessels, belonging to the enemy, employed in the war, and of all transports carrying troops, warlike, or naval stores, or provisions, and directs the distribution of the prizes.

The next resolution which passed on the 23d of March 1776, extends the right of capture to all vessels, and to all goods, wares and merchandize, belonging to any inhabitant of Great Britain: but slaves are not mentioned. Whether they should be considered as goods &c. within the meaning of this resolution or whether they are to be classed with lands, or ships and cargoes, so as by the rules of postliminium, to require the sentence of a Court of Admiralty to change the property, or whether they are to be considered in the light of moveables, and the property in them changed by capture, without condemnation, are questions, which the court think unnecessary to consider, since it is not stated, that the slave belonged to an inhabitant of Great Britain, so as to bring the case within the resolution of Congress: neither is it stated, that he was taken in war

217 by the enemy, and *recaptured, so as to bring it within the exception in the act of Assembly passed in 1782. It appears, that he was the property of Pierce, and being such, ran off, and was found on board an enemy's vessel, where no person claimed a right to him.

The sale therefore, in the present instance, could not divest the right of the original proprietor, however inconvenient this doctrine might prove to purchasers—for though equitable rights may, in favor of fair bona fide purchasers, for valuable consideration, and without notice, be lost by a sale, legal rights never can, unless there be fraud, as in the case of a prior mortgagee standing by, whilst another is throwing away his money by purchasing the mortgaged premises, without giving notice of his prior incumbrance—in cases of legal rights, the principle of caveat emptor properly applies.

Judgment affirmed.

Thweat and Hinton v. Adam Finch.

October Term, 1793.

Pleading and Practice—Nonsuit—Court Cannot Compel.*—Upon a motion for a nonsuit, the Court may give their opinion that the plaintiff has no cause of action, and may direct him to be called: but the

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***Pleading and Practice—Nonsuit.**—In Gunn v. Ohio River R. Co., 36 W. Va. 176, 14 S. E. Rep. 468, it is said: "Upon a motion for a nonsuit, the court may give their opinion that the plaintiff has no cause of action, and may direct him to be called, but he may nevertheless appear and refuse to be nonsuited. *Thweat v. Finch*, 1 *Wash.* (*Va.*) 217. So, on the other hand, the court may, upon motion, declare that the action is maintainable, or may refuse to give any opinion, and so leave the whole question with the jury, (Id.;) and this latter is the proper course, unless some essential element of the right of recovery is wholly wanting, or the evidence, as a whole, is so destitute of proof of what is essential that there is no room for two honest, intelligent opinions about it, or the question, on indisputable facts, is purely a question of law."

And in Brooke v. Young, 3 Rand. 114, the principal case is cited to the point that if the court admit improper evidence, an exception may be taken; but if the question depend on the *weight* of testimony,

plaintiff may refuse to suffer a nonsuit; or the Court may refuse to give any opinion, and so leave the whole to the Jury.

Demurrer to Evidence—When Court May Refuse to Compel Joinder.†—If one of the parties offer a demurrer to the evidence, the Court, if the evidence be clearly against him, may refuse to compel the other party to join.

Pleading and Practice—Declaration—Multifariousness—Case at Bar.—Case, against two inspectors of tobacco at Robert Bolling's warehouse, for that they, having inspected a hogshead of tobacco, the property of the plaintiff, refused to deliver the notes, or tobacco, to the plaintiff, as by law, and the duty of their office, they were bound to do, but had delivered the notes and the tobacco, to another, having no authority to receive them, contrary to law, and the duty of their office. Objections to the declaration for being multifarious, and for not stating the warehouse to be a public one, overruled.

Finch brought an action upon the case, in the District Court of Petersburg, against Thweat and Hinton as inspectors at Robert Bolling's warehouse. The declaration states, that the defendants, having inspected and passed three hogsheads of tobacco, the property of the plaintiff, they refused to deliver him the usual notes, or receipts for them, as by law, and the duty of their office, they were bound to do; but had delivered the notes, and the tobacco to other persons, having no authority from the plaintiff, to receive the same, contrary to law, and the duties of their office. Plea, not guilty. Verdict and judgment for the plaintiff, from which the defendants appealed.

The defendants filed a bill of exceptions, at the trial, stating, that the plaintiff gave in evidence that John Finch, by direction of the plaintiff, applied to the defendants in the year 1784 for the tobacco in question. That the defendants shewed him the warehouse books, by which it appeared, that the defendants had received, and inspected the three hogsheads of tobacco 218 *in the declaration mentioned, as the property of the plaintiff, and that the same had been shipped; the defendants alledging, that they had issued notes for it, in obedience to a written order to do so in the name of the plaintiff, which they shewed to John Finch, who is certain, it was not the hand writing of the plaintiff, of which he informed the defendants.

That the plaintiff, afterwards gave a written order, directing the inspectors to deliver the notes for the tobacco, to the said John Finch, who presented the same, and demanded the notes, but the defendants refused to deliver the notes, or tobacco, for the reasons before given; but that no proof was made of a personal demand, by the plaintiff himself. The defendants alledging, that the evidence was not sufficient to maintain the issue on the part of the plaintiff, moved for a nonsuit, which was over-ruled.

Call, for the appellants. The first objection which is to be made to this judgment, respects the imperfections of the declaration. Though it states that the defendants were inspectors at Bolling's warehouse, it does not charge them to be public inspectors of a warehouse established by law, and unless this were the case, this action could not be sustained. Robert Bolling, might have owned a private warehouse, and the appellants might have been inspectors at it, for any thing that this court can judicially know. The contrary is not to be presumed. —The appellants, could not with propriety, traverse this material fact, as it was not charged in the declaration.

The declaration is also liable to objection, on account of its being double, and thereby forbidding an issue upon a single point, or at least tending to produce confusion in the trial, and to conceal from the defendants view the point intended to be controverted. It charges, 1st, A refusal to deliver the notes to the plaintiff; and 2dly, a delivery of them to a third person, unauthorized to receive them. If the plaintiff may bring two distinct charges into discussion, in one court, he may multiply them without end.

As to the bill of exceptions, I think it shews that the appellee ought not to have recovered upon the evidence produced by him. It appears, that no demand was made by the appellee himself, and the act of Assembly does not authorise inspectors to deliver the notes to the order of the owner, but to the owner himself. If the appellants were chargeable in this case, it would place inspectors in this dangerous dilemma: if they deliver the tobacco to the forged order of a person, whose hand 219 writing *they never saw, they subject themselves to an action, and to a penalty also: if they do not deliver it, and the order should be genuine, they will still be liable to an action. The law, authorises the delivery of the notes, to the person who brings the tobacco and from any thing appearing in this record, the notes, might have been delivered to the overseer of the appellee.

Marshall for the appellee. What weight there might be in the objections to the declaration, if they had been made at a proper time it is unnecessary now to decide, because, after a general verdict, the court will presume, that those things were proved to the jury, without which, they ought not

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the jury, and not the court, are exclusively and uncontrollably the judges.

†**Demurrer to Evidence—Joinder.**—In the first headnote of Dunbar v. Beale, 5 Munf. 24, it is said: If the case be clear against the party tendering a demurrer to evidence, the court may refuse to compel the other party to join. See *Thweat & Hinton v. Finch*, 1 *Wash.* 220. The principal case is cited on the question of joinder in a demurrer to the evidence in Green v. Buckner, 6 Leigh 88; *foot-note* to Trout v. Va. & Tenn. R. Co., 23 Gratt. 619. See monographic *note* on "Demurrer to the Evidence" appended to Tutt v. Slaughter, 5 Gratt. 364.

to have found as they have done. The court, after verdict, will not, for the purpose of destroying it, hunt after objections, or enquire, whether there might not be a possible case, in which this action would not lie. It is notorious, that there are no private warehouses for the inspection of tobacco, in this country. The declaration, pursues the words of the law. The act of Assembly, which establishes tobacco warehouses, is a public one, and the court will therefore take notice, that Bolling's warehouse is one, created by this law. But there may be enough collected from the declaration, to defeat this objection; for it charges, that the defendants refused to deliver the usual notes, contrary to their office of inspector. Another objection to the declaration is, that it is double. But if there be two acts, either of which will sustain an action, it cannot be error to state them both, by way of aggravating the damages.

The point made in the bill of exceptions, having been before decided in this court, it will be unnecessary to take notice of it. It is settled, that the court cannot direct a nonsuit in any case, and that if they do, the plaintiff may refuse to submit to it.

Call in reply. As to the power of the court, to direct a nonsuit, I admit, that the point has been settled as Mr. Marshall has stated. But certainly, if a bill of exceptions exhibits the whole evidence, and shews, that the plaintiff had no cause of action, judgment may be rendered against him, as well in such a case, as if it had appeared, in the form of a demurrer to evidence.

The PRESIDENT delivered the opinion of the court.

Upon a motion for a nonsuit, the court may give their opinion, that the plaintiff has no cause of action, and may direct him to be called. But he may nevertheless appear, and refuse to be nonsuited, nor can the court compel him against his will.

220 *So on the other hand, the court may declare, that the action is maintainable—or may refuse to give any opinion to the jury, and so leave the whole question with them: if they do instruct, still the jury may find against the opinion of the court, who have no remedy left, but to grant a new trial.

So, if the party file a demurrer to the evidence, the court may, if the evidence be clear, refuse to compel the other party to join in demurrer, leaving the jury at liberty to determine.

But if in either of these cases, if the Superior Court should be satisfied, that the plaintiff had no cause of action, they will reverse the judgment.

This bill of exceptions, exhibits a very different case—the whole question was, whether the order, on which the notes and tobacco were delivered, was genuine, or counterfeit. This was a mere matter of fact, proper only for the enquiry, and determination of the jury. As to the hardship, which it was contended inspectors would be subjected to, it is no greater than that to which they might be exposed, by delivering tobacco on counterfeit notes, in which case, they would clearly be liable, to the holder of the real notes. It is a common and known risk of office, contemplated when undertaken.

We are next to consider the objections to the declaration.

The first is, that the warehouse is not stated to be a public one. If it were possible to suppose a private warehouse, at Robert Bollings—Inspectors there, to view, and pass tobacco—compelled by law, and the duty of their office, to give notes obligatory upon them, to deliver the tobacco on demand—that the inspectors had refused such notes, by which the plaintiff had lost his tobacco: if, I say, we could suppose all this, and consider this as a mere private contract, it would even then be difficult, to suppose the objections to the action, upon principles of common law.

But such a case is altogether visionary. The record, and the public laws upon the subject, warrant the court in saying, that the warehouse, and the inspectors, are such as the law has established.

The second objection is, that the declaration is multifarious.

The act of Assembly requires, 1st, that the notes should be delivered to the owner of the tobacco, but inflicts no penalty for refusing to do it. 2dly, It imposes a penalty upon the inspectors, for delivering the notes to any, but to the proprietor of the tobacco, without a written order from him.

221 *This action is brought, not for delivering the notes to a third person, unauthorized to receive them, but for not delivering them, when demanded, to the owner.—The former offence, tho' charged, is merely by way of special damage, and intended to shew the remedy complete for the whole value of the tobacco, since the defendants had put it out of their power, ever to deliver it.

Judgment affirmed.

Brown's Administratrix v. Garland & Others.

October Term, 1793.

Sale of Property by Administrator—Bonds Bought by Defendant after Death of Testator—Right to Set-Off against Purchase Price.*—An administrator having advertised a sale of the property of his intestate, offering to purchasing creditors, a discount of five per cent. The defendant, (who was not a creditor,) purchased at the sale, and gave his bond for the amount.—Upon the plea of payment to an action

*The principal case is cited in *foot-note* to White v. Bannister, 1 Wash. 166; Dangerfield v. Rootes, 1 Munf. 531, 532; Pulliam v. Winston, 5 Leigh 327; Washington v. Castleman, 31 W. Va. 834, 8 S. E. Rep. 604. See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

on this bond, the defendant ought not to be permitted to off-set bonds, due by the intestate in his life time, and which were assigned to the defendant since the institution of the suit, although he had given six months previous notice of the off-set, and also offered, at the trial, to prove a sufficiency of assets to pay the debts, and tendered the costs of the suit. The advertisement was confined to creditors who should purchase, which the defendant was not.

The appellant instituted an action of debt in the District Court of Richmond against the appellees, (stiling herself, administratrix of W. B. Brown) upon a bond taken to herself as administratrix. The declaration is in the debet et detinet—Plea, payment. The defendant Garland having given six months previous notice of offsets, offered as such at the trial, two bonds due from the intestate, and which had come to his hands by assignment since the institution of this suit—also two receipts signed by the plaintiff, the one for money, and the other for a bond due by the intestate, and assigned to the same defendant; all which offsets had been acquired since the institution of this suit. They also produced in evidence an advertisement of the plaintiff's, offering for sale the property of the intestate at public auction, and agreeing to allow a discount of five per cent. to such of the creditors of the estate, as chose to purchase at the sale. They also offered at the trial to prove a sufficiency of assets to pay the debts, and tendered the costs of suit. All these facts appeared in a bill of exceptions taken by the plaintiff to the opinion of the court, admitting the testimony—verdict for the defendant and appeal.

Washington for the appellant. The defendant at common law could shew nothing in discharge of a bond but something of an equal dignity with itself, such as a release, &c. offsets are permitted in England by a statute, which is not in force here. In like manner, the defendant
222 is permitted by a *statute in that country as well as by the law of this, to plead payment. But there is no law of this state which authorises offsets. If this were a question in Westminster Hall, it would be decided against the appellees under the English law; for the debt to be offset must be in the same right as the debt demanded. Thus in an action by the assignee of a bankrupt, a debt due from the bankrupt cannot be set off. Wils. Rep. 155. So where after the testators death the defendant received rents which became due before, he was not permitted to set off against the claim of the executor for those rents, a debt due to him from the testator. —Shipman v. Thomas, Espinass 274. The reason is, that where there are mutual debts, there must be mutual remedies; and unless there are, the doctrine of offsets cannot apply.

So a man cannot set off a debt due in the right of his wife, against one due from himself. Bull. 179, 180—3 Atk. 691.

Though the bond in question were actually given for property of the testator's sold to him (which does not appear) yet it became a debt due to the executrix—she must sue in the debet et detinet, and is accountable for the amount of the property so sold, to the persons entitled to demand it. The remedies therefore are not mutual—The debts are not mutual—and consequently the offsets inadmissible. If they were, it might subject the appellant to a devastavit in cases of debts of superior dignity and an insufficiency of assets.

Warden for the appellees. The act of assembly 22 Geo. II, C. 27, § 6, which permits the defendant to make all the discounts he can, is more comprehensive than the statute relating to offsets, and sufficiently so to embrace the present case. But I rely principally upon the advertisement, as imposing upon the appellant an obligation to receive the bonds in question in discharge of the debt for which the suit was instituted. He cited, 3 Wils. 396, 2 Bur. 821—1229.

Marshall on the same side.—The first question in this cause is, whether the discount offered is proper, under the act of Assembly—2dly, if not, what operation the advertisement will have upon the case.

1st, The words of the act are very extensive; much more so than the statute of offsets. The adjudications in England therefore are not applicable, because the statute speaks of mutual debts which our law does not. In the present case, the bond being given for property of the testator sold, the money when received is to be administered as other assets, and may therefore be properly subjected to the discount insisted upon at the trial.

223 *MERCER, J.—Ought not the defendant to have pleaded this offset? The plaintiff might then have replied, no assets.—That it was not given for property of the testator, or the like; in which case the issue would have been upon the proper point.

Marshall. The act of Assembly does not require it to be pleaded, but declares that the discount if proved, shall be allowed.

But 2dly, the advertisement strengthens the case very much, because it creates an obligation on the appellant to admit the discount, is a tacit admission of assets, and of course does away the danger of producing a devastavit.

Duval on the same side, perhaps the appellee might have been induced to take the assignment of these bonds in consequence of the advertisement, and therefore the rejection of them as a discount would be a fraud upon him.

Washington in reply. If the defendant upon the plea of payment, can give in evidence offsets of this sort, it is impossible for the plaintiff to know how to meet the plea at the trial.—The bonds may be void, or paid off.

In the construction of the act of Assembly, the question, what are the proper discounts is still left open for the court to decide upon, and no better, or more just

rule can be adopted than that, which prevails in cases of offsets in England. By confining it to mutual debts, it prevents confusion at the trial, or the possibility of eventual injustice to any of the parties.

The advertisement does not better the situation of the appellee, because neither of them were purchasing creditors; and to such only, are the benefits offered or intended. If the offset were in this case permitted, the appellant might be subjected to this inconvenience. A purchaser at the sale gives his bond, not claiming to be a creditor, for if he were, he would be entitled to a discount of five per cent, and ought not to have given a bond at all. The debt belonging to the administratrix and she being accountable for the amount to those intitled to distribution, she may have paid them, and afterwards upon bringing suit upon the bond, the defendants obtain assignments of debts due from the intestate to destroy the demand.

As to the defendant's offer to prove assets, it does not better the case, because it not being a point in issue, the plaintiff could not be prepared to meet such evidence.

CARRINGTON, J.—delivered the opinion of the court.

The court considers the motive of the advertisement, which was only to enhance the sales by offering the inducement of five per cent discount to the purchasing creditors.

224 *But Garland not being of that description, can claim no benefit under it. The advertisement therefore is out of the question; and without it, there is no doubt, but that the admission of the board as offsets was improper. Neither the advertisement, nor the bonds ought to have been given in evidence to prove a payment, upon the plea and issue joined in the cause.

Judgment reversed and a new trial awarded.

Sir Jonathan Beckwith v. Beckwith Butler, and Others.

October Term, 1793.

Equity Pleading—Answer—Effect as Evidence of Affirmative Facts.*—An answer in Chancery is not evidence in favor of the defendant, as to affirmative facts, in opposition to the plaintiff's demand.

Deeds—Capacity—At What Time Evidence of Attesting Witnesses to Be Regarded.†—Upon a charge of fraud in obtaining a deed or will, or incapacity in the testator, the evidence of the attesting witnesses as to capacity at the time of executing the instrument, is chiefly to be regarded.

Advancements—Hotchpot—Interest and Increase of Slaves.‡—Where a child is advanced with money or negroes, the donee is not bound to bring in hotchpot, the interest of the one, or the increase of the other.

The appellees filed their bill in the High Court of Chancery, praying for a distribution of the personal estate of Sir Marmaduke Beckwith, and to set aside a deed made by Sir Marmaduke to the appellant for 14 slaves, upon a suggestion of fraud in the obtaining of it, and for a division of them amongst the representatives.

The defendant in his answer denies the fraud in obtaining the deed, and contends that it was but a reasonable provision for him, the heir of the family and title, otherwise unadvanced. He states that there were little other estate except a debt due by bond from Col. Tayloe which his father gave him in his lifetime as a compensation for his having consented to the sale of a large English estate which would have descended to him.

The allegation in the answer respecting the gift of Tayloe's bond is not supported by testimony.

The Chancellor having directed an account of advancements made by Sir Marmaduke Beckwith to his children and grandchildren with the value of such advancements, also an account of the value of such of the slaves, named in the deed from the said Sir Marmaduke to the defendant Jonathan Beckwith and their increase, as were living, a report was made, to which sundry exceptions were taken by

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*__Equity Pleading—Answer—Effect as Evidence of Affirmative Facts.__—The rule is well settled, that the answer of a defendant in chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiff's demand, but he is, in such case, as much bound to establish it by independent testimony as the plaintiff is to sustain his bill. Paynes v. Coles, 1 Munf. 395, citing *Beckwith v. Butler*, 1 *Wash.* 224. See also, citing the principal case on this question, Robinson v. Cathcart, 20 Fed. Cas. 990; Moore v. George, 10 Leigh 248; Lewis v. Mason, 84 Va. 738, 10 S. E. Rep. 529; *foot-note* to Maupin v. Whiting, 1 Call 224; *foot-note* to Lewis v. Caperton, 8 Gratt. 148. See monographic *note* on "Answers in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

†__Wills—Capacity of Testator.__—The principal case is cited in Spencer v. Moore, 4 Call 427 (see *foot-note*); Buckey v. Buckey, 38 W. Va. 175, 18 S. E. Rep. 586. See also, *foot-note* to Beverley v. Walden, 20 Gratt. 147.

‡__Advancements—Hotchpot—Interest and Profits.__—In Knight v. Yarborough, 4 Rand. 568, it is said: "In cases of intestacy, when one of the children has been advanced, if he chooses to bring his advancement into *hotchpot*, he does not thereby renounce his title, but retains it, and is entitled to have so much of the intestate's estate as will, with what he has already received, make his part equal to that of the other children; and in such case, his advancement is valued at what it was worth at the time it was made; which value is added to the distributable fund, without interest or any account for profits. This was the rule adopted in *Beckwith v. Butler*, 1 *Wash.* 224, and has been adopted also in Massachusetts and Pennsylvania; and this seems to be the rule in England." On this question, the principal case is also cited in Williams v. Stonestreet, 3 Rand. 561; Chinn v. Murray, 4 Gratt. 379, 396; Kyle v. Conrad, 25 W. Va. 781, 783; *foot-note* to Knight v. Oliver, 12 Gratt. 33; *foot-note* to Kean v. Welch, 1 Gratt. 403. See monographic *note* on "Advancements" appended to Watkins v. Young, 31 Gratt. 84.

the defendant. These exceptions being over-ruled by the court, the defendant was decreed to pay (out of the estate of his intestate in his hands to be administered) to Beckwith Butler £610: 12: 4½ and to Lawrence Butler £813: 2: 3½ with interest from the 1st of September 1781 appearing by the said report to be due to them. From this decree Beckwith appealed.

225 *The PRESIDENT delivered the opinion of the Court.

The answer of a defendant in chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiffs demand. In such a case, he is as much bound to establish it by indifferent testimony, as the plaintiff is to sustain his bill. The appellant, who is the heir at law and executor of his father, swears in his answer, that the father in his life-time gave him Tayloe's bond, the amount of which forms the great bulk of the personal estate sought to be distributed. It would be monstrous indeed, if an executor when called upon to account, were permitted to swear himself into a title to part of his testator's estate.

As to the fraud charged in the bill, in the obtaining of a deed for the 14 negroes, it is not sufficiently proved. Some of the witnesses prove an incapacity in the donor to contract at certain times: but the subscribing witnesses swear to his capacity at the time of executing the deed, and as the settlement is by no means an unreasonable one, the court think it most proper and safe to establish it. It resembles the case of a will which was contested in this court, where the proof as to the state of the testators mind, when the will was signed, overcame all the testimony respecting his capacity both before and after. But then the negroes conveyed by this deed must be considered as an advancement, as to which a question was made at the bar, whether the encrease of the slaves, and interest on money advancements ought to be brought into hotchpot? The court are of opinion, that where a child is advanced with money, or negroes, he need not bring into hotchpot the encrease of the one, or account for the interest upon the other. For as he must sustain the loss, by accounting for the property at its value when given, and by supporting and raising the negroes, so he is entitled to the encrease of them. There does seem to be a hardship, where one son has been advanced for many years, that he should account with an unadvanced child only for the principal; yet no better rule than the above can be adopted.

Some objections were made at the bar to the mode pursued by the master, in ascertaining the value of the negroes advanced; but we are of opinion, that though the value seems to have been guessed at, it does not appear to be unreasonable either way, and as no exception is taken to the report, the objections now made ought not to be regarded.

The report is in favor of all the plaintiffs and is confirmed by the Chancellor. Yet a decree is given in favor of the Butlers
226 *only, without noticing Marmaduke Beckwith, another of the plaintiffs. This we suppose to have been a mistake of the clerk.

The decree therefore must be affirmed so far as it goes, and the cause remitted to the High Court of Chancery, for a hearing as to Marmaduke Beckwith.

Warden and Washington for the appellant. Campbell for the appellees.

Sallee v. Yates and Wife.

October Term, 1798.

Legacies—When Payment in Depreciated Paper Money Good.*—A legacy paid in the year 1778, to the guardian of the legatee in depreciated paper money, is a good discharge of the executor, at the nominal amount, and the guardian having lent out part of the money, and received it back in depreciated paper, which he at last funded, is not liable for the loss by depreciation.

This was an appeal from a decree of the High Court of Chancery—The bill was brought by the appellees to recover a legacy of £300, devised to the female plaintiff, by the will of Benjamin Harris her father, made in the year 1776, of which, £100 was to be paid in a year after the legatee should attain the age of 18 years, and the residue, so soon as the executors could raise it. The first payment was made to Sallee, the guardian of the legatee, on the 12th of September 1778, some time after she arrived to the above age, as was also the residue, on the 31st July 1779.

The guardian lent out the £200 on the day he received it, which was repaid to him in the year 1780—the £100 remained in his hands, not lent out, nor used, until the paper money was called in, when he funded the whole sum of £300 together with his own money, at the rate of one, for a thousand. The legatee refused, (before the money was funded) to receive it from the guardian, and instituted this suit, against him, as also against the executors and residuary legatees of the testator, praying that the £300 may be reduced according to the scale when it was paid, and that the balance may be made good out of the residuary estate. The Court, decreed the executors to pay £300 to the plaintiffs, after deducting therefrom, the payments, made according to the true value at the time of such payments with interest from the time the plaintiff was entitled to recover her legacy. From this decree, the defendants appealed.

The PRESIDENT delivered the opinion of the court.

This is certainly a very hard case, but we think there is no ground for relief. The legislature in the year 1781, contemplating,

*The principal case is reported in Wythe 163, and cited in Jennings v. Jennings, 23 Gratt. 320. See McCall v. Peachy, 3 Munf. 288; Taliaferro v. Minor, 2 Call 190, and *note*.

no doubt, all those cases of hardship, and at the same time, the infinite mischief and confusion which would be 227 introduced, *by a re-settlement of paper money claims, passed a law, declaring "that all actual payments made by any person or persons, of any sum, or sums of the paper currency, there mentioned, at any time, or times, either to the full amount, or in part payment of any debt, contract, or obligation, whatsoever, the party paying the same, shall have full credit, for the nominal amount of such payments, which are not to be reduced." It is remarkable, that to the words debts and contracts, are added, or obligations whatsoever, which comprehend legacies. Courts of Equity, are as much bound by this legislative declaration, as courts of law. The executor therefore, by the payments made to the guardian, was by this law totally discharged, and since the guardian was guilty of no fault, either in receiving, or in the application of the money, he ought not to be subject to the loss, by further depreciation, subsequent to the payment by the executors. The bill must be dismissed as to the executors and residuary legatees, and the cause remanded to the High Court of Chancery, as to the guardian, for an account to be taken of the money received by him, according to the principles of this decree.

Jacob Westfall v. John Singleton.

October Term, 1793.

Northern Neck—Obligation of Lord Fairfax as to Settlers.—The obligation imposed upon Lord Fairfax, by his advertisement in 1749, and his subsequent invitation to settlers on a certain territory in the Northern Neck, to make them titles.

This was an appeal from a decree of the High Court of Chancery. Sometime in the year 1749, Lord Fairfax, by a public advertisement, invited settlers, to that part of the Northern Neck where the land in question lies, promising to make rights to such, as would settle there. A man of the name of Vanderpool, having previously made a settlement upon the tract in dispute, he, about this time, sold the same to Abel Westfall, who took possession, and continued to hold it, until the year 1755, when he died, intestate, leaving two sons, Cornelius his eldest, and John. Lord Fairfax, having granted a very large tract of country, (including within it, the land in question,) to Bryant Martin, received a reconveyance of it, and laid off the whole into a manor.

In the year 1770, upon the application of the settlers, he, by a writing under his hand, agreed to convey to them their 228 respective *settlements, for three lives, renewable for ever, reserving an annual rent; which agreement was proved and recorded. Cornelius Westfall, who at the time of his fathers death, and long after, lived in the state of New Jersey, removed to this commonwealth, and took possession of the land in question, about the year 1773, and continued to hold it until his death, in 1780, having by his will devised it to his sons Isaac, and Zachariah, who afterwards conveyed the same, to Jacob Westfall, the plaintiff. Cornelius, paid rent for this land for some years, tho' lord Fairfax had refused to convey it to him.

The defendant (who claims under a purchase from John Westfall, the younger, son of Abel Westfall, by the defendant's father, and a deed in consequence thereof from lord Fairfax in the year 1773, to the defendant) states in his answer, that it was customary in that part of the country, for persons, having mere settlement rights, to transfer the same, by death bed donations, which were always considered as valid. That Abel Westfall made such a disposition of the land in question, to his son John, who had shared with him in the toil and danger of making this settlement, and of securing it from the Indians; that the defendant and his father held possession until 1774, when Cornelius Westfall took possession.

There is some evidence, proving a custom, similar to that mentioned in the answer. The defendant having recovered the land in ejectment, this bill was filed praying an injunction and a conveyance.

The Chancellor dismissed the bill, being of opinion, that the equity therein stated, was neither admitted by the answer, nor established by the evidence.

The PRESIDENT delivered the opinion and decree of the court as follows: "If lord Fairfax had not originally invited settlers on his lands on the South Branch, by a promise of making them titles, he was nevertheless bound, by his advertisement of the 5th of August 1749, to grant such titles to all persons then settled thereon. That Abel Westfall, being at that time settled on the land in dispute as a purchaser from Vanderpool, the original settler, was entitled to a grant thereof, from lord Fairfax, on the usual terms of granting his lands; and Abel, dying so entitled, in possession of the land, in the year 1755, without making a will, or other disposition of it, his equitable interest therein, descended to Cornelius Westfall, his eldest son and heir at law; who not appearing to have done any act, to forfeit, or to shew that he abandoned his title, but on the 229 contrary, *having entered on the land, within 20 years, (the time allowed by law for his entry if it had been a legal title, and he in the state,) he was entitled to the like grant from lord Fairfax, which his father might have claimed: But as it appears, that the settlers within the manor, generally agreed, to accept leases on the terms of lord Fairfax's advertisement in 1770, and Cornelius himself, applied for such lease, and paid the annual rents accordingly, which amounted to his consent, to wave the claim to an absolute title, that he ought to hold the land, under the heirs, or assigns of lord Fairfax, on the terms, and subject to the covenants contained in the lease.

"That John Westfall, the younger, son of Abel, having no title in law or equity, to the land, no right could be derived to Thomas Singleton from him; and therefore, it is immaterial, whether their contract was for an absolute purchase, or for a term only.*

"That lord Fairfax being bound in equity, to lease the land to Cornelius, at the time he executed the lease to John Singleton the appellee, the latter, ought to be considered in equity as a trustee for Cornelius, and those claiming under him, as to so much of the said land, as was within Abel Westfall's settlement.

"The decree therefore must be reversed with costs, and it is decreed and ordered, that the appellee do, at the costs of the appellant, execute to him a proper deed, for assigning to him, his heirs and assigns, the said lease, made to him by lord Fairfax, and bearing date the 3d day of August 1773, with all the benefits, and subject to the covenants and conditions therein contained, on the part of the said Singleton. That the injunction granted by the said Court of Chancery, to stay the proceedings on the judgment at law, obtained by the appellee, against the appellant in the county court of Hampshire, stand and be perpetual. That the appellant be quieted in his possession of the said land, and that the parties bear their own costs in the said Court of Chancery: Liberty however, being reserved to the appellee, to state, and shew to the said Court of Chancery, that part of the land contained in the lease, was not included in Abel Westfall's settlement, and to the said Court of Chancery, on that being made to appear, to vary the decree, so as to confine the assignment of the lease, the injunction, and quieting of possession in the plaintiffs, to the lands, to which Abel Westfall was entitled."

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230 *Jones v. Williams & Tomlinson.

October Term. 1793.

Land Settlements—Act of 1779—To What Applies.—A right of settlement on the crown lands could not be acquired prior to the Act of Assembly passed in May, 1779; and this Act only gives to settlers a preference in lands waste and unappropriated, and which had not before that time been located under warrants.—That law does not set up rights of this sort, so as to defeat those legally acquired under warrants: it applies to controversies between mere settlers.

Depositions—Not Admissible against New Parties.†—If after answer filed and depositions taken, the plaintiff makes new parties, and files a new bill, the depositions previously taken cannot be read against the new defendant.

Same—Admissibility against Pendente Lite Purchaser—Query.—If such depositions can be read, where the new defendant has purchased from the original defendant, pendente lite?

The appellees filed their bill in the High Court of Chancery against John J. Jacobs and wife, praying for a conveyance of a tract of land to which they were entitled in right of a settlement, made before the year 1775, and which had been granted to the said Jacobs and wife, by patent dated in 1784, in virtue of a survey made upon a military warrant by David Rodgers under whom Jacobs and wife claimed. This warrant was located in 1775, and the survey was returned in 1776; long subsequent to the settlement of the plaintiff's as asserted in their bill. Tomlinson's right of settlement having been affirmed by the commissioners in the year 1780, Williams alone entered a caveat against the emanation of a grant to Rodgers, but by an accident attending the transmission of subpœnas for his witnesses, the caveat was dismissed.

Jacobs and wife by their answer insist, that Rodgers had a right of settlement prior to that of the plaintiff's, and amongst other things disclosed, that they had sold to the appellant Jones.

Depositions were taken, which prove the prior settlement of the plaintiffs. After this, a new bill was filed by the plaintiffs, making Jones a party defendant, who appeared and put in an answer, in which amongst other things, he asserts a right in Rodgers by settlement, prior to that of the plaintiffs. No replication was put in to this answer, but the cause coming on to be heard upon the bill, answers, exhibits and examinations of witnesses, the court decreed in favor of the plaintiffs, from which decree the defendant Jones appealed.

Marshall for the appellant. This cause, as to the appellant, is to be considered as having come on, upon bill and answer: for the depositions having been all taken, before he was a party to the suit, and an entirely new claim being made, and new matter brought before the court, the evidence could not with any propriety be used against him. It would be most unreasonable, if claims not put in issue by the former bill, could be supported by the evidence taken on that bill. In 1 Harr. Ch. Prac. 108. It is laid down, that at any time before hearing, upon cause shewn, the plaintiff may obtain an order to add parties to his bill, but in this case, the cause 231 is to be heard as *to such new defendant, upon bill and answer. In the same book p. 150, it is also said, that when a supplemental bill is filed, after publication, the court never gives leave to examine that, which was in issue in the former cause, and it is irregular to examine witnesses, to a matter, that was in issue, and not proved in the original cause, and such proof, is not to be read. So, if there be no proof of the new matter in the supplemental bill, it must be dismissed,

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*There is some contradictory testimony in the cause upon this subject.—Note in Original Edition.

†**Depositions.**—The principal case is reported in Wythe 145. See monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

Caveat.—The principal case is cited in Noland v. Cromwell, 4 Munf. 168, 170, 172, 177; Depew v. Howard, 1 Munf. 301; McClung v. Hughes, 5 Rand. 462, 479, 481; Jackson v. McGavock, 5 Rand. 524.

unless such matter be admitted by the defendants answer.

If then, the cause is to be heard on the bill and answer, the state of the case will be simply this. The answer, positively denies the plaintiff's title; states a completely equitable right in the defendant, under a prior settlement by Rodgers, and that, converted into a legal title, by being carried into grant.

The PRESIDENT delivered the opinion of the court.

The depositions are clearly inadmissible. The first answer is filed in 1789, disclosing the sale to Jones, but at what time, does not appear. If it had been, pendente lite, the depositions might perhaps have been read. The bill against Jones, is neither supplemental nor amended, for it contains new matter entirely, without noticing the former bill. The cause must therefore be heard upon the bill, answer and exhibits.

It appears, that under the act of Assembly passed in 1779, Rodgers was entituled to a grant on a military survey, returned in 1776. This however was subject to a caveat, upon the trial of which, the merits might have been heard, and decided.

A caveat was entered by Williams, and in consequence of an accident was dismissed; we shall therefore consider the case, as the General Court would have done, on a hearing of the caveat.

As to a right by settlement, Rodgers appears to have had the best; but no right whatever, could be acquired in this way, in lands formerly belonging to the crown, until the act passed in May 1779—before that time, those lands might have been entered, and patented by any person, notwithstanding prior settlements by others: and even this act, which considers settlers as entitled to some compensation for the risk they had run, allows them only a preference to such settlements in lands, as at that time were waste and unappropriated. As to priority of settlement, it might still remain a question between persons, both of whom claim under the same sort of title; but the law of 1779, does not set up rights of this sort, so as to defeat those legally acquired under warrants; it applies to controversies between mere settlers.

232 *The land in question therefore, was not waste and unappropriated in 1779, nor subject to the claim of a settler, however just it might be, because Rodgers was then entitled to a patent for it.

Decree reversed with costs and bill dismissed, each party paying his own costs in the High Court of Chancery.

Byrd v. Cocke.

October Term, 1793.

Sheriffs*—Proper Remedy against†—Case—Debt‡—Case at Bar.—An action of debt will not lie against a Sheriff for levying an execution upon the property of the plaintiff's tenant, without paying him a year's rent. The proper remedy is case for consequential damages.

This was an action of debt brought by the appellee against the appellant as high sheriff, for levying an execution on the property of the plaintiff's tenant, without paying him an years rent, due at the time. The declaration "demands £80, which the defendant owes and detains, for that the defendant refused to pay the plaintiff the said sum of £80, though he the defendant, as sheriff, levied an execution on the property of J. Stith, which property was on the plaintiff's premises, rented to the said Stith, for the said £80 a year, and notwithstanding, the said Stith was in arrear to the plaintiff, for the last years rent, to wit, for 1780 and although the defendant was applied to for the said £80, contrary to the form and effect of the act of Assembly &c. and the defendant still refuses to pay the said £80 tho' often required &c. to the plaintiffs damage £150" &c.—Plea non assumpsit—verdict and judgment for the plaintiff for £83: 13: 4 damage.—This judgment, being affirmed in the District Court, an appeal was prayed to this court.

The attorney general for the appellant.

This record though small, is as full of error as it can well be.—The writ is in case—the declaration in debt—the issue is non assumpsit, and verdict and judgment is entered for the plaintiff, though the jury have not found that the defendant did assume.

The declaration being in debt, makes an incurable error in the proceedings, at the very threshold. Debt will not lie in a case of this sort, where no contract exists, unless it were given by statute. It is brought too, against the sheriff for an act of commission, for which, even an action on the case would not lie. But if the action were proper, still the issue is immaterial, for tho' the defendant did not assume, yet he might be liable to the recovery of the plaintiff.

233 *Wickham for the appellee. That an action will lie against the sheriff, for levying an execution upon the property of a tenant on the demised premises, without paying a years rent to the landlord, if the same be due, is settled by the cases of Palgrave v. Windham, 1 Str. 212, and Gore v. Gofton, 1 Str. 643, both of which, being adjudications upon the statute of Ann, from

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***Sheriffs**—See monographic *note* on "Sheriffs."

†**Pleading—Declaration—Effect Where Wrong Action Brought.**—In Taylor v. Rainbow, 2 Hen. & M. 441, it is said: "In *Byrd v. Cocke*, 1 *Wash.* 232, this court observed, that the declaration being in *debt*, although after a verdict, they could find no authority to justify a rejection of *that part* as *surplusage*, which designated it to be an action of *debt*; and for that reason reversed the judgment. The case of Gibbons v. Jameson, Nov. 15, 1804, was reversed upon the same point, because the plaintiff had brought an action of debt for military certificates." The principal case is also cited in Cunningham v. Herndon, 2 Call 533.

‡**Debt.**—See monographic *note* on "Debt, The Action of" appended to Davis v. Mead, 13 Gratt. 118.

which our act is copied, will be considered as authority.

The objection to the declaration, is more to the form, than the substance of it, tho' it begins like a declaration in debt, by stating the defendants to owe and detain &c. yet upon a view of the whole of it, we shall find it to be in fact a declaration in case; and if so, the debet et detinet may properly be rejected as surplusage. It states the act of Assembly—the rent due, and execution levied, notwithstanding notice to the sheriff, and demand of the years rent.

As to the issue, it is only informal, and therefore cured by the act of Jeofails—nil debet, may be pleaded to an action upon the case—not guilty to an action of debt; and tho' neither are formal, yet they are cured by verdict.

The PRESIDENT delivered the opinion of the court.

If the declaration could be supported, the court might get over the errors which precede and follow it, either by considering them, as cured by the verdict, or by awarding a repleader, from the first fault. But the declaration is certainly in debt, and tho' after a verdict objections to the form of a declaration will be disregarded, yet we can find no authority, to justify a rejection of that part of it, as surplusage, which designates it a declaration in debt. As an action of debt, it is not sustainable under the act of Assembly, which does not impose a penalty upon the officer; and therefore, an action upon the case, for consequential damages, was most clearly the proper remedy.

Both judgments must be reversed with costs.

Coleman v. Dick & Pat.

October Term, 1793.

Indians—Who May Be Held as Slaves.*—Since the year 1705, no American Indian could be held as a slave, but foreign Indians, coming within the description of the Act of 1705, c. 49, might be made slaves.

Action for Freedom—Finding of Jury—Sufficiency.—If, in an action for freedom, the jury find that the plaintiff is descended from an Indian who was brought into this State generally, without saying from whence, it is sufficient for the plaintiff.

Same—Nature—of Action—Two or More May Join as Plaintiff.†—An action of trespass for freedom, is, in form, an action for a personal tort, and, in substance, a remedy to try the question of freedom or slavery, and, therefore, two or more may join as plaintiffs in the action.

This was an action of assault and battery, and false imprisonment, brought by the appellees, in the District Court of Petersburg. Plea, that the plaintiffs are slaves—Replication, that they are free and not slaves, and issue thereupon.

234 *The jury found a special verdict in the following words viz. "We find, that the plaintiffs are lineally descended by the maternal line from Judith; that Judith was an Indian, or the descendant of an Indian. That she was brought into this state by a certain Francis Coleman, sometimes after the year 1705, and was held as a slave, to the day of her death. If the law be for the plaintiffs, we find &c."

The District Court, gave judgment upon the special verdict for the plaintiffs. From which the defendant appealed.

Wickham for the appellant. I shall in the argument of this cause, rely upon three points. 1st, Admitting Judith to be an Indian, that she was nevertheless a slave. 2dly, That it does not sufficiently appear, that she was an Indian, entitled to freedom. 3dly, That the plaintiffs cannot recover in this action, tho' both these points be against me.

1st, The first act respecting Indians, passed in the year 1662, C. 136, Purv. Ed. of the laws p. 96, which does not relate to the subject of slaves. The next was in 1670, C. 12, p. 172, which enacts, that all servants, not christians, imported into this country by shipping, shall be slaves for life, but that those, who come by land, shall serve for a limited time.

The next law passed in 1672, C. 8, p. 181, which speaks of Indian slaves, or servants for life, and proves, that the act of 1670, did not prevent Indians from being made slaves. The act of 1679, C. 1, p. 235 declares, that Indian prisoners taken in war, should be free purchase to the captor. Then comes the act of 1682, C. 1, p. 282, which repeals that part of the law of 1670, relating to slaves and enacts, "that all servants, (except Turks and Moors, whilst in amity with his majesty,) which shall be brought, or imported into this country by sea or land, whether negroes, Moors, Mulattoes, or Indians, who, and whose parents

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***Indians—Slaves.**—Upon the question as to what Indians may be held as slaves, the principal case is cited in Hudgins v. Wrights, 1 Hen. & M. 143; Pallas v. Hill, 2 Hen. & M. 152; Pegram v. Isabel, 2 Hen. & M. 205; Gregory v. Baugh, 4 Rand. 648; Gregory v. Baugh, 2 Leigh 685. See also, Butt v. Rachel, 4 Munf. 209; Jenkins v. Tom, 1 Wash. 123, and *note*; Robin v. Hardaway, Jeff. 109.

†**Suit for Freedom—Form of Action.**—In Paup v. Mingo, 4 Leigh 185, which was an action for freedom by slaves, and damages for detention, TUCKER, P., said, though the form is that of an action of assault and battery and false imprisonment, yet, in substance, it is always considered as a *fictitious action* moulded by the courts for the purpose of trying the mere question of freedom. "Actions like the present" (said PENDLETON in *Coleman v. Dick*, 1 *Wash.* 233) "are merely fictitious and are very properly in this respect (as to number of parties joining) likened to actions of ejectment." They are in effect, to try the *right* not to try the *injury*; as the writ of right at common law, settled the mere right but never gave damages. The issue made up between the parties is upon the right to freedom only, not upon the *quantum damnificatus*, and still less upon the idea of contract express or implied. There is no room for such an implication where one party is held by another in slavery.

The principal case is cited in Stuart v. Coalter, 4 Rand. 85.

and native country were not christian, at the time of the first purchase of such servants by some christian, though afterwards, and before such their importation and bringing into this country, they shall be converted to the christian faith, and all Indians which shall be hereafter sold by our neighboring Indians, or any other trafficking with us, and for as slaves, are deemed to be slaves, to all intents and purposes."—The act of 1705, C. 49, which is re-enacted by the acts 1748, and 1756 declares, "that all servants, imported and brought into this country by sea or land, who were not christians in their native country, (except Turks and Moors in amity with his majesty and others that can make
235 *due proof of their being free in England, or in any other christian country before they were shipped in order for transportation hither,) shall be accounted and be slaves, and as such, be bought and sold, notwithstanding a conversion to christianity."

It is true, that in this law, there is a repealing clause of all other laws within the purview of it; yet, as this law differs not materially from that of 1682, it cannot be considered as intended to repeal that, but is merely a revision and collection of all the laws upon the subject. The act of 1682, makes slaves of Indians within our territory, which this act does not, and therefore, that part of the former law may be repealed by this. I am aware, that a notion has prevailed, that Indians could not be made slaves; this can only be accounted for, by considering the opinion, as applying to Indians within the limits of this country.

2dly, The verdict is so insufficiently found, that no judgment can be entered upon it. It finds, that Judith was an Indian, or the descendent of one; but it does not find expressly, that she was an Indian. Admitting the plaintiff to be descendents from Judith, in the maternal line, it does not follow that they are Indians intitled to freedom. Suppose Judith had only been stated to be the descendent of an Indian, that might as well have been in the paternal as maternal line. The jury in tracing the plaintiff's descent, derive it from Judith in the maternal line, but when speaking of Judith's ancestry, they state her to be a descendent from an Indian generally, which shews that they understood the principle, that the issue, as to the question of slave or no slave, follows the condition of the mother. We may therefore, fairly conclude, that the jury could not ascertain, in which line Judith was descended.

Thirdly; There is no principle of law better settled, than this: that in personal torts, two or more cannot join as plaintiffs in the action, because the injury done to one is not an injury to the other. I submit it therefore, whether upon this point, the present action can be maintained.

Campbell for the appellees. In favor of freedom, we are bound to construe all laws tending to its destruction, with the greatest strictness. From a view of all the acts which have been cited, it is evident, that the legislature never intended, that Indians generally should be made slaves, tho' some particular Indians, in special cases might. When therefore we speak of an Indian, unqualified by circumstances of any sort,
236 we as certainly *speak of a freeman, as if an Englishman had been mentioned. To associate the idea of slavery with the condition of this class of men, it is necessary to speak of them, as Indians of a particular description, who, by some law might lose their freedom. The preamble to the act of 1705, C. 52, shews, that the design of it was, to regulate the trade and intercourse with all Indians whatsoever, proving thereby, the sentiments of the legislature as to the free state of the Indians.

If then, Judith were an Indian, she was free—if a descendent from one, the court will presume her equally free, unless, they should presume the descent to be from such an Indian, as might by law be made a slave. For as Indians, generally speaking are free, the presumption, (unless opposed by circumstances proving her to be of that description, which might be made slaves,) will be, that the descent was from a free Indian.

The third objection is not a solid one. Actions of this sort are merely fictitious, and intended for the purpose of trying the single question, whether free or not? They are under the controul of the court, as much as actions of ejectment, and will be so moulded, as to bring into view the only point to be tried, and to favor the most complete attainment of that object. Besides, it is a benefit to the master that they should all join.

Marshall on the same side. The act of 1670 does not speak of Indians generally, but of such only, as are captured in war by each other, and sold to the whites. The act of 1679 does not make slaves of any, but only declares, to whom the property, such as it is, belongs. The Indians, mentioned in the recital to the act of 1682, (on whom alone that law operates,) are such only, as were captured by other Indians in war and sold, as mentioned in the act of 1670. This law speaks only of Indian servants, (not of Indians in general,) and authorizes such, as were held in servitude in their native country, to be made slaves, tho' Indians in general could not. But whatever may be the construction of these laws, I take the act of 1705 to be conclusive upon the subject. It not only repeals, in express terms, all former laws upon the subject, but establishes an intercourse with the Indian nations, as with freemen—it authorizes free commerce with them. Is it usual for freemen to treat, or to trade with nations as free, the individuals of which, if caught, become slaves? The act of 1705 therefore, shews, that Indians in general could not be made slaves, but such of them only, as were servants in their own country.

237 *The second objection goes to the insufficiency of the finding. But if I

am right upon the first point, then it follows, that if Judith were an Indian she was free, unless she were also found to come under the description of Indians, who, by law might be made slaves. As to the alternative finding, the court must presume, that Judith was a descendent from an Indian in the maternal line, because where marriages are unknown, the father can never be certainly ascertained, the mother always may, and consequently the presumption in all such cases is, that the descent, when generally spoken of, is in the maternal line. In the case of illegitimate issue, the law acknowledges no father.

The third point, I consider as being completely settled, by the affirmance of the judgment, obtained by Tom and others v. Jenkins, (all of whom joined in one suit) in the Northumberland District Court.*

Wickham in reply. The act of 1705, (which I call the treaty law,) could only relate to Indians within our territory. 1st, because the preamble so states it, and 2dly, because Virginia had no right to make regulations, respecting Indians without her limits. This law is intended to regulate trade with Indians, considered in a national point of view, which is by no means incompatible, with the right, or the policy of purchasing the individuals of those nations for slaves. Suppose this had been a statute of the Parliament of England respecting a trade with Guinea, tho' that nation is acknowledged to be free, and is so treated, yet it would not follow, that a traffic carried on for the purchase of the individuals of that nation, as slaves, would be incompatible with that acknowledgment. I admit, that no Indians, but such as were brought in, in a state of servitude, could be made slaves; but I contend, that Judith's situation was such, is fairly to be inferred from the verdict, which finds that she was brought in by Coleman, and held by him as a slave; that is, brought in as a slave, and held as a slave, which is the plain construction of the finding. The mother being stated to have been retained in slavery, is at least prima facie evidence that her posterity are so, and ought to require some opposing testimony to defeat it. If this be not the case, what, let me ask, will be the situation of our negro property? If the master in every instance, is bound to prove his negro to be of that particular description, which subjects him to slavery, there is not one in ten thousand instances, where he could do so.

238 *But upon the second point, I still rely with confidence. If the finding Judith to be an Indian, is finding that she might be either free or a slave, it leaves the question as to that fact in a state of too much uncertainty, for a decision either way. This court can presume nothing for, or against the plaintiffs. As individuals, they may form their own conjectures as to the fact. As judges, the fact must be found for them, and that with certainty. But if presumption is to be let in, I must still controvert the rule mentioned by Mr. Marshall. A bastard, is said not only to have no father but no mother. He is nullius filius.

Marshall. The question seems to be narrowed to a single point; and that is, whether Judith, being found to be an Indian, unqualified by any circumstance, or description whatever, is insufficient, or can amount to a finding against the plaintiffs? now I hold the rule to be, that where an affirmative is proven, and can only be defeated by a negative, the party who would claim a benefit under the negative, must prove it. Thus, a verdict which finds, that the plaintiff's ancestor died seized, and that the plaintiff is his heir, need not find also that the ancestor died intestate, in order to perfect the plaintiff's title, but the defedant must prove that he did not die intestate, if being true, he would avail himself of that fact. So here, Judith is stated to be an Indian—an Indian generally speaking is free. —But some Indians are not free—yet Judith is not found to be such an Indian, as could not be free: the affirmative therefore being found, clear of the exceptions, the latter is not to be intended, so as to destroy the former. It is useless to cite cases to establish such plain principles of law.

Wickham.—The cases cited, are not in point. The court intended matter collateral to the issue, in order to sustain the verdict, but they did not, and could not intend the very point in issue, for that would be in fact, a finding of the court, not of the jury. I will examine one of the cases. The dying intestate, was a point merely collateral to the issue. But suppose the issue had expressly been, whether the person died intestate, or not; would the finding in that case have been sufficient? So here—the point in issue is slavery or not: but whether in the affirmative, or negative, is not deducible from the verdict: for tho' Judith was an Indian, yet she might be either a slave, or free. Can this court then intend she was free? Surely not.

The PRESIDENT delivered the opinion of the court.

We considered the last point first, because if this were against the plaintiffs, it would have been unnecessary to decide the 239 *others. The objection, when applied to common cases of personal torts, is well founded: but actions like the present, are merely fictitious, and were very properly in this respect, likened to actions of ejectment. For it many persons may unite as plaintiffs, not try a joint right to land, (which no doubt they may,) no good reason can be given why they may not unite, to try a joint right to freedom as in the present case. Although suits for freedom may be instituted without the leave of the court, yet it is usual to petition for such leave. The court, generally require the opinion of the counsel upon the plaintiff's right; and if it appear, that the plaintiff has probable cause for suing, the court will make special

*See Ante 123.

orders for the purpose of protecting the plaintiff from the master's resentment, or ill treatment, on that account, and for allowing him reasonable time to prepare for this trial.

As to the first point made at the bar, the court are of opinion that the act of 1705, is a compleat repeal of all former laws on the subject, and that since that period, no American Indian, can be reduced into a state of slavery. Foreign Indians coming within the description of that act, might be made slaves. When therefore, we speak of Indians generally, it is to be understood, that some might, but others might not be made slaves in this country.

This principle being ascertained, we were led to a consideration of the second point, which respects the insufficiency of the finding. Upon this, the court are divided.

Two judges think, that finding Judith to be an Indian, brought in by Coleman, without saying from whence, whether by sea, or land, is insufficient to warrant the judgment. That whatever lengths the jury might have gone in presuming the fact, the court cannot supply those circumstances, necessary to establish it. On the other hand, two judges, presuming in favor of liberty, think that the verdict is sufficient.

The judgment therefore must be affirmed.

Keene v. Lee.

October Term, 1798.

Devise of Land upon Condition—Performance—Case at Bar.—Devise of land to A, upon condition, that as soon as he arrives at the age of twenty-one, he joins the executors in a conveyance of certain slaves, to the persons who may purchase them from the executors. Upon A's arrival at full age, he made a declaration in writing, which was recorded: by which he agreed to perform the conditions of the will. He afterwards sold and conveyed the land to B, and then by deed settled the slaves upon his family. This last deed is no breach of the condition, being made without a valuable consideration, and A was not bound to convey the slaves until they were sold by the executors, and he was required to join in the conveyance of them to the vendees. The first declaration of A, passed away all his right to the slaves, and incapacitated him to make the settlement.

Ejectment in the District Court of Northumberland, brought by the appellee. The parties agreed a case, in substance as follows, viz.

That William Keene the 1st, being seized &c. by his will, made in 1681, devised 240 acres of land, (part of the tract in
240 *question) to his son William and his heirs for ever, and if he died without issue, remainder over.

That William Keene the 2d, being seized of the said 240 acres of land, as well as of 260 acres bequeathed to him by Mrs. Banks, (the residue of the land in the declaration mentioned) devised the whole to his son Newton and his heirs for ever.

That Newton, being seized &c. by his will made in 1770, devised to his executors his lands in Fairfax and Loudoun, and all other the lands and slaves to which he was entitled, as heir by the mother's side to John Woodbridge, to sell for payment of debts; and if there remained more slaves than were necessary for this purpose, he devised them equally amongst his children. He then devised as follows, viz: "I give to my wife my dwelling plantation, and tract of land, (being the land in question) during her widowhood, and after her death, or widowhood, I give the same to my eldest son William, to him and his heirs, on this condition, that my said son shall, as soon as he arrives to the age of 21 years, join in, and make sufficient deeds for conveying to the purchaser or purchasers of my said land in the county of Fairfax, an absolute estate in fee simple, and shall also join in the sale of the aforesaid negroes, as my said executors may sell for the payment of my debts, and suffer the remainder of the said slaves to be enjoyed, and go for ever as I have before bequeathed them; but in case my said son does not comply with the aforesaid condition, then," he gives the dwelling plantation and tract of land under the same condition, first to his son Thomas, and then to his son John.

The testator then proceeds to devise as follows: "Item, it is my will, that if my son William, die without heir of his body, before he comes to the age of 21 years, that the land above devised to him, shall go to my son Thomas and his heirs, yet it is my meaning, that if he attain that age, he shall enjoy a fee simple in the said land, with the condition aforesaid annexed."

That William the 3d, in the year 1775, and after the death of his father executed a paper under his hand and seal, which was duly recorded, by which, after reciting that he had just attained full age, and had considered his father's will, he declared that he would abide by, and perform the directions of the same, and the conditions therein contained.

That the executors sold the land in Fairfax, pursuant to the power given them by the will of Newton Keene, and
241 *that his son William, joined them in a conveyance of it to the purchaser.

That the negroes, to which the said Newton Keene was entitled, as heir by the mother's side to John Woodbridge, mentioned in the will of Newton Keene, were at the time of his death, and have been ever since, in the adverse possession of George Yerby; and that a suit has been commenced by the executors, and is still pending for the recovery of them.

That in the year 1789, William Keene the 3d, executed a deed, conveying to trustees all the slaves mentioned in his father's will, (to which he was entitled as heir on the mother's side to John Woodbridge,) for the use of the wife and children of the said William; with a power to the trustees, to sue for and recover the said slaves, for the uses mentioned in the deed.

That the said William Keene the 3d, did

in the year 1779 sell and convey all the land, to which he was entitled under the will of his father, and which is the land in the declaration mentioned, to the lessor of the plaintiff, in fee simple.

That after the execution of this deed, the lessor of the plaintiff used the land in the declaration mentioned, for some years, for the purpose of a cart way, to and from his other land; and that the defendant, who is the second son of the said Newton Keene, entered upon the same, about the year 1788, and still keeps possession.

That Robert Keene, the son of William the third, is heir at law of the said William, and is yet living.

That the widow of Newton Keene, after his death, viz. in 1771, appeared in court, and renounced all benefit under the will of her said husband; after which, William Keene the 3d, entered upon the lands in the declaration mentioned, and allotted to the widow her dower in the same, according to a survey and plat, which are annexed and agreed.

They agree the lease, entry and ouster, and if upon the whole matter, the law be for the plaintiff, they agree that judgment shall be entered for him, for his term yet to come, in the land in the declaration mentioned; if the law be for the defendant, then judgment to be entered for him.

Judgment upon this special verdict was given for the plaintiff, in the District Court.

Campbell for the appellant. I am to contend, that the estate in question, devised to William Keene, by the will of his father Newton Keene, was to take effect 242 upon the performance *of a precedent condition. The estate is not to vest, until his arrival at the age of 21 years; immediately after which, he is to join in a conveyance of the slaves. It is necessary therefore, that William Keene, or those claiming under him should shew, that he had strictly performed the condition; since no obstacles however great, could excuse him from the performance. The declaration made in 1775, agreeing to perform the conditions in the will, cannot be said to amount to a performance, because this is a thing merely executory, whereas the thing to be done, should have been executed.

The cause of forfeiture which I have just considered, is in the omission of the devisee, to convey the slaves. But the conveyance of those slaves to trustees, for the use of the family of the devisee, is a more active and deliberate breach of the condition, and has for ever put it out of his power to perform it, although all other obstacles should be removed.

Warden and Washington argued the cause for the appellee.

There is certainly a material difference, between a condition precedent, and subsequent, both in their nature, and effects; if the former, the condition must be strictly performed, before the estate can vest; but if the latter, the estate is immediately vested, and the continuance of it, depends upon the performance. As to the former, it is admitted that nothing, not even the act of God, or of law, can dispense with a strict performance. In the latter, if the performance be prevented from any such cause, the estate becomes absolute in the possessor; for conditions which go to defeat estates, are odious, and to be taken strictly. Shep. Touch. 129—130.

The condition in question is most certainly subsequent. Immediately after the death of Newton Keene, the remainder vested in his son William in interest; and upon the death of the widow of the testator, it vested in possession. But the condition was not to be performed, until William came of age, which must have been subsequent to the vesting of the estate; and therefore, if the performance was prevented by the act of law, the estate is absolute in him.

Let it be here premised, that as to the negroes, the condition is nugatory in itself; because they being devised to the executors, with a power to sell, it was entirely unnecessary to require, that William should join in the conveyance, and therefore if he had really refused to do so, tho' it might have prevented an estate from vesting, it would not have divested an estate.

243 *But suppose the act required to be done, were material; it is denied, that a forfeiture has taken place, either by omission, or by any act of commission.

As to the first, the charge is, that William has not joined in a conveyance of the slaves mentioned in his father's will. But before this is relied upon, it should appear, 1st, that the executors had found a purchaser for the slaves, and 2dly, that they had produced a conveyance of them, requesting him to join. For William Keene, is not authorized to sell, but is required, to join in conveying to the persons, to whom the executors had previously sold. But again: neither William Keene, nor the executors could convey the negroes until they were reduced into possession. Such a conveyance would have been ipso facto void, besides exposing the parties to a severe penalty. A condition to do a thing, which amounts to maintenance is void. Shep. Touch. 129, 1 Hawk. pl. Cr. 255, Rolls Ab. 417. If then this be a condition subsequent, the performance of it is forbidden by the law, and therefore, no forfeiture can have incurred.

2dly, What act has William Keene done, to disable himself from performing the condition? Let it not be forgotten, that so soon as he arrived to full age, he bound himself by a declaration, sufficient to restrain him from any active breach of the condition. But if not so, the deed of 1789 was not a breach. It is found, that at that time, the negroes were in the adverse possession of another; the deed therefore was void, both at common law, and by the act of Assembly against the selling of pretensed titles. If so, it could produce no disability whatever in William Keene, if the negroes should ever afterwards be recovered, and reduced to possession. If a

feoffee, upon condition to reenfeoff, be disseized, and then he take wife, and enter into a statute, &c. yet before his entry, this is no breach of the condition, for 'till then, the charge doth not bind the land. Shep. Touch. 143, Co. Litt. 222, 2 Co. Rep. 59, b. Suppose then, that the negroes in question should hereafter be recovered, and admit that the trustees in the deed of 1789 could recover damages, under an idea, that this deed, though not valid as a conveyance, amounted to a covenant to convey, when the negroes should be recovered, still such a recovery would produce no disability, and most certainly, a Court of Equity, would never decree, in the very teeth of the statute, a specific execution of such an agreement.

William Keene then, cannot properly be charged with a breach of the condition, until having it in his power, legally, 244 *to perform it, and being requested to do so, he refuses. Besides, the deed of 1789, is not only voluntary, but fraudulent as to the appellee, who had purchased and paid a valuable consideration for the land, ten years before this deed of trust was made.

But if all these points are against the appellee, he is most clearly entitled to the 240 acres, which were entailed upon William the 2d, by the will of his father, and therefore descended upon William the 3d, unclogged with the condition in Newton Keene's will.

The PRESIDENT delivered the opinion of the court.

There can be no dispute about the 240 acres, which being entailed by William Keene the first, descended upon William the 3d, free from the conditions in the father's will, and being converted into a fee simple estate in 1776, he was enabled to convey to the lessor of the plaintiff, a compleat and absolute estate in this parcel of land, by the deed of 1779.

But as judgment is given for all the lands mentioned in the declaration, without distinguishing this part, from the other, it must be reversed, unless the plaintiff's title to the whole can be sustained.

The condition annexed to this devise in the will of Newton Keene, is active, so far as it requires the son, when of age, to join with the executors in a conveyance of the slaves to those, who might purchase from them; or passive, as it injoins him, to suffer this property to be enjoyed by the devisees, in case they were not sold. The condition was certainly nugatory, since the devise to the executors to sell, or to the legatees, was perfect, and would have included the heir, without any act on his part. It was added, probably, from abundant caution, to remove any doubts of the title from the minds of purchasers. But though it was unnecessarily required, the devisee was not therefore excused from the obligation of performance, since he took the estate subject to that condition. This then brings us to the question, whether it has been sufficiently performed, or not?

In January 1775, the devisee executed a writing under seal, reciting, that in the preceding month he had attained full age, stating the condition on which the land was devised to him, which he had considered, and declaring, that he would abide by the directions, devises, and conditions of the will, and join in any sale of the lands and slaves, according to the will.

It is objected, that this is not a conveyance, but merely an executory declaration.

As to the lands, this is true; the title 245 *to them cannot pass at law, but by a regular conveyance; yet a Court of Equity would have compelled him, to release to the person, who might purchase from the executors. But it is unnecessary, to consider the extent of the obligation, which this declaration imposed upon William Keene, as to the land, since it is found, that he joined the executors in a conveyance of it.

As to the slaves, the declaration under consideration, is important. This species of property may pass, from one to another, without a deed or written contract, if a valuable consideration be given. And if William Keene had instituted a suit for the recovery of these slaves, the writing in question, would have been such an evidence of a contract, as to have created a bar to his recovery; not by way of estoppel, but as passing his title.

But it was contended, that he ought, as soon as he came of age, to have conveyed his right in the slaves to the executors.

This would have been doing more than the testator required. He is only enjoined, (in case of a sale made by the executors,) to unite with them in a conveyance to the purchaser, and this he was not bound to do, unless required by the executors. If no sale were made by them, he was then bound, to suffer this property to be enjoyed by the devisees.

It is objected, that the deed of trust made in 1789, has disabled William Keene from conveying to a purchaser when required, and has also deprived him of the power, of permitting the enjoyment of the property by the devisees, within the meaning of the testator. To this, there are two sufficient answers.

1st, That the settlement is merely voluntary, and therefore fraudulent as to creditors and purchasers, and indeed as to all the world, except the grantor himself. It is therefore void, as to the appellee, who claims under a prior title from William Keene. Besides, the declaration made in 1775, and recorded, had passed away his interest in the slaves, to the uses mentioned in his father's will, and therefore the deed of 1789, could not operate to defeat it.

2d, If it could be admitted, that this deed produced a forfeiture, still the remainder man could not lawfully enter in 1788, before this deed was made.

Upon the whole, we are of opinion, that the conditions in the will of Newton Keene have been performed, and that the judgment must be affirmed.

246 *Granberry's Executor v. Josiah & James Granberry.

October Term, 1798.

[1 Am. Dec. 455.]

Executors—When Answerable for Paper Money at Scale of Depreciation.—To make an executor answerable for paper money at the scale of depreciation of the day on which he received it, is, in general, wrong; but if he has charged himself so in his accounts, and points out no other mode of adjusting it, he shall be bound by his own act.

Same—Liability to Pay Interest on Money in Hands.*—There is no general rule as to an executor's liability to pay interest on money in his hands. In this case, he was charged with it from the end of each year for the balance then resting in his hands; but such interest is not to be carried to the balance of the succeeding years.

Executorship—Renunciation—Right to Legacy.†—A legacy is given to an executor, as nephew of the testator. He will be entitled to the legacy, though he renounce the executorship.

Executor—Allowed Use of Money by Will—Payment.—An executor by the will is allowed the use of 6001. for five years, without interest. He may pay it in depreciated paper money, and the entry of such payment in his accounts, will be evidence of the payment.

Executor Who Is Also Legatee—Right to Commissions.—An executor, to whom a legacy is left as nephew of the testator, is entitled to his commissions also, and that by custom is generally fixed at five per cent. on actual receipts.

Executors—Unequal Legacies Given to—Right to Residuum.‡—Unequal legacies given to executors do not exclude them from the residuum.

The appellees filed their bill in the High Court of Chancery against the appellant, the executor of their father, and their guardian, for an account.

To the report of Auditors made in the cause, the appellant took the four following exceptions. 1st, That his receipts of money in depreciated paper, are reduced by the scale of depreciation, on the day they were received, without any proof that he received it unnecessarily, or delayed paying it away to those who were entitled to it.

2dly, Interest is allowed on monies in his hands, as if he were a debtor, or had retained the same improperly, and that too at a time, when borrowers of good credit were not to be met with, and when the executor neither did nor could make a profit thereby.

3dly, No commissions are allowed him.

4thly, That £500 due from him to the testator and to be paid in June 1779, and which was paid on the day, is charged to him as specie.

The report being confirmed by the High Court of Chancery, the defendant appealed.

Ronold for the appellant. As to the first exception.—An executor, is in the nature of a trustee, he receives no benefit from the execution of his office, and should therefore be subject to no injury, unless he hath produced it by his own misconduct. An executor is not only compelled to receive the debts of his testator, but is bound to solicit and to enforce the payment of them. For if they should be lost by his neglect, in not using the proper means of obtaining payment, he must sustain that loss. In this situation therefore, it would be unjust, to burthen him with the loss, by depreciation of money; thus forced into his hands, and at a time, when perhaps no opportunity offered of applying it. Some reasonable time then, should be allowed him, to dispose of the money, before the scale can with justice be applied.

Second exception.—Where the risk must be run by the executor, he is not bound to pay interest. This is laid down in the case of Ratcliff v. Graves, 1 Vern. 179; and tho' in that case, interest was decreed, yet it was upon a principle, which does not apply in this country: it was, that the 247 money might *be insured. So, an executor who changes the nature of a debt, due to the testator, becomes liable himself to pay it, out of his own pocket—1 Vern. 473. An executor is not liable to pay interest, even in England, unless he make a profit by the principal. Brow. Ch. Rep. 359, Newton v. Bennet. The Chancellor was therefore mistaken, (as I humbly conceive,) when he presumed the appellant had made a profit, because the contrary was not shewn. The executor could not in this case, distribute the money amongst the legatees, who were under age, and who of course, could not give him a discharge; he was therefore compelled to retain it, and unless it appeared, that he made use of it, nothing can be more unrighteous, than to force him to pay interest.

It is true, that the appellant stands in the double character of guardian and executor, but as the debts due from his testator, were not all discharged, he will be considerd as holding the money, in his capacity of executor. The interest, I consider as a reasonable compensation for his trouble, upon the same principle, that he is entitled to the undisposed surplus, unless barred, by an express compensation allowed by the testa-

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***Executors—Settlement of Accounts—Liability.**—On the general subject of the rights and liabilities of executors in the settlement of their accounts, the principal case is cited in Hipkins v. Bernard, 2 Hen. & M. 21; Miller v. Beverleys, 4 Hen. & M. 416; Cavendish v. Fleming, 3 Munf. 201; Hite v. Hite, 2 Rand. 415; Burwell v. Anderson, 3 Leigh 354, 359, 361, 362; Garrett v. Carr, 3 Leigh 416; *foot-note* to Handly v. Snodgrass, 9 Leigh 484; Coltrane v. Worrell, 30 Gratt. 447; Dromgoole v. Smith, 78 Va. 668; Anderson v. Piercy, 20 W. Va. 302, 326; Kester v. Lyon, 40 W. Va. 164, 20 S. E. Rep. 934; Pulliam v. Pulliam, 10 Fed. Rep. 62.

†**Executorship—Renunciation.**—The principal case is cited in Burnley v. Duke, 1 Rand. 113.

‡**Wills—Residuum—To Whom it Passes.**—See the principal case cited in *foot-note* to Shelton v. Shelton, 1 Wash. 53.

See generally, monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

tor. There is no case to be found, which subjects a guardian to the payment of interest, from whence I conclude that he is not liable to pay it: and a guardian and executor appear to stand, much in the same situation; for if the former, take a bond for rent due to his ward, he is liable to pay it out of his own pocket, and the bond is his own. 2 Ch. Rep. 97.

The law of this state, requires, that a guardian should annually return an account of the profits and of the income of the ward's estate, to court; but this can only mean the real estate, to which, the words profit and income, are more properly applicable; unless indeed the guardian should lend out the money, in which case, the interest would be income, and to be accounted for.

Third exception—The legacy given to the executor, is to be considered as a gratuity, independent of his trouble in executing the trust, and not in lieu of his commissions. If he had refused, he would still have been entitled to the legacy, and having undertaken the trouble, he ought to receive a compensation for it.

Fourth exception—The appellant, being an executor, was not thereby rendered incapable, of discharging a debt he owed to the estate of his testator, at the time it became due, more especially, as it appears in this case, that the payment was applied to the discharge of a debt, due from
248 the testator. If so, he *is entitled equally with others to the benefit of the law, respecting payments in paper money.

Campbell for the appellees. 1st Point—Nothing can be more just, or reasonable, than that an executor, claiming to be charged on a day posterior to that, on which he received money, or in other words, with less than he received, should shew some good reason for such a pretension. It is a subject, susceptible of proof and of explanation.

If the rule laid down by the Chancellor be rejected, to what other can we resort. The liability of an executor, if he do not recover his testator's debts in a proper time, can only exist, where there was probable ground to apprehend insolvency, or the like; and in such cases only, can he be charged with such negligence as to render him personally liable. But at a time, when a depreciated paper money was in circulation, I should not hesitate, to consider an executor guilty of malfeasance in his office, who should press for the payment of his testator's debts, unless under an evident necessity.

2d point—The Chancellor, in the case of Newton and Bennet, which has been cited, says, that where it does not appear, that the executor applied the money to the purposes of the will, or unless he brings it into court, he shall be presumed to use it in the way of his trade, and be liable to pay interest for it. This case, is strongly in my favor. If there be debts due from the estate, and carrying interest, and the executor permits that interest to accumulate, when it might be avoided, it is right, that he should answer it out of his own pocket.

3d point—By the laws of this state, a guardian receiving the estate of a ward, must annually render an account; and he is confined to the profits or other income, for the support of the ward, without being permitted to go farther. The word estate includes money, as well as land.

The PRESIDENT delivered the opinion of the court.

The first objection made to the report is, that the paper money is reduced by the scale of depreciation, on the day it was received by the executor. Upon general principles, such a rule, would certainly be improper and unjust; and especially too, when the money was received in a state of rapid depreciation. The executor may not be able to find a creditor, or legatee, to whom he could pay the money, on the day it was received, or the payment might be suspended in some cases, by disputes amongst creditors for the preference.
249 *But in this case, the appellant has neither objected to the mode originally, nor pointed out any other, the propriety of which might be considered by the court: on the contrary, his accounts were stated by himself in the same manner, the debits and credits being reduced by the scale, on the day they were received and paid. He ought therefore to be bound by this mode, and the Chancellor did right, in over-ruling this exception.

The second objection, is to the charge of interest, as if the executor were a debtor, or had received, or retained the money improperly. It is contended, that such a charge, at the time it is made, is peculiarly unjust, as there were then no borrowers of good credit to be met with; and that the executor neither did nor could derive a profit from it.

There are no facts disclosed in the record, which can throw light upon this subject. The bill is silent as to interest, and so in the answer, except that part of it where (speaking of the paper money which he had scaled,) he states the injury arising from considerable sums having been on hand, from time to time, lessening every day in their value, without benefit to him, and without an opportunity of paying it away. Thus the question stands upon the face of the accounts. It is true, that there is no general rule, which obliges an executor to pay interest. We find from the cases upon this subject, that it has been determined both ways; and upon principle, it will appear, that no general rule can be formed.

Each case must depend upon its own particular circumstances; in some cases the executor ought, and in others, he ought not to answer interest. In this we think he ought to be accountable for interest, on the money resting in his hands, from time to time. But for the reasons before stated,

in considering the first point, it would be too rigid, and injurious, to charge him with interest from the day of each receipt of money. The accounts ought to be closed at the end of each year, and interest allowed upon the different balances, up to the year 1782, when the whole transaction closed. But such interest, ought not to be carried to the account of the succeeding years, in order to deduct the same, from the payments made in such succeeding years. This though done in the common cases of debtors is too strict as to trustees.

As to the risk stated at the bar, or the difficulty of procuring borrowers, it is an objection which does not come from the executor, nor is it stated by him in 250 his answer, but is *mentioned in argument as a possible case. But if it were true, he might have applied to the Chancellor for his direction, as to lending it to individuals, or to the public, which would have made him safe; or he might have carried the money into that court. In this case there were children, whose fortunes were almost entirely pecuniary. It would therefore be unjust that the money should lie in the executors hands unproductive, so as to deprive the legatees of maintainance, or oblige them to resort to the principal of their legacies.

If the executor does not settle his accounts every year, he ought at least to strike the balance at the end of every year, that he may see the estate of his accounts and of the funds in his hands. It is upon this principle, that we establish the rule before mentioned.

In stating this interest, the appellant ought to have credit for the £500, in 1773, which by the will was directed to be lent him without interest, and to be re-charged with it in 1778, when the loan was to cease.

The third objection is made on the score of commissions.

An executor, is certainly entitled to some compensation for his trouble, and that, by custom, is generally fixed at five per cent upon actual receipts. But it is objected, that the legacy left to him, is a bar of all further compensation. The rule, that a legacy given to an executor, defeats his claim to the undisposed residuum, is assimilated to the point under consideration. But that principle, seems to be much mistaken, in the application made of it. It is unnecessary for us to give an opinion upon that point, as in this case, there is no surplus; yet it may be observed, that if there were such a residuum, the legacy would be no bar, as there were several executors, to all of whom unequal legacies are given, and so this court decided, in the case of Shelton and Shelton. The present question therefore, like all others of this nature, depends, (as to the amount to be allowed,) upon the custom, and the intention of the testator. He clearly meant, to allow an adequate compensation. To one executor, he gives £250, and lest that should be an insufficient recompence for his trouble, he authorises the other executors to encrease it, if necessary. In the codicil, he gives the appellant (who is not named an executor in the will itself,) a legacy, as being his nephew, and to this, he would have been entitled, tho' he had refused the office. It would seem, as if the testator did not at first mean to make him an executor, by his directing his executors, to lend him £500 with interest. 251 So that it is *evident, he never intended the legacy as a compensation for his services, but merely as a bounty. The appellant therefore, ought to have credit, for five per cent commission on his receipts of each year, before the accounts are closed, in order to adjust the interest as before mentioned.

As to the 4th point, the court entertain some doubt, whether the £500, ought to be charged to the defendant at all, or not?

In the exceptions, it is stated as a debt due from the appellant, to the testator, and paid in 1778,—in his account, he gives credit in October 1777, for this sum, as due in 1778, and reduces it by the scale of October 1777. He is charged with it by the commissioners, in 1778, as cash, had five years, without interest, and then due; in which case, he ought not to be charged with it, unless he received it in other money, than what came to his hands by collection, with the whole of which, he seems to be charged in the account. This fact therefore, must be ascertained in the Court of Chancery.

If it appear, that he is so charged, the credit in his account (as executor,) in October 1777, ought to be considered as a payment on that day, in paper, and reduced by the scale accordingly; for a debtor, by undertaking the office of an executor, cannot be prevented from exercising, in common with others, the right of paying in paper money a debt due to the testator. And as no better proof can be expected, the entry in his account, will be evidence of the time of payment, and from that time, he bound his securities, to be answerable for the proper application of the money.

The decree therefore must be reversed with costs, and the cause remanded to the High Court of Chancery for the enquiry to be made, and for an account to be taken, according to the principles of this decree.

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252 *APRIL TERM, 1794.

Taylor's Administratrix v. Peyton's Administratrix.

April Term, 1794.

Evidence—Copy of Bond—Waiver of Production of Original.*—If in debt on bond, with a profert, the de-

***Evidence—Copy of Bond—Waiver of Production of Original.**—In Waller v. Ellis, 2 Munf. 100, it is said the declaration was sufficient in stating a copy of the bond; the principle of the common law being that where a deed is remaining in one court, it may be pleaded in another, without showing forth; especially as the defendant in this case has not insisted upon *over of the original*, but has accepted

fendant crave oyer, which is given, but the bond shown is a copy, and the defendant plead payment, he waives the necessity of producing the original, and a copy may be given in evidence at the trial, upon due proof of the loss or destruction of the original.

This was an action of debt upon a bond, instituted in the District Court of Northumberland. The declaration was in common form, with a profert &c. Upon oyer, the bond is set forth at large, and the defendant pleads payment. The jury found the following verdict, viz: "We find for the plaintiff the debt in the declaration mentioned, if the court shall be of opinion, that the copy of the original bond with the endorsements thereon, filed in this cause, and proven to be stolen and burnt, all of which is well attested, is legal evidence to go to the jury and support the plaintiff's declaration, otherwise they find for the defendant."

Upon the copy of the bond is endorsed a memorandum signed by three persons, certifying that they had compared the copy with the original and found them perfectly to agree. Judgment for the plaintiff and appeal prayed.

Washington for the appellant. The copy of a deed, of which oyer cannot be demanded, may be given in evidence if the original be lost, or be in the possession of the adverse party. But if oyer be demanded, and must be given, the obligee has no remedy left but to resort to a Court of Equity, to establish the bond. Even if this court should consider itself bound by 253 the *case of Read v. Brookman in 3 Durnf. and East. 151, still that decision will have no influence upon this case, since the loss of the bond is not stated in the declaration, or put in issue by the pleadings.

Marshall for the appellee. The case of Puered v. Duncombe, 2d Ld. Ray, 852, is an express authority to prove that it is not necessary to produce the original bond. Why the party should be forced into a Court of Equity, if he can at law prove the existence, and subsequent loss or destruction of the bond, I am at a loss to imagine. The same evidence is required in both courts—The danger of setting up a forged bond, for the copy of the real one, is not greater in the one court than in the other. If a suit should be brought in the Court of Chancery, and doubts be entertained concerning the execution, or loss of the bond, that court would at last direct an issue to be tried at law. In the note to the case of Read v. Brookman, it was decided that the copy of a bond, or of a release might be given upon oyer. But admit it to be true, that the bond must be produced, if oyer of it be demanded, yet if the defendant wave the necessity of seeing the original, and without denying the validity of the bond, avoid it by the plea of payment, it is surely too late after this to object.

Washington in reply. The case of Puered v. Duncombe was decided before the statute of the 4th of Ann, C. 16, making the sum mentioned in the condition, instead of the penalty, the real debt, and is therefore not to be relied upon.

The case of Matison v. Atkinson, 3 Durnf. and East 753, in the note, is against the appellee, because it proves, that where oyer of the original is dispensed with, the plaintiff must file a special declaration, stating the loss of the bond, or obtain a rule upon the defendant, to shew cause, why profert of a copy should not be accepted. This mode of proceeding, tho' new, seems liable to no solid objections, because the loss being put in issue, the defendant is apprized of the point he is to contest.

LYONS J. We will not now determine how the case would have been if the defendant had insisted upon oyer of the original bond: because it is clear, that she has waved the necessity of its being produced, by accepting oyer of a copy, and pleading to the action.

The case is completely within the reason of the modern practice, stated in the case of Read v. Brookman, in 3 Term Rep. and the notes subjoined.

Judgment affirmed.

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254 . ***Burwell v. Court.**

April Term, 1794.

Forthcoming Bond—Failure to State Place of Delivery—Effect.*—A forth-coming bond is good, although it appoints no place at which the delivery is to be made.

This was an appeal, from a judgment of the District Court of Williamsburg, rendered upon a bond for the forthcoming of property taken in execution.

Mr. Ronold for the appellant objected to the form of the bond, the condition of which is, "that the property shall be produced at the day of sale," but appoints no place.

By the court—The act of Assembly requires that the defendant should give bond and security to have the property forthcoming at the day of sale, but is silent as to the place.—The omission therefore cannot vitiate the bond.

Judgment affirmed.

Smith & Moreton v. Wallace.

April Term, 1794.

Bail—Objections to.—It is no objection to a bail piece entered into by one defendant, that it takes no notice of the other defendant.

Equity Practice—Judgment against Sheriff—Relief.†—

over of the copy (thereby waiving a necessity of the production of the original), and has pleaded to the action, citing *Taylor v. Peyton*, 1 *Wash.* 252.

See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

*See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

†The principal case is cited in Dickinson v. Sizer, 4 Rand. 117, 126.

A judgment entered against the Sheriff, under a mistaken opinion of the Clerk, that the bail piece was insufficient, the counsel having agreed that it might be filed, is relievable against in equity.

This was an appeal from a decree of the High Court of Chancery. The case was as follows: The appellants instituted a suit in the General Court against Benjamin and William Piper, the latter of whom being arrested by the appellee (the sheriff) was discharged upon the parol agreement of Jett to become bail for his appearance.

The clerk being of opinion that this undertaking was not sufficient, and a bail piece being offered, and rejected by him, because it did not mention the name of the defendant on whom the writ had not been served, a common order was entered at rules against the defendant and sheriff. On the 8th day of the succeeding term (at which time the office judgments were to be set aside) the bail piece being again objected to by the clerk, for the reason before mentioned, it was shewn to the plaintiff's counsel, who thinking it sufficient, said that he should make no objection to it. It was then delivered to the clerk, who was directed by the counsel to file the same; but he, not knowing what had passed at the bar, entered the plea of payment for the sheriff, against whom judgment was afterwards obtained in the District Court. From this the sheriff appealed, pending which, the real
255 defendant offered *to deliver himself up to the plaintiff's attorney, in exoneration of the sheriff, but was refused. The gentleman who appeared as counsel for the plaintiffs in the General Court, being examined as a witness in this cause, deposed, that when he declared he should not object to the bail piece, he only meant that in case a motion were made by the defendant's counsel to receive the bail piece, and to be permitted to set aside the office judgment, he should not oppose it; but that he still expected the sanction of the court was to be obtained, as was the practice where an objection was made to the bail piece.

To be relieved against this judgment, the sheriff filed his bill in the High Court of Chancery, and a perpetual injunction was decreed, from which decree an appeal was prayed.

Ronold for the appellants. I must admit that the case of the sheriff is a hard one, and cannot fail to excite compassion. It is to be regretted that he can be relieved only by shifting the burthen from himself, to another, who on no principle whatever ought to bear it.

Let it be supposed, that the appellants and the appellee are equally innocent; equally clear of any charge of negligence, or improper conduct. Yet their relative situations in this court are widely different. The former, has the law in his favor, and cannot lose the advantage it gives him, unless it be opposed by superior equity on the part of the latter. It cannot be pretended that this is the case. But the truth is, that the appellee has not equal equity with the appellants, because he has been guilty of an unwarrantable negligence, which has operated to the prejudice of the party against whom he now seeks relief.

By omitting in the first instance to take a bail bond, he deprived the plaintiff at law of the opportunity of excepting to the special bail. For unless appearance bail be given, special bail cannot be demanded. But admit that the bail piece was sufficient, and so considered by the plaintiff's counsel, it was the duty of the sheriff, against whom the judgment was entered at the rules, to see that the bail piece was filed, and a proper plea entered. He could relieve himself by no other means. He was legally, as well as equitably, bound to substitute some other security for the debt, before he could be discharged.

Tho' he should be permitted to shelter himself under the plea of ignorance or surprize, on the day the mistake (as it is pretended) happened, yet the orders of the court being extended, and read the succeeding day, gave him abundant opportunity to correct it. His failing to do so subjects
256 him at least to the charge *of negligence, against which equity can never relieve, and for which a third person ought not to suffer. This negligence was calculated to impress the plaintiff's counsel with a belief, that the bail piece was withdrawn, and consequently prevented him from objecting to the sufficiency of the bail, which he was not precluded from doing by his agreeing not to object to the form of the bail piece.

Between persons standing in this situation, equity ought not to interfere.

Marshall & Campbell for the appellee. If accident or surprise can ever furnish a ground for the relief of a Court of Equity, the pretensions of the appellee in this case must be well founded. But if Mr. Ronold be correct, it is impossible that accident, unmingled with fraud, can ever be relieved against; for in all such cases, both parties are, or may be equally innocent. If a bond be lost, or destroyed, both parties are equally innocent, and yet a Court of Equity will relieve. No blame is imputed to the appellant, and none can with propriety be charged upon the appellee. Yet an accident has happened, which subjects the latter to unmerited injury at law.

The appellee did every thing which he was bound to do. When the bail piece was objected to by the clerk, his attorney had either to appeal to the court, or to adjust the difference with the adverse attorney—he attempted the latter, and succeeded—the former became of course unnecessary. The clerk was then directed to file the bail piece. Ignorant of the agreement of the counsel, he by mistake enters a plea for the sheriff. The blunder was in the officer of the court, not in the party, and therefore it should not injure him. But it is contended that a real injury to the plaintiffs might

have resulted from this mistake: suppose it might, yet none such is proved: a real injury sustained by one party, is not to be sanctioned, because it is possible that the other might also have been injured. But there is in truth no ground, even for the conjecture of the counsel. The sheriff is not bound to take appearance bail. He may himself become special bail, or the defendant may give other special bail. Suppose the bail piece had been filed, would the appellant have been in a better situation than he now is? He could not have charged the bail, until after a non est inventus had been returned upon a ca. sa. against the principal; and it appears that the principal offered to surrender himself.

257 *LYONS J.—The court are of opinion that the bail piece was sufficient, and must have been so considered if it had been objected to, at the time it was offered. The clerk therefore mistook the law when he rejected it, and entered a plea for the sheriff. That court might, and most certainly would, have corrected this mistake at any time, if it had been moved to do so. But the party was ill advised when instead of doing this, he applied for a supersedeas to the judgment, since the record furnished a Superior Court with no ground for an interference.

However, we are fully satisfied upon the equity of this case. A more complete surprize can hardly be conceived. It would be strange if an accident so mischievous as this in its effects, were beyond the reach of that court, whose peculiar province it is to grant relief in such cases. The negligence with which the appellee is charged, is fully excused by the agreement of the counsel, and the mistake which followed; and therefore cannot be urged as a ground for denying the relief which has been extended to him.

The decree must be affirmed.

Walter Peter v. Samuel Cocke Executor of Henry Cocke.

April Term, 1794.

Bonds — Declaration — Variance — Immaterial.*—Declaration upon a bond given to the plaintiff of the County of S., on account of Messrs. P. & G., Merchants in Glasgow. The omission in the declaration to state the County, or for whose use the debt was contracted, is not a material variance.

Same — Same — Nonpayment — Quære. — Declaration upon a bond given by the defendant, and by J. S. deceased, whom the defendant survived; breach, not the defendant had not paid. If it should not also have averred nonpayment by J. S.?

*__Bonds — Declarations — Variance—Immaterial.__—For the proposition that, the omission in the declaration to state for whose use the debt was contracted is not a material variance, the principal case is cited in Cabell v. Hardwick, 1 Call 353, 359; Moore v. Fenwick, Gilm. 216. See also, Lewis v. Thompson, 2 Hen. & M. 100. See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

This was an action of debt, brought in the District Court of Williamsburg by the appellant, upon a bond given to him for and on account of Messrs. Glen and Peter, merchants in Glasgow. The declaration states the debt as due to the plaintiff without mentioning for whose use.

The defendant without craving oyer, put in the following pleas.

1st Payment—2dly, That the debt was originally due to a British subject, and was acknowledged by the testator to the plaintiff, on account of Glen & Peter, merchants in Glasgow, who were British subjects; and was contracted before the 1st of May 1782, and was not transferred to a citizen of this state, nor to any person capable of maintaining an action in this commonwealth, at any time before the first of May 1775, for a valuable consideration. There are 258 many other pleas, all unimportant *in the decision. At the trial, an objection was made by the defendant to the admission of the bond in evidence; because the bond stated in the declaration was given to Walter Peter, and the one offered in evidence, is to Walter Peter of the County of Surrey on account of Messrs. Glen & Peter merchants in Glasgow. This objection being sustained by the court, the plaintiff filed an exception to the opinion; and a verdict and judgment being given for the defendant, the plaintiff appealed.

Wickham for the appellant. It was necessary that this suit should be brought in the name of Walter Peter, the trustee, as he alone had a right to recover at law. The use to which the money was to be applied when recovered, was unimportant to the debtor; it was stated in the bond merely as a memorandum for the obligee, and would have been very unnecessarily set forth in the declaration. It is not usual to set out the bond at large in the declaration, provided the material parts of it are stated, so as to apprize the defendant of the true ground of the action. It might as well be contended, that the title, or place of residence of the parties if mentioned in the bond, should be carefully recited also in the declaration.

LYONS J. There appears to be a defect in the declaration which has not been noticed. It charges that the said Henry Cocke and a certain Richard Cocke deceased, whom the said Henry Cocke survived, gave the bond in question. And the breach laid is, that "neither the said Henry nor the defendant hath paid," without averring nonpayment by Richard the other obligor.

Copeland for the appellant. It is a rule, that the plaintiff need not aver a matter, which it would be unnecessary for him to prove, if averred; and, if in the present case, the declaration had charged non-payment by the other obligor, the plaintiff could not have been required to prove it. The defendant pleads payment, and there can be no question, but that under the act of Assembly permitting him to prove all the discounts in his power, he might have

availed himself of any payments made by the other obligor. The case of Busher v. Philips. Bull. nisi prius 163, seems to be in point. That was an action of debt, on a bail bond, against C. and the declaration stated, that the defendant and two others became jointly and severally bound; the breach was that the defendant had not paid.

—The plaintiff had judgment, al-
259 though *the defendant demurred specially, and stated as a cause, that the declaration did not aver non-payment by the other obligors.*

LYONS J. delivered the opinion of the court. The first objection cannot be sustained upon any principle. It was unnecessary to state in the declaration, the use or consideration for which the bond was given; and if it had been stated, it would have been mere surplusage.

But we do not feel satisfied upon the objection to the declaration stated from the bench.

The cause must be sent back for a new trial, with directions to admit the bond as evidence but reserving to the appellee by the consent of the appellant the liberty of availing himself of any other legal exception to the proceedings already had, as if this judgment had not been rendered, or any appeal granted.

Judgment reversed.

Hubbard v. Taylor.

April Term, 1794.

Forthcoming Bonds—Failure to State against Whom Issued and upon Whom Property Levied—Effect.†—If a forthcoming bond do not recite against whom the execution issued, and upon whose property it was levied, it may be quashed on motion.

This was an appeal from a judgment of the District Court of Charlottesville, affirming the judgment of the County Court of Charlotte, upon a bond given for the forthcoming of property taken under execution.

The condition of the bond is, "that if the said Hubbard and Tomkies, shall deliver to Samuel White, sheriff &c. on Friday the 15th day of June next, at Charlotte court house, being the day of sale appointed by the said sheriff, three negroes [by name] which were taken under execution by a writ of fi. fa. issued from the office of the County Court of Charlotte, to satisfy the said John Taylor the sum of £151: 6: 11¼, then" &c.

The objection to the judgment, insisted upon by Mr. Wickham, was, that the condition does not mention the person against whom the execution issued, or upon whose property it was levied.

By the Court. The law requires that the execution should be described in the condi-
tion of the bond which not being
260 sufficiently *done in this case, in the instances mentioned at the bar the judgment is erroneous.

Judgment must be reversed, and the motion of the appellee on the said bond overruled—The bond and execution quashed.

Carr v. Gooch.

April Term, 1794.

Promise of Indemnity—Sufficiency of Consideration to Support Action for Failure*—Case at Bar.—The plaintiff being employed by A. and B. to sell land at public auction, cries it out to C. as the highest bidder. A. considering the sale as unfair, directs the plaintiff to cry it again. B. promises to indemnify the plaintiff if he will not comply with the request, to which he accedes; in consequence of which he is sued by A. and B., and damages are recovered against him. The consideration of the promise made by B. is both legal and sufficient to support an action against him upon his promise of indemnity.

This was an appeal from a judgment of the District Court of Charlottesville in an action upon the case, brought by the appellee. The declaration stated: that John Carr deceased, by his will, directed his executors (of whom the defendant was one) to sell a tract of land the property of the testator: that the plaintiff was employed by the executors, to cry this tract of land at public auction, when the same was purchased by a certain John Moore who was the highest bidder. That Nathaniel Anderson, one of the executors, complained of the sale as being unfairly made, and contrary to the directions of the executors, and insisted that the land should be again set up for sale. That the defendant objected to this, and promised that if the plaintiff would not cry it again but would confirm the sale so made, that he would indemnify and save him harmless from all actions or demands, which might be brought against him on account of the sale made to Moore: that the plaintiff in consideration of this promise did forbear to cry the land again, and did confirm the sale. The breach is, that the defendant not regarding his said promise did cause and permit an action to be brought against him, in his name, and that of the other executors, for and on account of the sale so made to the said Moore, and did cause and permit a judgment to be obtained against him, for £140.

Upon the plea of non assumpsit the plaintiff got a verdict. The defendant moved in arrest of judgment but was over-ruled.

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*See the case of Arscott and Heale, Cro. Car. 6. debt against 3 obligors, one pleads solvit ad diem. Replication that neither of the three nor any one of them had paid: on issue joined, verdict, that one had paid, held good.—Note in Original Edition.

†**Forthcoming Bonds—Failure to State against Whom Issued and upon Whose Property Levied—Effect.**—If a forthcoming bond does not state against whom the execution is issued and upon whose property it is levied, it may be quashed on motion. For this proposition, the principal case is cited in Downman v. Downman, 2 Wash. 191; Lewis v. Thompson, 2 Hen. & M. 103; Glascock v. Dawson, 1 Munf. 606. See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

*See Scott v. Osborne, 2 Munf. 413.

Washington for the appellant. There is either no consideration at all laid in the declaration, or if there be, it is an illegal one. 1st, There is none laid. After the appellee had struck off the land to Moore, his power over the subject ceased. He had no longer an authority to vacate the purchase, and again expose the land to sale, or to confirm what had been done. If the transaction was fair and legal, nothing *remained to consummate it, but for the executors to convey. If it was unfair or illegal, they alone could confirm or sell again. A promise then, made in consideration of the auctioneer's not doing what he could not legally have done, was entirely vain, and had no necessary cause to induce it. As little so, as a promise to pay money to B. in consideration that he will not sell the land of C. which would undoubtedly be a nudum pactum.

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But if there be a consideration, then 2dly, it was illegal and consequently insufficient to maintain an assumpsit. The defendant undertakes, that if the plaintiff will confirm an unfair and illegal sale, he will save him harmless for so doing. When the foundation of an agreement is fraud, immorality, or any thing against law, a court of justice will not be made the instrument of enforcing the performance of it. The plaintiff himself states the consideration of the defendant's assumpsit to be bottomed upon a fraud.

Marshall for the appellee. Wherever a consideration, which is the foundation of a promise, produces benefit to the one party or injury to the other, it is sufficient to support an assumpsit. The defendant requests the plaintiff not to do a certain act, and promises to save him harmless from the consequences of his compliance. The plaintiff is induced by this promise to gratify the wishes of the defendant, which afterwards subjects him to the payment of damages. Can it be seriously urged that in such a case, there is no consideration for the promise? If the case require further aid, let it be observed, that the person bound to indemnify, is the very person who assists in producing the injury.

The second point appears to be still more destitute of foundation. The principle laid down, that a consideration illegal or immoral will not sustain an assumpsit, is unquestionably true. But I cannot discern the application of it to this case. It does not appear that the plaintiff had done an unfair or illegal act. One of the executors supposes so, and insists upon a re-sale. The other executor thinks otherwise, and wishes to confirm it. It is a mere contest between them, each wishing to prevail, and the one promises to indemnify a third person employed by them to do a certain act, if he will obey his directions.

LYONS J. delivered the opinion of the court.

The principle, laid down at the bar by the appellant's counsel, as to the validity of consideration, is certainly correct. A promise to pay money in consideration of another's doing an immoral or illegal act, would clearly be insufficient to support an action. But the present case is not chargeable with any such *objection.

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The appellee was employed by all the executors to perform the duties of a cryer, in the selling of a tract of land. In that capacity, he struck it off to the highest bidder as he was bound to do. The sale, for any thing that we can know from this record, was fair and legal. But one of the executors thinking otherwise, desired a resale, which was successfully opposed by the appellant, in consequence of his promise to indemnify the cryer against all actions or demands on that account. Yet this very executor causes or permits an action to be commenced against the person he was bound to protect, and recovers damages. If there be fraud any where, it is properly chargeable to the appellant. Suppose a man is arrested at the suit of two executors, one of whom directs the officer to discharge the defendant, which is opposed by the other. The orders of the former are obeyed in consequence of a promise to indemnify and save the sheriff harmless. Yet this very executor unites with the other in an action against the sheriff, and damages are recovered against him. Can there be a doubt, but that the sheriff might well maintain an action upon this promise? It is difficult to conceive upon what principle the executors could recover damages from the cryer in the present case. As to the purchaser, he being the highest bidder, was most clearly entitled to the land, if he were not privy to a fraud; or apprised of a deviation in the cryer from the orders of those who employed him. In such a case, the cryer might certainly be subjected to damages.

But whether the judgment against the appellee was a righteous one or not, cannot be a question in the present action: he has sustained an injury in consequence of an act performed at the request of the appellant, against which the appellant promised to indemnify him.

We think there is no difficulty in the case and affirm the judgment.

Cole v. Clayborn.

April Term, 1794.

Wills—Residuary Clause—Reversion in Slaves*—Case at Bar.—The testator (after devising to his wife two negroes over and above her dower) devises all the rest and residue of his negroes to his children, equally to be divided between them; and then directs his executors to work all his negroes (except those particularly bequeathed) on his lands, till his son W. shall come of age. The dower slaves pass under the residuary clause, after the death of the widow.

The appellee brought an action of detinue to recover a number of slaves. Upon the pleas of non detinet, and the act of limita-

*See Read v. Payne, 3 Call 228.

tions, the jury found a special verdict as follows.

That William Cole the elder, by his will dated in 1729, made the following devises, viz: "I give to my wife, for ever, two negroes named Will and Sarah, above
263 and besides her *dower in my lands and negroes; as also one ninth of my personal estate:" After which he devised as follows, viz. "All the rest and residue of my negroes and personal estate, of what nature or kind soever, to my children for ever, equally to be divided amongst them, the survivors or survivor, share and share alike: My will also is, that my executors shall work all my negroes, (except those particularly bequeathed) on my lands, until my son William shall come of age, and the profits of the said lands and slaves, to be equally divided amongst my children; and in case my son William, should molest, sue, or demand account of my executors for using the entailed lands, then the said residue of negroes and personal estate to my other children."

That the slaves, in the declaration mentioned, are the descendents of a female slave allotted to Mary Cole, the widow, as part of her dower.

That William Cole the younger, father of the defendant, was son and heir at law of the said William the elder, and died in the year 17 having by his will devised all his personal estate, of what nature or kind soever, to his son William and his heirs for ever, subject to certain charges and conditions.

That after the death of Mary the widow of William Cole the elder, which happened before the year 1752, Bridget, one of the slaves in the declaration mentioned, and the mother of the others, was, on a division of the estate of William Cole the elder, allotted to Martha, one of his daughters, the wife of one Leigh, as her share of the dower slaves of the said Mary.

That the present defendant is the son and heir at law of the said William Cole the younger, was born in June 1744, and in the year 1769, commenced suit against the said Leigh for the slave Bridget, in the declaration mentioned, who at that time had no children: That this suit abated in 1779, by the death of Leigh, who had retained the possession of the slaves ever since the death of the widow, and the present defendant became possessed in February 1783.

That the said Leigh, by his will, devised the negroes in question to his daughter Mary, and her husband William Clayborn the plaintiff, during their lives, and the life of the survivor, remainder over to their children; that immediately after the death of Leigh, the plaintiff got possession of the slaves in the declaration mentioned, and continued to hold them until February 1783, when they came to the possession of the defendant. That Mary the wife of the plaintiff died in April 1783. And if, &c. &c.

264 *Upon this verdict the Distrit Court gave judgment for the plaintiff, from which the defendant appealed.

Marshall for the appellant. The principal question in this case is, whether the slave in the declaration mentioned, from whom all the others have descended, passed under the residuary clause in the will of William Cole the elder? if they did, then the appellant has no title; if they did not, he has a complete title as heir at law.

I admit, that the residuary clause is sufficiently comprehensive to include the reversionary interest in the dower slaves; but if the whole of this clause be connected together, the intention of the testator may require a different construction. When he speaks of all his slaves, it is improbable that he meant to include the dower slaves, because he directs that all his slaves be worked on his lands by his executors. Now it would be improper to extend the generality of this clause to the dower slaves, which the testator knew he had no power over during the life of the widow. And if he could not mean to include those slaves in this part of the clause, it is not probable that he had them in view in the preceding part of the clause, which respects the disposition of them.—The clause is an entire one connected together by an evident continuation of the same idea, without any interruption, and must be supposed to embrace the same subject, throughout.

It would therefore seem to be a very strained and unnatural construction to break the clause, and make the testator mean, only a part of his negroes, when he speaks of the whole of them in one instance, and the whole of them, when he mentions them in another place, but in the very same sentence.

Duval for the appellee.—The devise of the residue of the negroes, though coupled in the same clause with the direction to the executors concerning the temporary employment of them, is nevertheless a distinct part of the sentence from that, and may with propriety receive a different exposition. It is not unusual, in the construction of wills, and even of deeds, to enlarge or limit the meaning of particular words, so as to fit them to the subject on which they are meant to operate, and to avoid contradiction or absurdity. Thus, though the word all would if unrestrained comprehend the dower slaves, yet, as the testator could exercise no dominion over them during the life of his widow, it is not probable that he meant to include them in that part of the sentence, which directs his negroes to be employed on the plantation. But if he did intend it, he mistook the extent
265 *of his power but he meant to pass all his slaves in the former part of the sentence is evident: 1st, Because the plain and natural import of the words include them; and 2dly, because it is a residuary devise, which from the very nature of it is intended to leave nothing undisposed of. The court always inclines against such a construction, as tends to produce a partial intestacy. But what strengthens this.

exposition in the present case is, that the heir at law is provided for by an estate entailed upon him, which is noticed by the testator, and operates strongly to repel a presumption that the testator intended to leave any part of his estate to descend upon the heir.

As to the possession, it is found to have been in Leigh from the year 1752 till 1769, before any suit was brought.

LYONS J. delivered the opinion of the court.

There is no difficulty in this case. A testator may carve out as many particular estates, from the fee simple interest in the property disposed of, as he pleases; and, whatever part is not specially given away, remains with him: If he disposes of the rest and residue of his estate, such remnant will pass, unless restrained by other parts of the will. There are no words in this will which limit the general operation of the sweeping clause.—All the rest of his estate, means every thing over which he had a power; and his intention, so far from appearing to controul these general expressions, seems to favor the operation of them in their greatest latitude. The testator had no doubt an equal affection for all his children. They are all equally provided for by the will, and can hardly be presumed that he would leave a part undisposed of in order that it might descend to the heir at law, who was otherwise provided for.

This case is not like that of Kennon & M'Roberts in this court. In that, the intention was very clear.

Judgment affirmed.

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266 *OCTOBER TERM, 1794.

Shermer v. Shermer's Executors.

October Term, 1794.

[1 Am. Dec. 460.]

Wills—Devise to Wife for Life with Power of Appointment—Effect*—Case at Bar.—The testator devises the whole of his estate to his wife during her life, and after that is ended, then to be equally divided between whoever his wife should think proper to make her heir or heirs, and his brother R. S. The wife died without making any appointment. She took a fee simple in the moiety, which descended, after her death, to her heir at law.

This was an appeal from a decree of the High Court of Chancery. The case was this; John Shermer, by his will, devised to his wife the use and profits of his whole estate, both real and personal, during her natural life, and after that was ended, then the whole of his estate, exclusive of that already given to his wife, to be equally divided between whoever his wife should think proper to make her heir, or heirs, and his brother Richard Shermer. He further directed, that his executors, as soon as the crops were finished after his wife's death, should sell and dispose of his whole estate, real and personal, as they might think most conducive to the receiver's benefit.

The wife died in 1775, a few days after the testator, without making any disposition, or appointment of her part of the estate. The executors sold the estate, agreeably to the will, and distributed one moiety thereof, amongst the relations of Mrs. Shermer; for the recovery of which, this suit was brought against the executors and distributees, by the present appellant, the son, heir and executor of Richard Shermer, the brother named in the will. It is proved that the testator frequently said, he would leave his wife one half of his estate, to dispose of as she should please, and that most of his estate was acquired by his intermarriage with her. Upon a hearing of the cause the bill was dismissed, from which this appeal was prayed.

Ronold for the appellant. The principle upon which the appellant's claim is founded, is so fully explained, and so 267 conclusively *settled in the case of Tomlinson and Dyghton, 1 P. Wms. 149. that it is unnecessary to add any thing to it.

Marshall for the appellee. The devise to Mrs. Shermer, was intended to pass to her, the whole interest and absolute ownership in the moiety, given to her appointed heir. In last wills, it is not necessary that the testator should use technical words, in order to pass a fee; for however inartificially he may express himself, yet if his intention can be discovered to mean a disposition of his whole interest in the thing devised, the court will supply such words, as may be necessary to effectuate that intention. Thus, if the devise had been to the wife, to dispose of as she pleased, she would most unquestionably have been entitled to the fee simple, because such a power is the eminent quality of such an estate. But the case of Tomlinson and Dyghton is relied upon, to establish this principle, viz:

***Wills—Devised to Wife for Life with Power of Appointment—Effect.**—The principal case is reported in Wythe 159. In Goodwyn v. Taylor, 4 Call 308, the principal case is cited for the proposition that the power of unlimited disposition gives to the first taker an absolute fee. See also, Robinson v. Brock, 1 Hen. & M. 233; Cheshire v. Purcell, 11 Gratt. 773; *foot-note* to Missionary Society v. Calvert, 32 Gratt. 357; Cole v. Cole, 79 Va. 253; Miller v. Potterfield, 86 Va. 878, 11 S. E. Rep. 486; Farish v. Wayman, 91 Va. 435, 21 S. E. Rep. 810; Lee v. Law, 1 Va. Dec. 815; Milhollen v. Rice, 13 W. Va. 559, 531, 532, 533, 535, 543, 560; Wilmoth v. Wilmoth, 34 W. Va. 430, 12 S. E. Rep. 732; Bank v. Green, 45 W. Va. 176, 31 S. E. Rep. 263; 1 Va. Law Reg. 220.

Same—Construction—Intention.—On this subject, the principal case is cited in Ambler v. Norton, 4 Hen. & M. 44; Minnis v. Aylett, 1 Wash. 302; Miars v. Bedgood, 9 Leigh 375; Robinsons v. Allen, 11 Gratt. 788; Williamson v. Coalter, 14 Gratt. 399; Randolph v. Wright, 81 Va. 615; Bartlett v. Patton, 33 W. Va. 77, 10 S. E. Rep. 23.

that where an express estate for life is given, it cannot be enlarged by words of implication, tho' if the estate had been given generally, it might be otherwise. I shall contend 1st, that the principle is not true, and 2dly, if it were, still the case itself is not like the present.

1st, The principle is fully contradicted by the case of King and Melling, 1 Ventr. 214, and the great variety of cases there cited. Langly and Baldwin 1 Eq. Cas. Ab. 185. —Blackbourn and Edgley 1 P. Wms. 605. —The Attorney General v. Sutton, 1 P. Wms. 754. These cases clearly prove, that an express estate for life, may be enlarged by words of implication, if the testator's intention require it. The case Tomlinson and Dyghton is consequently founded upon a mistaken principle, and ought not to be regarded.

But 2dly, If that case be law, it is unlike the present. In that, the power of disposing is limited to particular children; in this, it is to the heirs general. The distinguishing feature of a fee simple estate, is consequently discernible in this case, and not in that. Again—in that case, as well as in that cited from 3 Leon. 71, the wife having made an appointment, the intention of the testator could not be frustrated, and consequently, the question, turning merely upon the validity of the appointment, the nature, or extent of the wife's estate, was a point only incidentally decided, and therefore, the opinion as to that point, ought not to be considered as a binding authority. Again; it will not be denied but that if an express estate for life had not been given to the wife, the latter words, would have enlarged the estate into a fee simple. In this case, the court, to effectuate 268 *the intention of the testator, will consider the life estate given to the wife, as applying, not to her moiety, but to the moiety, which after her death is devised to the brother, and this will materially distinguish the present case, from that of Tomlinson and Dyghton, & will bring it precisely within that part of the rule laid down by the court, which makes the estate to the wife a fee simple.

Washington in reply. The case of Tomlinson and Dyghton, and the cases there cited, from 3 Leon. 71 & 1 Mad. 189, are so conclusive upon the point now under consideration, that it can only be necessary for me, to shew that the objections made to them are not well founded. Those cases are built upon this well established principle of the common law, viz: that an heir shall never be disinherited by implication, nor by words of uncertain and doubtful meaning. In last wills, an estate of inheritance is permitted to pass, by other words than those artificially appropriated to that purpose; but it is intention only, which governs in such a case; and where that intention can be clearly discovered, the court will give such a construction to the words, however inapt they may be, as will fulfill that intention. Thus in the case of Langly and Baldwin, the testator declared an intention, in one part of his will, to give an estate for life only; but it was equally clear, that he meant all the sons of the tenant for life to take estates tail in succession, before the limitations over were to take effect. But the 7th and other sons would not by the rules of law, come into the succession, if the ancestor took only an estate for life; because, where the ancestor takes an estate for life, the heirs, or issue, by such names, cannot take as purchasers. So is Shelleys case—here then, are two contending intentions, both of them equally clear, tho' depending upon different claims for fulfillment. A provision for all the children, was more likely to be the favorite intention of the testator, than the nature, or quantity of the estate to be enjoyed by the ancestor. How then, ask the court, is this prevailing intention to be effectuated? The answer is, by uniting the estate for life with that arising by implication, and thus enlarging that estate into an inheritance; by which means only, the whole issue could be provided for. By such refinements, do the judges govern themselves in cases of that sort, and thus ingenious are they in inventing some subtle mode or other for carrying into effect the will of dead men. They metamorphose an estate for life, into an estate of inheritance, to promote this primary object, but not otherwise. It is necessity only, which could justify it, since if this necessity 269 did not require it, such *refinements would amount to the making, not to the construing of wills. So too, in the case of the Attorney General v. Sutton, founded upon the same principle with that just spoken of; except that in this, if all the issue had been provided for, yet the court must have decided as they did; because, from two clauses in the will, (mentioned in a note in the last edition of P. Wms.) the testator expresses his intention to give an estate tail, in words too plain to be misunderstood. But the court never will convert an express estate for life, into an estate of inheritance, by words of implication, unless compelled to do so by absolute necessity; that is, where the intention is in the first place clear, and not merely a doubtful, or possible intention; and secondly where that intention cannot otherwise be effectuated. This is the principle, upon which I rely; it is laid down in all the cases, and controverted in none. Those cited upon the other side prove it, and it is the very principle, upon which they are decided. Tomlinson and Dyghton does not oppose, but on the contrary supports it, and yet it seems to have been supposed by Mr. Marshall, that the judge declared, "that an express estate for life could not be enlarged by implication." Taking it as a thing granted, that this position was there asserted, he proceeds to prove its fallacy, by citing Langly and Baldwin, and the other cases relied upon for this purpose. But these cases, tho' they contradict the supposed case of Tomlinson and Dyghton, are entirely consistent with that case, as it

really is. The Chancellor there says, "that where an express estate for life is given, with a power to dispose, the latter words, shall not by implication enlarge the former, into an estate of inheritance, but they shall be considered as a distinct gift, and as coming in by way of addition." Now the difference between that, which the judge is supposed to say, and that which he actually says, is obvious. An express estate for life may be enlarged by words of implication, if by no other means the testator's intention can be complied with, and therefore, in Langly and Baldwin, it was done, because there was no other way to effectuate the intention; because, if the 7th and other sons could not take by descent, it was supposed they could not take at all: but they were clearly intended to take; therefore from necessity, the ancestor took an estate of inheritance. But in the case of Tomlinson and Dyghton, the children of the testator might take by purchase, without doing this violence to the plain words of the will. Therefore no necessity existed, for enlarging the estate for life, by words of implication, for in that case, the
270 wife *might, by exercising the power of appointment given to her, make the children take as purchasers. So upon this principle, the case before the court, and all others, where a power of appointment is annexed to the express estate for life, will be found to differ, from cases, where the issue are let in under words of implication, enlarging the estate for life into an estate of inheritance.

The next question is, does the case of Tomlinson and Dyghton differ from the present? The restriction of the power to dispose in that case, is noticed in the argument, and differs from this thus far only, that if that passed a greater estate than for life, it was a conditional fee, this an absolute one: if that only gave a power to dispose, it was a limited one, this is unlimited. But as to intention, there is no difference. The testator might as well intend the one, as the other, and both are equally distinguished by the marks of ownership, if there exist any in either. But it is contended, that in that case, the wife had made an appointment, and therefore, as to the other point, it was merely an obiter decision. But it is evident, that this was a material point in the cause, for if the wife took an estate in fee, it was unnecessary to decide the validity of the appointment, and therefore, this was a previous and important subject of consideration.

The last argument relied upon is, that the court to effectuate the testator's intention, will construe the express estate for life in this case, as applying only to the moiety, which after the wife's death, is given to the brother, and not to the other moiety devised to her appointed heir; and upon this difference, it is supposed, that the case of Tomlinson and Dyghton, does not apply. This argument tho' specious, has no solidity when examined; for, I ask, where is that intention, which, without resorting to the construction contended for, will be defeated? What is the intention? To give an estate for life, for so are the express words of the will; in the next place, to limit the inheritance to the person, whom the wife should appoint. No person can doubt, but that this was the intention, because the words are too plain to be misunderstood. There is no room left for construction, where there is no ambiguity in the expression. But, can this intention, so expressed, be no otherwise effectuated, than by converting the life estate into a fee? If it cannot, then I admit it must be done, and greater concessions ought not to be required, since all the cases, cited against us, shew, that this bold attack upon the plain words of the testator, can only be warranted, where otherwise, the in-
271 tention would be entirely *defeated.

To the question, I answer, let the wife take an estate for life; let her exercise the power of appointing her heir or heirs; let such heir or heirs take the inheritance, and then the testator's intention is fulfilled. Is not this what we contend for? and cannot all this be done, consistently with the rules of law? where then, is the necessity of giving the wife a fee? The heirs could have taken if she had chosen to name them, and if she did not chuse, but preferred leaving the estate to descend, where the law would cast it, it cannot alter the case, or make the intention of the testator mean, what was not meant when that intention was expressed. That intention, was either to give a power, or a beneficial interest to the wife in the inheritance, and this court, will decide at this day, as they would have done, had the question come on the moment after the testator's death. One would suppose, from the argument on the other side, that the heirs of the wife could not possibly take, unless the wife was construed to take a fee, and that the court were struggling to invent some mode, or other, to prevent this violence from being done to the testator's intention. Whereas, there is nothing more in the case, than that the wife has either neglected, or not chosen to exercise the power she had, and therefore, this attempt is made, in order to repair the consequences of this omission, by sacrificing to that end, the established principles of law.

There are some expressions in this will, not unworthy of notice, as tending to furnish additional proof of the intention.—He gives to the wife, the use and profits of his estate for life, and says, "and after this is ended" &c. Now these words strike me to be as strong as the words and no longer, in Target and Gant, 10 Mod. 402. Again, the devise, is not of the estate itself, but of the use and profits for life, which is another strong evidence of intention.

The PRESIDENT delivered the opinion of the court.

It is contended by the appellant's counsel, that Mrs. Shermer was by the will, only tenant for life of a moiety, with a power to

dispose of the fee; and that not having executed that power, the estate descends to the heir of the testator.

In support of this position, several cases have been cited; but they seem to verify the saying of a judge, "that in disputes upon wills, cases seldom illucidate the subject, which depending on the intention of the testator, to be collected from the will, and from the relative situation of the parties, ought to be decided upon the state and circumstances of each case."—To 272 which *I will add, that I have generally observed, that adjudged cases have more frequently been produced to disappoint, than to illustrate the intention; and I am free to own, that where a testator's intention is apparent to me, cases must be strong, uniform, and apply pointedly, before they will prevail to frustrate that intention.

The cases produced tend to prove, that an express estate for life to the wife, with a power to dispose of the fee, shall not turn her estate for life into a fee.

In the case of Target and Gant, the subject in dispute was a chattel, and the objection to the remainder was, that it was void, being limited on too remote a contingency, being after an estate tail, which, it was said, the wife took, tho' devised to her for life, being limited over on her dying without issue. The lord Chancellor said, that the estate tail in such a case, as to lands, was raised by implication, to favor the testator's intention, and he would not make the implication, in the case of chattels, destroy that intention. So that if this case apply at all, it proves, that the testator's intention shall make such words either an estate for life, or an inheritance, as shall best promote that intention.

In both the cases from 1 P. Wms. and 3 Leon. where it was adjudged the wife took an estate for life, with power to dispose of the fee, the decision of the point was unimportant, since in both, the wife had executed her power, properly and effectually.

In those and all the cases, the question turns upon a fee estate in lands, here there is no doubt about the fee. It is in the purchaser from the executor, and the only question is how the money shall go according to the will? whether this will make a difference, need not be decided, since upon a view of the will, the intention is apparent, that the wife should have the whole estate for life, and that at her death, one half (except his specific bounty to her) should go to her family, and the other to his own. Their relative situation, and his prior declarations, only shew such intention to be liberal and just.

His words have been critically scanned; he does not give her a power to dispose, but to name the person or persons she might chuse to succeed to her part, to whom the testator gives the money; and it is doing small violence to the words, even in their critical meaning, to say that by suffering her legal representatives to succeed her, she has actually made them her heir or heirs, as much so as if she had pointed them out by an express devise.

The decree affirmed.

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273 *Bently Executor of Ronold v. Harmanson's Executors.

October Term, 1794.

Bonds—Oyer—Waiver*—Case at Bar.—Debt upon a bond—defendant, without taking oyer, pleads payment, with leave to give special matter in evidence. The bond given in evidence had the name and seal of another obligor. It not appearing in the appellate Court by a bill of exceptions, or otherwise, that the obligor not sued was the survivor, and the jury having found a verdict for the plaintiff, that Court cannot say that the judgment rendered upon the verdict was erroneous.

This was an appeal from a judgment of the District Court of Accomack, reversing a judgment of the County Court. The appellant brought an action of debt against the appellee upon a bond executed by the testator of the appellee. The defendant pleaded payment, without craving oyer of the bond, and leave was given to offer special matter in evidence.

The bond produced in evidence at the trial, and which is set out in the record, has the signature and seal of a co-obligor, and is joint. The jury found that the defendant owed the debt, and judgment was thereupon entered for the plaintiff. Upon an appeal to the District Court, this judgment was reversed, because there appeared to be a joint obligor who survived the defendant's testator against whom the charge survived.

The PRESIDENT. The reason for reversing the judgment of the County Court, would have been a sound one, if the fact upon which it is founded had appeared in the record; but it does not. The declaration is upon Harmanson's bond alone, without taking notice of another obligor. A bond appears in the record, with the name and seal of another obligor, but 1st, it is doubtful whether it can be noticed, since oyer is not taken. 2dly, It does not prove this material fact, that the other obligor was the survivor. It might, if true, have properly been taken advantage of by plea. The defendant was permitted to give special matter in evidence, but what that special matter was, is not spread upon the record; if it respected the fact of survivorship, it was decided by the jury against the defendant.

The judgment of the District Court is to be reversed, and that of the County Court affirmed, with damages and costs.

Pleasants & Co. v. Lewis.

October Term, 1794.

Forthcoming Bonds—Partial Delivery of Goods—Effect.[4] -A partial delivery of the goods men-

*See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

*Forthcoming Bonds—Partial Delivery of Property

tioned in the condition of a forthcoming bond, is not a performance, and the penalty becomes forfeited. But if the Sheriff secure and sell what is so delivered, the amount must be credited to the obligor.

This was an appeal from a judgment of the District Court of Charlottesville, overruling a motion made by the appellants, upon a bond given by the appellee, 274 upon the service of *an execution, conditioned for the delivery of 1000 bushels of wheat, at the day, and at the time of sale appointed by the sheriff. The facts stated in a bill of exceptions are, that on the day of sale, the obligor delivered a parcel of wheat to the sheriff, the quantity at that time unknown, but which the defendant at the trial acknowledged to be about 500 bushels, which the sheriff received, without excepting to the quantity, and proceeded to sell the same, but could not for the want of buyers. The court over-ruled the motion, from which this appeal was prayed.

The PRESIDENT. The condition of the bond was not performed by the partial delivery stated in the record, and of course the penalty became forfeited.

The judgment must therefore be reversed, and the cause remitted to the District Court, to proceed to judgment on the bond, allowing credit for any money, which may be proved to have been paid to the appellants, or to have been raised by the sale of any part of the wheat delivered.

Judgment reversed.

Ward and Others v. Webber and Wife.

October Term, 1794.

Equity Practice—Deeds*—When Equity Will Supply Legal Defects.—In general, Equity will not aid a volunteer in supplying legal defects in a prior deed, against a subsequent volunteer. The cases of advancements for younger children, otherwise unprovided for, form an exception to this rule.

Same—Same—When Lost Deed Will Be Restored.—A father, by deed executed, conveyed to his daughter several tracts of land, with many slaves, &c. After this, the father got possession of the deed surreptitiously, and cancelled it. Upon a bill by the daughter, the Court restored the deed to its legal force.

This was an appeal from a decree of the High Court of Chancery, upon the following case. A suit was instituted by Webber and wife, in the former General Court, on the Chancery side, against the father of the appellant, and of Mrs. Webber, stating, that the father, had by a deed executed in 1754, conveyed to his said daughter, whilst single, several tracts of land, together with 16 slaves, and all the furniture and stocks on those plantations. That previous to this deed, and before her marriage, the father had frequently declared his intention to give his daughter the greatest part of his estate, if she should marry to please him. That in consequence of these promises, the complainant courted the daughter, and married her. That the father, after executing the deed, got possession of it surreptitiously, and cancelled it. The object of the bill was, to set up the deed. The answer of the father denied the material allegations in the bill; admitted the existence of the deed, but that it was made on a condition, that the daughter married to please him, which she did not.

275 *Upon the death of the father, the suit was revived against the appellant, the son, and against the executors, and a decree was made in that court; in favor of the complainant, as to the land, and part of the slaves, which were in the possession of the defendants. The same plaintiffs, afterwards, instituted a suit in the High Court of Chancery, for the balance of the negroes. The appellants filed a bill to review the former decree; and that being opened the whole question came on again to be heard and considered. The ground now relied upon by the appellants to set aside the former decree, as well as to defend the last suit, is, that the father at the time of making the deed, labored under a prosecution which threatened his life, and that the deed was executed, in order to screen his estate from forfeiture, in case he was convicted, and under a trust, to re-convey the estate to the father, if he should get clear of the prosecution. Sundry depositions were taken, upon the weight of which, the present cause very much depended.

The Chancellor dismissed the bill of review, and decreed for the appellees upon their bill, from which decree this appeal was prayed.

Mentioned in Condition.—The principal case is cited in Cole v. Fenwick, Gilmer 135, to the point, that where a part of the property is delivered, the sheriff is bound to receive the same, and to proceed therewith, in the same manner, as if the whole had been delivered; and that the avails thereof, on a sale made by him, shall be applied, in whole or in part discharge of the execution, as the case may be: and if the latter, that the award of execution in the bond, should be limited to the balance then appearing due on the execution. It is also cited in *note* to same case; Wallace v. McCarty, 8 W. Va. 198; Adler v. Green, 18 W. Va. 206. See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

***Deeds—Consideration.**—In Lightfoot v. Colgin, 5 Munf. 70, it is said the grantees in the deed were the children of the grantor; and an obligation resting on the father to provide for his children is said by the court in the case of *Ward v. Webber*, 1 *Wash.* 274, to be a good consideration both in law and in equity. The principal case is also cited in Harris v. Harris, 23 Gratt. 760; Owen v. Sharp, 12 Leigh 430; Robinson v. Cathcart, 20 Fed. Cas. 1000. The principal case is distinguished in Applebury v. Anthony, 1 Wash. 290, as to the point, where a voluntary conveyance by a father to a child, being cancelled by the father, was restored to its legal validity.

See monographic *note* on "Consideration" appended to Jones v. Obenchain, 10 Gratt. 259; also, monographic *note* on "Deeds" appended to Flott v. Com., 12 Gratt. 564.

Marshall for the appellants. It might perhaps be made a question in this cause, whether the deed of 1754, being made without consideration, can deserve the aid of a Court of equity to set it up? But as this is a point upon which I do not rely, I shall pass it over, and insist, that there are circumstances in this case, which would render it iniquitous in a Court of Equity to aid the plaintiffs, and that it will therefore leave him in the situation in which the law has placed him. That there was a secret trust and confidence between the father and daughter, is so strongly to be presumed from circumstances, that aided by the positive evidence of one of the witnesses, the fact can scarcely be doubted.

1st, the time when the deed was made,—the father then labouring under a perilous prosecution, which he appears to have been very apprehensive would affect his life.

2dly, This person to whom the deed was made—a child—in whom this secret confidence might with safety be reposed if with any person.

3dly, The various expressions of the father about that time, indicating his apprehensions, and the mode by which he expected to save his estate, (all of which are abundantly proved) at a time too when it is not to be supposed, he was preparing for future litigation.

276 *4thly, The father continuing in possession of the property.

These circumstances strong as they are by themselves, are very much strengthened by a fact proved and admitted, viz: that the daughter, declared, that the deed for one parcel of land (about which there is no dispute) was to be recorded, but that the other (which is the deed in question) was not to be recorded. The fact is, that one deed was recorded, and the other was not, which proves, that as to the deed which was not intended to be recorded, a mere trust was understood. If then the court be satisfied that a trust was intended, its aid will not be afforded in an attempt to violate that trust.

Warden for the appellee. Before the deed was made, or a prosecution apprehended, it is in full proof, that the father had frequently made parol declarations of his intention to give the greatest part of his estate to his daughter when she married. If the deed in question had not been made, this court would have decreed a specific performance of those promises; being made, it must be considered as done in execution of them. The title of the daughter therefore is paramount to, not dependent upon that deed.

Campbell upon the same side. I lay down this as a principle of equity not to be controverted, viz: that where a father makes a deed to a child, it will be considered as an advancement and not a trust. 2 Vern. 19—28—436. Eq. Cas. Ab. 382. 1 Vern. 467, 2 Ch. Cas. 26, 231. The principal circumstances relied upon in this case to establish a trust, is the proof of a fraud intended by the father, for the purpose of defeating the crown of its eventual dues. It would be strange, if a person who hath committed a fraud, could be permitted to defend himself by averring it. It is not pretended that this trust was declared in the deed itself, and parol evidence is relied upon, not to explain a doubtful construction, but to establish one, totally different in its operation, from that which the real deed upon the face of it imported; and this, no court has ever yet gone so far as to suffer. Even in the case of last wills, evidence is received with great caution, and even then only, to rebut an equity. 2 Vern. 98, 377—648, 736.

The first point having been given up, it will be unnecessary to take up time in proving, that a Court of Equity will aid a volunteer, against a volunteer. But if it should be doubted, I will refer the court to the following cases, 1 Vern. 219, 365—464. 2 Vern. 473. 1 P. Wms. 60.

277 *Marshall in reply. A Court of Equity, will never lend its aid to set up a deed, (tho' destroyed by fraud) if it would do iniquity. I may go farther, and say, that it will not even assist in setting up a hard and oppressive deed. It is contended, that independent of the deed, this court would enforce a specific performance of the parol promises of the father. But there is abundant proof, that those promises were conditional, and that the father, was always strongly opposed to the marriage of his daughter with Webber. Besides, the bill does not claim the property upon that ground; those promises are not put in issue, and of course the evidence as to them is irrelevant to the real merits of the cause.

The principle contended for by Mr. Campbell, that every thing is to be presumed against him who commits a fraud, applies not to this case, because there is no dispute between us, as to the contents of the deed. If there were, then I admit, that every thing should be presumed against the person who destroyed the deed. But I contend, that the deed, tho' absolute on the face of it, was intended to pass a beneficial interest, only in case the grantor should be convicted, and that a resulting trust was meant, in the event of his escaping the prosecution. Whether the fact be so or not depends upon the evidence. I admit therefore, that if this case were unconnected with those circumstances relied upon to prove a trust, that the deed would be considered as an advancement to the daughter, in which case the authorities cited would apply. But since a child, may as well as any other person be a trustee for a father, evidence to establish the trust may as properly be admitted in such a case, as if the conveyance were made to a stranger.

I do not contend, that if Ward had applied to the court to set aside the deed, that he would have been entitled to its aid: But on the other hand, that court will not assist the daughter to set up the deed. For if he were guilty of a fraud by intending to defeat the crown of its rights, she was par-

ticeps criminis, and can be in no better situation than he is. We ask no favors, nor do we require the aid of the court; we only desire that none may be granted to the other side, but that the parties may be left where the law has placed them.

As to the propriety of admitting parol evidence in this case, I do not contend, that it ought to be received to explain, or to contradict the words of a written contract; but it is every days practice to admit such evidence, to prove a secret trust. As for instance, to convert a deed absolute
278 upon its face into a mortgage, *which is a case parallel with this. So too the establishment of resulting trusts, depends almost always upon parol evidence varying the nature of the written deed. Upon the whole, I rely upon this principle, that tho' equity may aid a volunteer in setting up a deed against another volunteer, yet the plaintiff in such a case, must have compleat equity, and must come to ask relief with clean hands.

Campbell—The case stated of an absolute deed being considered as a mortgage is not apposite to this, because in that, it is a fraud in the grantee not to insert the defeasance. Besides, the mortgagee is active, and is a real purchaser; whereas in this case the daughter is merely passive, and cannot be guilty of a fraud in accepting the deed.

Marshall.—If he who conveys, commits a fraud, the receiver, knowing of it, is equally guilty, because to all deeds there must be at least two parties, and if there were no fraudulent grantees, there could be no fraudulent grantors. A mere volunteer may as well be guilty of a fraud, as he who pays a valuable consideration, and all trustees are volunteers.

The PRESIDENT delivered the opinion of the court.

The first point mentioned, tho' not relied upon was, that equity will not aid one volunteer against another, but will leave them to the law, their equity being equal. It is generally true, that this court will not aid a volunteer in supplying legal defects in a prior deed, against a subsequent volunteer. But there are exceptions to this general rule, one of which is, the cases of advancements for younger children otherwise unprovided for, in favor of whom the court will supply such legal defects; the counsel probably considering this as such a case, did not press the objection; but he insisted, that applicants to this court must come with clean hands and a fair case, as this court will not enforce iniquitous or even hard bargains.

As to the first, the whole proceeded from the father, and if there were any evil in his intentions, it is not to be imputed to the daughter, who was wholly passive, and used no means either fair or otherwise to procure the deed. Nor can it be thought immoral in her to accept the voluntary bounty of her father, securing to her a provision for life. Natural affection imposes upon parents a moral obligation to provide for their children, and it hath been esteemed both in law and in equity a good consideration for supporting such provisions.
279 *As to the second branch of the objection; it is true that the court will never decree iniquity, and there are instances, where they have refused to decree hard bargains though fair, but these are rare, and are generally cases of glaring hardship. For in general, the court will not undertake to estimate the speculations of parties, in a contract, but will deem them the best judges of their own views, and will compel a performance, though they may be eventually disappointed in their expectations.—As to iniquity the court discovers none in this case, at least on the part of the daughter, and upon the ground of hardship how does it appear? It is suggested, that the father left himself nothing to subsist upon; but the fact is not proved. On the contrary, it being charged in the original bill, that he had a considerable estate, he who best knew the truth or falsity of the assertion, does not deny it, nor does he complain of hardship, but rests his defence on quite another ground, viz that the promise was conditional, and was broken by the daughter. So that the principles of the objection do not apply to the present case.—If they did, it might be worthy of consideration, whether the present application to restore a deed to its legal force, which it had lost by fraud or accident, is not distinguishable from an application to supply original defects in a deed. The difference seems to be a strong one, and the court recollect the case of applications to supply defects in bonds against securities, which is constantly refused; yet if a bond in which they are legally bound be lost, the court will not on account of the securities, withhold the usual relief in giving it the same validity as if it were produced. The argument seems a fortiori, that a deed, deprived of its legal force by fraud in the donor, will be restored tho' in a hard case, the court considering that as undone, which should not have been done; but as I said before, it is unnecessary to decide this point, since the facts do not support the objection.

Two other objections remain to be considered. 1st, That the promise was conditional and broken. As to this, there is no proof.

2ly, That there was an implied trust for the father, in case he survived the impending prosecution for felony. Upon this head, the proof is generally derived from the vaunting declarations of the father, that he had secured his estate to his children, that he would face his enemies, and was a proper person to go to law. Mrs. Cotterel is a positive witness, that when he delivered the deed to his daughter, he said, it was not to have
280 *effect, if his life were saved, and the circumstances stated by the counsel might have weight to induce a presumption of the trust, if there were nothing to

encounter them—but there is abundant proof to over-rule both.

1st, The deed was absolute—without trust or condition—if the former could not safely be inserted, the latter might and ought to have been, in order to prevent imposition upon her future husband.

2dly, There were three subscribing witnesses to the deed and a fourth present, who did not subscribe it, all of whom swear, that no mention was made at the time of either trust or condition.

3dly, Mrs. Woodson's deposition is material—she says that when Ward was speaking of the condition and trust, he was asked if there were any agreement at the time either verbal or in writing to that purpose, and he answered there was not.

4thly, As to the trust. Ward himself who certainly knew more of the matter than Mrs. Cotterel, does not mention it in his answer—whereas he ought to have relied upon it, if it were true, and ought to have brought a cross bill to discover and establish the trust—He did neither, and upon what ground can it now be set up?

The decree must be affirmed.

Field's Executor v. Spotswood.

October Term, 1794.

Promise to Indemnify—What a Sufficient Consideration to Support*—Case at Bar.—Declaration, stating that the plaintiff, as agent of the defendant's father, made a lease of certain lands of which the father was seised in tail, to D., who assigned to S., and that the plaintiff and D. bound themselves in a bond to S. to obtain a confirmation of the lease from the defendant, the issue in tail, in possession, on the usual terms of his other leases. The defendant promised to make the lease, and for many years received rents from S. and then turned him out of possession. S. then sued D. upon his bond, and recovered damages; and on a suit by D. against the plaintiff, the same damages were recovered from the plaintiff; that pending the above suit, the defendant promised D. to indemnify him and the plaintiff against the suit of S. The consideration stated in this declaration is sufficient to maintain the action against the defendant for breach of his promise to indemnify.

Same—Witnesses—Competency.—D. was a competent witness for the plaintiff in the above action, as he was indemnified by his recovery against the plaintiff; and the promise of the defendant to indemnify, though made to D., was intended for the plaintiff, it being made in answer to a letter from the plaintiff on the subject of saving him harmless.

This was an action on the case brought by the appellants against the appellee in the County Court. The declaration contained two counts: the 1st, a special one, stating, that the plaintiff's testator was authorised by the defendant's father to lease out certain lands of which he was seized in tail. That he made a lease to one Dillon of a parcel of the said land for three lives; that Dillon assigned the same to Sisson, and that Field and Dillon gave their bonds to Sisson with condition to procure for him a lease from the defendant, (on whom the estate tail had by that time descended,) on the usual terms of his former leases, and that the defendant promised the said
281 Sisson *to make him a lease. That the defendant for many years received rents from Sisson, and then turned him out of possession; that Sisson sued Dillon upon the bond and recovered damages, and that Dillon afterwards upon motion recovered over against Field: that whilst the suit was depending, the defendant in consideration of the premises promised Field to save the said Dillon and the said Field harmless on account of the said bond and suit aforesaid, and of their engagements to Sisson. The breach assigned is, that the defendant has failed to indemnify &c. The 2d count was for money laid out and advanced for the defendant's use. Verdict for the plaintiff. An exception was taken to the evidence of Dillon, who proved, that he carried a letter from Field to the defendant upon the subject of his indemnifying the said Field, and that immediately after reading the letter, the defendant promised that Field should not suffer on account of his contract for the said lease &c. The judgment of the County Court was reversed in the District Court of Fredericksburg, from which this appeal was prayed.

Williams for the appellant. It is unnecessary to enquire whether the 1st count be sustainable or not, although I have no doubt myself but it is. The 2d count is certainly a good one, upon which the plaintiff below might well recover. The only question then will be, whether the inferior court did right in admitting the evidence stated in the bill of exceptions? The witness was certainly disinterested, and his testimony was properly left to the jury, who were the only judges of the weight to be given to it. They were satisfied that it supported the claim of the plaintiff, and found for him.

Washington for the appellee. The first count certainly cannot be sustained, because the consideration stated being altogether past, it was not sufficient to support a valid promise. The undertaking of Field, either as it respected the lease, or his bond to Sisson, was not induced by the request, knowledge, or permission of the defendant. Both had been given, before Spotswood was consulted upon the subject. The responsibility which Field drew upon himself, was the result of his own conduct; unauthorised by the defendant, and no new motive appearing to induce the undertaking of the defendant, it is clearly a nudum pactum. The acceptance of rent by the defendant might possibly have amounted to a confirmation of the lease, and might have subjected the defendant to the action of Sisson

*See monographic *note* on "Consideration" appended to Jones v. Obenchain, 10 Gratt. 259.

for ousting him from the possession. But the present, is a different action brought by a different person, and for a differ-
282 ent cause of action—*If the first count be without consideration, the second cannot be supported, because the money paid by Field could not be for the defendant's use, and the whole case appears in the record.

As to the exception, my objection is, that the promise being made to Dillon and not to Field, the latter could not bring this suit and avail himself of that promise. 1 Esp. 105.

The PRESIDENT delivered the opinion of the court.

The bill of exceptions furnishes no ground for reversing the judgment of the County Court. Dillon was a disinterested witness, he having been indemnified by his recovery against Field, and the promise, tho' made to him, was intended for Field, it being given in answer to the letter of Field upon the subject of saving him harmless.

As to the want of consideration in the first count, which has been relied upon at the bar, the court is of opinion that there is nothing in the objection. A tenant in tail might at that time have made leases for three lives, under certain restrictions prescribed by the act of Assembly; but if he could not, yet surely he might promise to make a lease, and might be compelled to pay damages for breach of such a promise. In this case, it is evident that he did make such a promise, and received rent in consequence of it, which was a sufficient consideration to uphold the undertaking.

The judgment of the District Court must be reversed, and that of the County Court affirmed.

Doe Lessee of Murra v. Northern.

October Term, 1794.

Verdicts—Findings Uncertain—Effect.—Verdict set aside, and a venire de novo awarded, the findings being uncertain and contradictory.

This was an ejectment brought in the District Court of Northumberland by the appellant, in which the jury found a special verdict, to the effect following, viz: That in 1666 the governor of Virginia, with the advice and consent of the counsel of state, granted the land in question to Thomas Freshwater, who afterwards assigned the patent to Robert Sisson,
283 *who in 1698 devised the land to his grandson George Sisson in fee tail.

That George Sisson in the year 1725, by deeds of lease and release, conveyed the land in question to Edmund Northern, the father of the defendant, under whom the defendant claims, as heir or devisee, and that the said Edmund Northern was thereof seized and possessed.

That in the year 1736 George Sisson sued forth a writ of ad quod damnum, and proceeded regularly to dock the intail of this land, after which he by deed of bargain and sale dated in 1737, and recorded as the law directs, conveyed the land in question to Tobias Purcell the ancestor of the plaintiff, who, by virtue of the said conveyance, entered, and was seised and possessed thereof at the time of his death, which was after the year 1747, when he, by his will, dated in 1761, devised the same to the lessor of the plaintiff.

That the defendant's ancestor E. Northern was seised and possessed of the land in question after the year 1737, and that after his death, his son peaceably delivered up the possession to the ancestor of the plaintiff. That the guardian of the plaintiff was in possession of the land for many years, and continued so, till he was turned out by the defendants.

The District Court gave judgment for the defendant, from which this appeal was prayed.

Washington for the appellant. The single question in this case is, whether George Sisson in 1736 could legally dock the intail, and convey to the ancestor of the plaintiff under the law of 1748, which permits a person seised of an estate in fee tail, to dock the same by a writ of ad quod damnum. It will be objected, that Sisson legally divested himself of the estate during his life by the deed of 1725, and consequently that he was not seised of an estate tail in 1736, so as to bar the same under the words, or under the meaning of the above mentioned law. In answer to this objection, I submit it, whether after so great a length of time, and under all the circumstances of this case the court will not presume a surrender by Sisson of his life estate, for the purpose of giving validity to the inquest and deed of 1736. In England, it is necessary for the tenant in tail, if he would suffer a common recovery, either to have a sufficient estate and power, to enable him to do it, by being tenant in tail in possession, or he must have the concurrence of the tenant of the freehold. The rule there is, that where a person has
284 a *right to suffer a recovery omnia præsumuntur rite et solem niter acta, till the contrary appears; and a surrender of the life estate will be presumed, unless opposed by circumstances which contradict the presumption. 2 Str. 1267, 1129. So in the case of Bridges v. the duke of Chandos, 2 Burr. 1065, this principle is laid down, and fully explained. In the case from 2 Str. 1129, the presumption was rebutted by the production of an imperfect surrender. In the case from 2 Burr. the presumption was sufficiently contradicted: 1st, on account of the tenant in tail having other lands which he might bar, and upon which the recovery might operate, without resorting to presumption, in order to bar the estate tail, whereof he was not in possession. 2dly, because it was not fortified by proof of possession under the recovery. But the principle is fully established and admitted in both the cases. Now in the

case under consideration, if the writ of ad quod damnum and inquisition did not operate upon the land in question, it could not operate at all, but was a nullity: No imperfect surrender appears; and seisin and possession is found in Sisson, by the inquisition taken at the time, and upon the premises. Possession is also found in Purcell, under the deed of bargain and sale founded upon the inquisition. Acquiescence on the part of the issue in tail appears: acquiescence on the part of Northern is found, by his son quietly delivering up the possession, and finally these circumstances are fortified by length of time. A stronger case for presumption cannot be imagined.

Warden for the appellee. If the plaintiff's title be in any part of it defective, it is sufficient for the tenant in possession, however destitute he may be himself of right. The objections to the plaintiff's title are, 1st, that the patent found by the jury is not a complete one, not containing any of the formal parts of a deed, but is a mere skeleton. 2d, From the patentee it is transferred by assignment, which is not sufficient to convey a title to land; the law of 1748 declaring that no estate of inheritance in lands shall pass, alter, or change, from one to another, but by deed indented, &c.

3dly, The inquisition is taken the 10th day of March in the year 1736, and the writ of ad quod damnum is dated the 3d day of March in the 10th year of the reign of Geo. the II, which is subsequent to the inquisition, and therefore it was taken without a writ to warrant it.

4thly, The findings in the verdict are contradictory to each other. It is found that after 1725 and after 1737 Northern was seised, and yet it is found, that Purcell, after the deed to
285 him *was seised and possessed during his life. Again—by the will of Purcell, the land is devised to his wife for life, who, the jury find, died in 1766; and yet that he guardian of the lessor of the plaintiff was turned out of possession in 1764.

5thly, As to the point which has been anticipated, I think it too strong to be got over. By the deeds of lease and re-lease to Northern in 1725, which contains a warranty, the tenant in tail deprived himself of all interest in the premises, and, by discontinuing the estate tail, he no longer had any power under the law, to dock the intail, or to make the deed of 1737. The court will presume a great deal to support a recovery, which is a matter of record, and of course will be considered as having been rightly done, which they will not do, as to matters transacted in pais. This I consider as a full answer to the cases which have been cited.

Washington in reply. As to the 1st and 2d objections, the case of Birch v. Alexander, (see ante 34) where these points were much contested, is a complete authority.

3d objection. I have not time to examine whether Mr. Warden be accurate or not, in his calculation of dates; I am almost satisfied that he is not. But suppose it otherwise, I contend that any inaccuracy in this respect is supplied by the verdict, which finds, that a writ issued, in hæc verba, that in obedience thereto an inquisition was taken, and the deed recites both. Now the writ must in fact have issued before the inquisition was taken, and both must have existed before the deed.

4th objection. If the verdict be so contradictory that no judgment could be rendered upon it, then the judgment of the District Court must be reversed, and a venire facias de novo awarded; a decision which I did not expect to hear pressed for by the counsel for the successful party below. But though it might be my interest to consent to this, yet candor compels me to say, that I think the verdict may very well be reconciled, by the court's presuming, what I have contended they ought, in order to support the deed of 1737, viz: that Purcell consented, that, if Northern would surrender his life estate, for the purpose of giving effect to the deed of 1737, he should enjoy the land during his life that Northern did so: in consequence of this, Sisson became seised again, (as the jury find he was,) and the intail being docked, Purcell became seised under the conveyance to him: afterwards Northern re-entered by courtesy, and held the possession during his life—and that his heir knowing all this, quietly delivered up the possession to Purcell
286 the rightful owner. *These are the circumstances, which I rely upon, to aid the presumption arising from length of time.

The principal part of the fifth objection has been before answered. The form of the deed to Northern is relied upon. It is of little consequence, what sort of conveyance was made, as to the point we are discussing. But if it were material, I would contend, that the deed of lease and release set forth in the record, is a statutory conveyance, as much so, as a deed of bargain and sale, and that therefore neither could work a discontinuance, nor pass a greater estate than the grantor might lawfully part with. There might perhaps be a common law deed of lease and release at this day, but then the lease must not (as in this case,) be by bargain and sale, and recite that it is made for the purpose of enabling the lessee, under the statute of uses, to receive a release. As to the warranty, the jury have not found assets descended upon the issue in tail.

I do not ask the court to presume any thing, so as to supply defects in the writ, or inquisition, but merely a fact done in pais as well in this case, as in that of a common recovery, viz. a surrender: so that the difference contended for, does not weaken the authorities cited.

The PRESIDENT delivered the opinion of the Court.

The question on the merits is, whether George Sisson's deed of lease and release to Northern in 1725, prevented the operation of the writ of ad quod damnum in 1736, and his deed to Purcell in 1737. This may very much depend upon the actual seisin and possession of the parties; as to which, the findings are uncertain, and directly contradictory to each other.

1st, They find that George Sisson entered by virtue of his grandfather's will in 1698, and was seised and possessed, and being so seised and possessed, did in 1736 sue out the writ, and in 1737 conveyed the land to Purcell. Afterwards they find, that in 1725 (an intervening period between 1698 and 1736) the same Sisson conveyed the same land to Northern, and that he was thereof seised and possessed, in contradiction to the former finding.

Again; they find that by virtue of the deed of 1737, Purcell entered, and was seised and possessed, and was so seised and possessed at his death in 1761. Afterwards it is stated that Northern was seised and possessed after 1737 and that his son after 1747 delivered up the possession to Purcell.

These might be reconciled by a strained construction, so as to avoid a contradiction, but the court do not think it right
287 to *proceed to judgment upon so uncertain a verdict as to this fact.

The judgment of the District Court must be reversed for these reasons, and the cause remanded for a new trial.

Elizabeth Applebury and Others v. Anthony's Executors.

October Term, 1794.

Equity Practice—Lost Deeds—When Grantees Cannot Set Up*—Case at Bar.—The grandfather, who had promised before marriage, to give his daughter a negro-woman, made a conveyance of her after the marriage, and with the consent of the father, to the children of his daughter begotten, and to be begotten. The next day the grandfather and father agreed to exchange the above negro for another, which was duly carried into execution.

Same—Same—Same—Same.—Bill by the children to set up the first deed, which was lost, and for a decree for the negro named in it, dismissed.

Equitable Title—When Owner Estopped to Set Up Claim†—Case at Bar.—If the owner of an equitable title stand by, and suffer another to purchase without disclosing his title, he is guilty of a fraud sufficient to defeat his claim. But a legal claim cannot be so lost even in favor of a purchaser, and it is doubtful if even an equitable claim can be so lost, in the case of a mere voluntary conveyance.

This was an appeal from a decree of the High Court of Chancery, reversing a decree of the County Court in favor of the appellants, the children of Thomas Applebury, in the suit, who were plaintiffs. The bill states a marriage agreement between Thomas Applebury, father of the plaintiffs, and James Anthony, their grandfather, by which the grandfather promised to give to the said Applebury, a slave named Lucy, in marriage with his daughter, the mother of the plaintiffs. That the marriage took effect, and the grandfather refusing to deliver the slave, the father brought a suit to recover her. That the suit was referred to arbitration, when the grandfather finding it would be decided against him, he proposed to convey the slave to all the children of his daughter, begotten, or to be begotten, with which proposition Applebury closed, and dismissed his suit.—That in May 1769 the grandfather executed a deed for the slave according to the terms of the compromise, which deed is lost or mislaid. That the grandfather died in 1784, and that the defendants are his executors, and refuse to deliver Lucy and her children; and to compel them to do so, is the prayer of the bill.

The answer admits the marriage contract; the suit and reference thereupon; that Lucy was determined to be the property of Applebury, and she was soon afterwards delivered into his possession. That upon an application made by the grandfather to Applebury, the latter agreed to exchange Lucy and her children, for a slave called Dinah, and two notes of hand for £60 which were delivered, and Lucy was retained by the grandfather; that a receipt, expressing this exchange, was signed by Applebury, in May 1769. They admit a deed from the grandfather
288 *to Applebury, for Lucy, which was put into the hands of a third person, and which was after the exchange delivered to the defendants by an order from Applebury.

The deed of the grandfather dated in May 1769 to the children of Applebury is proved by the deposition, and that it was delivered to a third person to be recorded. The answer is fully supported by the testimony.

The decree of the County Court which was in favor of the plaintiffs, was reversed in the Court of Chancery.

Copland for the appellants. The children of Applebury taking a legal estate under the deed, as purchasers, not under their father, but under James Anthony the grandfather, the father had no right to sell, exchange, or in any manner to defeat that right. They stand upon the same ground as all other persons who apply to a Court of Equity to set up deeds lost or destroyed by accident or fraud; and the deed in question having been destroyed by the testator of the defendants, this court will establish it without regarding the unauthorised interference of the father.

Marshall for the appellees.—The equitable right to these slaves was originally in the father himself; and the subsequent con-

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***Lost Deeds.**—See *note* to Ward v. Webber, 1 Wash. 274, citing the principal case; monographic *note* on "Deeds" appended to Flott v. Com., 12 Gratt. 564.

†Equitable Rights—When Owner Cannot Recover.—On this question, the principal case is cited in *foot-note* to Hooe v. Pierce, 1 Wash. 212; Green v. Price, 1 Munf. 453.

veyance to the children being without consideration, they are merely volunteers against the representatives of James Anthony, whose testator was a purchaser, for valuable consideration, of the father's original equitable title.—So that this is not the case of a contest between volunteers, but that of a volunteer asking the aid of this court against a purchaser for valuable consideration; in which case, I conceive, a Court of Equity will not interfere. The only deposition in the cause is that of the father, who says, that he considered himself entitled to dispose of the negro mentioned in the deed, which leaves a strong presumption, that the deed was delivered as an escrow.

Copland in reply. I do not rely upon the deposition, because the answer admits the conveyance. As to the main point, there can be no good reason, why this court should not set up a deed destroyed by the party who gave it, because he had purchased the property from a person, who he knew had no right to dispose of it. Such a bargain could not bind the present plaintiffs.

The PRESIDENT delivered the opinion of the court.

This being an application to a Court of Equity, to restore a lost deed to its legal validity, it becomes important to consider whether the deed, if restored, has any 289 legal force. It is *the deed of the grandfather, for slaves, to which he had, at the time, no title. For upon the state of the case, the title appears to have been in Applebury the father.

But it is said, that this deed was made with the consent and privity of Applebury, and therefore ought to bind him; to this there are two answers. 1st, It is admitted, that if a man has an equitable title only, and stands by, and suffers another to purchase without disclosing his title, he is guilty of a fraud, which shall defeat him of his equitable claim. But it is supposed, that a legal claim could not be so lost, even in favor of a purchaser; and it is doubted, if even an equitable claim would be destroyed by that circumstance, in the case of a mere voluntary conveyance.

But 2dly, Suppose the children had this equity against their father, it is but an equity, which may be opposed by circumstances of superior equity on the other side, especially on behalf of the grandfather, who was a fair purchaser, and had his deed delivered to him without the same having been recorded.

The whole transaction was fair. The grandfather who was bound to give Lucy to Applebury, conveyed her to his children with his consent and approbation. The next day an agreement was made between the same parties to substitute a valuable consideration for Lucy, and this, not with any fraudulent view, but upon the laudable motive of gratifying the wishes of the slave. The consideration was paid; Lucy redelivered; and the deed restored to the grandfather. And now, the grandchildren are endeavoring to set up this voluntary deed, made upon a contract between their father and grandfather, who agreed without any fraudulent intention to change the contract, and to cancel the deed, whilst it was in their power to do so, (it not being recorded,) notwithstanding their father's estate was thereby augmented, in consequence of the consideration paid for Lucy. So that they have a chance at least, of receiving an equivalent, if they should get Dinah and the two other slaves purchased with the £60 which the father may give them in lieu of Lucy. The grandfather has already paid Applebury his wife's fortune, and if the plaintiffs were to succeed in this suit, they would compel the grandfather to pay it over again.

Upon the whole, the plaintiffs have neither law nor equity in their favor. The defendant Anthony has both, and the decree of the Chancellor is right. But it may be necessary to distinguish this case from that of Ward v. Webber and wife, 290 *(see ante p. 274) where a voluntary conveyance by a father to a child, being cancelled by the father, was restored to its legal validity:

1st, In that case the father was proprietor of the estate, and had a power to convey. In this the grandfather had no title and this original defect was to be supplied in equity by the consent of the father, and so liable to be opposed by superior equity.

2dly, In that case the deed was delivered into the daughter's keeping, who was of full age, and was privately cancelled by the father, without her consent: in this, the children, if they were in being, had no hand in the transaction, nor had they even the deed. The father who consented to accept it, relinquished it the next day, and gave it up to the donor.

3dly, The defendant in that case, was a mere volunteer, here, he is a fair purchaser, for a valuable consideration, so that the cases are wholly dissimilar, and the decree perfectly reconcileable.

Decree affirmed.

Smallwood v. Mercer & Hansborough.

October Term, 1794.

Sale of Land upon Condition—Failure to Perform Condition—Effect upon Purchaser with Notice.*— A. agrees by an arbitration bond, to sell his right to land in possession of B., if three persons, named in the condition, shall by a certain day make an award in favour of his (A.'s title,) and fix the price which B. shall pay for it. No award was made. C. a purchaser of the land from B., with full notice

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***Sale of Land upon Condition—Failure to Perform Condition—Effect.**—The principal case is cited and approved in Jones v. Hubbard, 6 Call 217; Jones v. Hubard, 6 Munf. 264; Dandridge v. Harris, 1 Wash. 326. See monographic *note* on "Specific Performance" appended to Hanna v. Wilson, 3 Gratt. 243; "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

of the above bond and agreement, cannot compel A. in Equity to make a conveyance, nor to submit those points to any other mode of adjustment.

This was an appeal from the High Court of Chancery, dismissing the bill of the appellant. The case was as follows.—Mercer being in possession of a tract of land, to a part of which Hansborough was entitled as heir to his mother, (and which had been sold to the father of Mercer, by the father of Hansborough, without the privy examination of the mother) proposed selling it to Smallwood, who hearing of the title of Hansborough, objected thereto. Mercer, to remove this obstacle, applied to Hansborough, and a bond dated March 26th 1783, was entered into, with a condition, the material parts of which are as follows, viz: "whereas certain matters of controversy now depend, and subsist between the above named Mercer, and the above bound Hansborough, that is to say, a claim which the said Hansborough pretends to have to 133⅓ acres of land, now in the possession of the said Mercer, and which the said Hansborough claims as heir at law to his mother Lettice, whom the said Mercer admits to be one of the daughters and
291 *co-heiresses of Joseph Sumner deceased; and also admits the said land to be the same, which the late John Mercer, father of the said Mercer, purchased of the father of the said Hansborough, as, and for, the reversion of one third of 400 acres, called the dower of the widow of the said Joseph Sumner; also a claim the said Mercer has, or may have against the said Hansborough, as executor of his father, for the value of the said land, in case the same shall be adjudged to the said Hansborough,—he the said Hansborough, hereby acknowledging assets in his hands sufficient to make satisfaction for the said 133⅓ acres, and also acknowledging the said Mercer to have all the right of his father, under the deed from the said Hansborough, which several disputes the said Mercer and the said Hansborough have agreed to submit to the arbitration &c. of Joseph Jones, Alexander Rose and Andrew Buchanan, or any two of them, to be adjudged &c. and in manner following, viz: if they shall adjudge the said Hansborough to be entitled to said land, they shall award the said Mercer to pay the said Hansborough, the value thereof in money, upon receiving a conveyance of the said land from said Hansborough; and as to the dispute between the said Mercer and the said Hansborough, as executor of his father, it is agreed, the same shall be adjusted as follows, viz; if the said arbitrators shall adjudge the estate of the said Hansborough liable to make good the value of the said land, they shall adjudge what value shall be paid, and may allow the said Hansborough to retain such value in his hands, in full, towards the consideration they shall adjudge to be paid for the said lands. The condition is, if the said Hansborough shall in all things do and perform the award &c. which the said arbitrators shall make touching the premises, (provided the same be made in writing ready to be delivered on or before the 30th of June next) then &c. &c. To which was annexed the following memorandum, viz: "It is agreed, if the legatees of the said J. Hansborough, (the father) shall dissent from the claim of the said Mercer, against the said Hansborough, on the covenants in the deed of the said J. Hansborough being arbitrated, then the arbitrators shall be discharged from that part of the business before submitted to them. And it is agreed, the said Hansborough shall enter an appearance that the suit of the said Mercer, in an action of covenant in the General Court, and allow the same to go on with all legal dispatch to a judgment, 'till when, said Hansborough agrees to wait with said Mercer, for
292 whatever *the said arbitrators shall adjudge the said Mercer to pay for the said 133⅓ acres, and then to discount therefrom what may be recovered in the action of covenant; and further, the said Hansborough agrees that he will make the said Mercer deeds for the said lands, immediately upon payment of the value to be awarded, or upon receipt of a bond for the same, with such security as the said Hansborough shall agree."

This bond being shewed by Mercer to Smallwood, the latter after consulting counsel was induced to make the purchase, and paid the consideration money agreed upon. The award was never made, on account of the refusal of one of the arbitrators to act, because he had previously given in his opinion to Hansborough with respect to his title. Mercer offered to concede the title to be in Hansborough, and to give him bond and security to pay as much per acre for the 133⅓ acres, as he was to receive from Smallwood for the whole tract, which offer was refused. Hansborough brought an ejectment against Smallwood, upon which Smallwood exhibited this bill praying for an injunction and conveyance. Upon the institution of this suit, Mercer brought an action of covenant against Hansborough as executor to his father.

Marshall for the appellant. This bond contains a positive agreement on the part of Hansborough to sell the land in question, and the agreement as to the sale, could not be dependent upon the award, the object of which was, merely to decide upon the title of Hansborough, to fix the price of the land, and the damages to be paid by Hansborough out of the assets of his father, for the breach of his contract, in not warranting the title of the land. The circumstances which attended the giving of that bond, prove incontestibly, that this was the intention and design of the bond. Hansborough knew of Smallwood's intention to purchase, and his objection on account of Hansborough's claim to the land. To remove this objection, he gave the bond, which was shewn to Smallwood, and it had the expected effect. A third person

paying his money in consequence of this agreement, ought not to be affected by the fault either of Hansborough, or of Mercer, in failing to adjust those other matters of dispute, which only concerned themselves. The proviso, that the award should be made, and delivered within a stated time, does not alter the case, because it could only relate to the matters submitted, which were the price and damages, not the sale, which is positively stipulated for, whatever might be the event of those subjects of dispute. But further; Hansborough, 293 by appointing a *referee, who he knew could not act, committed a fraud, and he will therefore be bound to submit to some other equitable mode of adjusting the price.

Campbell for the appellee. If this court be called upon to decree a specific execution of an agreement, it must be done in the way agreed upon by the parties, and in no other. For otherwise, it would be to make, not to execute an agreement; and if, from any circumstance, it cannot be executed in that way, this court must leave the parties to their legal remedy. It is to be observed, that Smallwood, knowing of Hansborough's title, can stand in no better situation than Mercer would, if he were plaintiff. This obligation is to be binding in the whole, or not at all. Now what does Hansborough bind himself to perform? The award of the arbitrators. That is, if they say, he hath a title, they are to decide upon the price which Hansborough shall take for the land. But upon what condition is Hansborough bound to sell for that price? That the decision be made within a limited time. If this condition be not performed, he is not bound at law, and upon what principle can he be bound in equity? He might, for the purpose of putting an end to litigation, and with a view of receiving the value of the land within a short period, be disposed to sell his right, which otherwise he would not have been induced to do, if kept in suspence beyond that time. But after that time is passed,—litigation still hanging over him,—the purchase money at this day unpaid, and he forced at length to assert his right in a court of law:—after so great a lapse of time, and after he has been compelled to incur all the trouble and expence, which he so anxiously wished to avoid;—can it be just or equitable, that he should be still bound to sell, tho' he agreed to do so upon a condition only, which has not been performed? It is impossible. But what can this court do? They cannot appoint referees; for they may not be agreeable to the parties. And if the court could appoint them, still the award cannot now be made within the time fixed upon by the parties, and consequently, the prayer of the bill which is for a specific execution of that agreement, cannot be decreed. The result of the whole is, that this court must remain neuter between the parties, and leave them to the law.

Marshall in reply. I yet insist, that the agreement to sell is absolute. The business of the arbitrators is stated in the preamble to the condition, namely, to decide the right of Hansborough to the land, the price to be paid by Mercer, and 294 Mercer's *claim to damages. But the arbitrators are not to decide, whether Hansborough is to sell, or not. If they were, then I admit the full operation of the proviso. But that is not submitted: the bond itself is compleat evidence of a prior agreement to sell; for in all bargains, it is usual for the vendor to agree to sell, before the price is spoken of. This previous point being settled, the consideration and terms follow next, and is either fixed by the stipulation of the parties, or left to depend upon other modes of ascertainment. I admit, that the court cannot appoint referees; but if it be clear, that a sale was agreed upon and that the award which was to fix the price, has been prevented by accident or fraud, this court may compel a specific performance as to the sale, and direct a jury to settle the price. In the case of Ross and Anderson in this court, a similar decree was made transfering this power from arbitrators to a jury. With greater reason ought it to be done in this case, where the party himself prevented the award by appointing an arbitrator, who he knew could not, or ought not to act, and knowing too, that Mercer's view in obtaining the bond was to enable him to sell to another.

The PRESIDENT delivered the opinion of the court.

The question is, whether a Court of Equity, upon the agreement, and the facts stated, will compell Hansborough to convey his land, upon receiving the value thereof, to be ascertained either by the price which Smallwood gave Mercer; by appointing new valuers, or by a jury.—It is to be premised, that Smallwood, is in no better, or worse situation than Mercer, since he purchased with notice of the written agreement, without any further information, or promise from Hansborough, who is not bound by any mistaken opinion formed of that agreement, either by Smallwood, or by his counsel. He seems to have considered as fixed, sundry events, then contingent; namely, that the arbitrators would decide the title, and, if in favor of Hansborough, that they would ascertain the price to be paid for the land, and that Mercer would, in case that price was not discounted by his claim, pay the value, or give bond with satisfactory security for the same. If all these things had been done Hansborough would indeed have been compellible in equity to convey. But Smallwood never could conceive, that Hansborough was to convey his land at all events, without even knowing the price he was to receive for it, or without having any satisfactory assurance, that he should 295 ever get any thing. Such a *conveyance I believe no Court of Equity ever compelled a defendant to make.

It was contended by Mr. Marshall, that

the sale was not refered to arbitration, but was made by the parties themselves, and that the arbitrators were only to settle the value. It would seem a strange sale, in which such necessary ingredients, as price, and the vendor's right to sell, were in suspence. It would be more properly described, by calling it an inchoate contract for a sale, provided the arbitrators determined in favor of the vendor's title, fixed the price, and that the other requisites were complied with, none of which were done, and consequently the contract never was compleated.

In cases of bonds to perform awards, there are two remedies, 1st, at law upon the bond, in which, a plea that the arbitrators made no award, would, if true, defeat the plaintiff's action. 2dly, If any act be awarded to be done, for which a compleat remedy cannot be had at law, such as to make a conveyance, a bill in equity for a specific performance of the award is common and proper. But how the Court can decree the specific performance of the condition of a bond to perform an award, when in fact no award has been or can be made, is not discernable. But the bond is relied upon, as containing an agreement to sell, which agreement is sought to be specifically executed. That agreement it has been shewn was only a treaty, never brought to perfection, for want of the award. And that this was the effect of the arbitrators refusing to act, seems to have been well understood, both by Mercer and Hansborough. The former makes new propositions which the other declines, and brings his ejectment, and Mercer brings his action of covenant, each pursuing his original remedy, as if no agreement had ever subsisted. It is true, if the agreement had been perfect, (since Smallwood purchased under it, and both the defendants knew it,) and they had consented to dissolve it, it would have been a fraud upon the plaintiff, against which, a Court of Equity would have relieved. But no such ingredient appears, and every thing depends upon the original agreement. That agreement never having been perfected, there is no foundation for the interposition of the Court of Equity, and therefore we affirm the decree.

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296 *Buckner and Others Trustees of Beverley v. Smith, Stubblefield, Graham, and Dixon's Executors.

October Term, 1794.

Bonds—Gaming Consideration—When Obligor Estopped to Set Up against Assignee.*—The assignee of a bond given for a gaming consideration, stands in no better situation than the obligee would have done; but it is otherwise, both at Law and in Equity, if he be induced by assurances of payment from the obligor to become the purchaser of the bond.

This was an appeal from the High Court of Chancery dismissing the bill of the complainants who are now appellants.—The case was as follows: Beverley during his infancy lost a considerable quantity of tobacco at unlawful gaming with the defendant Smith; who for valuable consideration gave to Stubblefield an order upon Beverley for 25,000 pounds of tobacco. Beverley accepted the order, and afterwards gave his bond to Stubblefield for the amount. Stubblefield assigned the bond to Graham, and Graham to Dixon, each paying for the same a valuable consideration. Upon an action brought by Dixon upon the bond, Beverley confessed a judgment. He afterwards conveyed his estate to the appellants in trust, to pay his debts, and to apply the residue, towards the support of his family.—The trustees understanding the real nature of this demand, filed their bill in the High Court of Chancery praying an injunction to this judgment, and charging that Stubblefield, Graham, and Dixon, had full notice that the bond in question was given for a gaming consideration, before they respectively acquired an interest in it. Stubblefield in his answer, denies that he had notice of the consideration for which the bond was given.—Dixon, just previous to his death, drew up the heads of an answer, and swore to it, denying notice, and stating that he was induced to accept of an assignment of the bond, by Beverley, who assured him that the bond should be punctually paid. His executor's answer refers to those heads, as part thereof. The answer also refers to a letter from Beverley to Dixon, after he had come to full age, giving assurances of payment. The only deposition in the cause is that of Smith, one of the defendants, who does not answer, nor is his deposition excepted to. He proves the consideration of the order upon which the bond was given, to have been for tobacco lost at gaming by Beverley, and that Stubblefield had notice of it, at the time the order was given, and agreed, that if Beverley should accept the order, he would discharge Smith from all responsibility.

297 *Warden for the appellants. The infancy of Beverley is proven, as also

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***Bonds—Gaming Consideration—When Obligor Estopped to Set Up against Assignee.**—For the proposition that, the assignee of a bond given for a gaming consideration, stands in no better situation than the obligee would have done, unless he is induced by assurances of payment from the obligor to become the purchaser of the bond, the principal case is cited in Woodson v. Barrett, 2 Hen. & M. 88; Dade v. Madison, 5 Leigh 403; Pettit v. Jennings, 2 Rob. 676, 691, 692 (see note); Steptoe v. Pollard, 30 Gratt. 701; Raynolds v. Carter, 12 Leigh 172. The principal case is also cited in Skipwith v. Strother, 3 Rand. 216. See also, on this question, Hoomes v. Smock, 1 Wash. 389; Mayo v. Giles, 1 Munf. 583; Stockton v. Cook, 3 Munf. 68; Meredith v. Salmon, 21 Gratt. 762; the principal case is reported in 1 Am. Dec. 463, with *note*; monographic *notes* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801; "Gaming" appended to Neal v. Com., 22 Gratt. 917; "Assignment" appended to Ragsdale v. Hagy, 9 Gratt. 409.

notice to Stubblefield, who does not positively deny it, but only says that he was not concerned in the gaming transaction. It is also fairly to be presumed, that the other defendants knew of it. But whether this were the case or not, Dixon ought not to have recovered; for tho' an assignee without notice, might in some cases be a sufferer, by considering him as standing in no better situation than the assignor, yet, this individual inconvenience is very far short of the public mischief, which would be produced by giving validity to a bond of this sort, because it had got into the hands of an assignee. For if the winner could pay his own debts, or make a valuable use of bonds acquired by gaming, it would be easy for him at any time to evade the statute, and to derive every advantage which he could desire, by a violation of the law. The case of Bowyer and Bampton 2 Str. 1155 is conclusive upon this subject It is absurd to contend, that a bond, which the law has declared void ab initio, can by any thing subsequent thereto be made effectual.

Campbell for Stubblefield. The appellant's counsel, has not, in the course of his argument, touched the only point in the cause; and that is, will a Court of Equity, after a judgment fairly obtained at law, and where the defendant has waved any legal advantage which he might have had, interfere to set aside that judgment without some special circumstances to warrant it? The case before the court, is not one of those, wherein Chancery can claim jurisdiction. It is not a case of trust, fraud, or accident. It is not a bill for a discovery, even if such a bill in a case like this could be sustained. The plaintiff does not pretend, that he is destitute of other evidence, than what he can draw from the defendants, and if he had stated such a charge in his bill, it would have been contradicted by the records, wherein a deposition appears, which completely proves the fact. Neither is this application warranted by the act of 22 Geo. II. C. 25, § 3, which authorises a bill of discovery only where actual payment hath been made, and upon a discovery and re-payment by the winner, excuses him from the forfeiture imposed by the law. So that, upon no principle whatever, are the plaintiffs (who stand in no better situation than Beverley did) proper in this Court.

Wickham for Dixon's executors. I shall in the first place object, that the bond in question, is not proved to have been given upon a gaming consideration. It is
298 positively denied by the answers *and those answers are contradicted only by the deposition of one of the defendants, whose evidence can have no greater weight, than his answer would have had, which could not have operated against a co-defendant. But passing over this, want of notice is positively denied by Dixon; and it is a well known principle in this court, that if the plaintiff and defendant are both equally innocent, equity will not interfere, but will leave them to the law. That Dixon was entirely innocent is not denied: no imputation can lie against him. But is Beverley so? No. In the first place, he violated a positive law. He then gave a negotiable paper, importing upon its face, the evidence of a just debt. This is sent into circulation, to deceive and injure those, who might unfortunately become its possessors. But above all, he induces Dixon to throw away his money in the purchase of that bond, under assurances of its being paid. Shall he then, who hath been guilty of a fraud, find countenance in a Court of Equity against the person, upon whom that fraud hath been practised, and who was thereby induced to throw away his money? It is a rule, that he who acquires a legal title without notice of an equitable claim opposed to it, shall not have it questioned in a court of equity. Thus a purchaser for valuable consideration, without notice of a prior equitable claim, may in this court, defend himself by relying upon such a purchase.—Suppose in this case, the money had been paid by Beverley, (and the principle will be the same after a judgment) could he have recovered it back at law? He might have done it perhaps under the act of 22 Geo. II. C. 25 if he had brought his action within three months.—But otherwise he could not, as the law itself proves, by affording a remedy, and prescribing a time within which it should be asserted. And if he could not recover it back at law, in an action for money had and received, which is as liberally a remedy as a bill in Chancery, would equity assist him? I contend it would not.

Upon the whole, I trust, that the decree will be affirmed: but if it should be supposed, that the appellants are entitled to relief, I hope it will not be granted against Dixon's executors, whose testator was entirely innocent, and who have the benefit of a judgment at law. For since all proper parties are before the court, it would be most consistent with the principles of equity, in order to prevent circuity of action, to decree at once against the person who ought ultimately to suffer.

Mr. Campbell observed, that as the bill prayed for an injunction, the court must either make it perpetual, or dismiss the bill.

299 *Mr. Wickham, in answer said, that the bill prayed for general relief, and therefore the court might make any decree which was thought equitable.

Warden in reply. Notice is not positively denied by Stubblefield, and the answer of Smith, not having been excepted to, must be considered as proper evidence in the cause. The court must not only consider the bond, but also the judgment as being void, under the act of Assembly. This act gives this court express jurisdiction in the present case, and the policy of it was to compel a discovery at all events, that the statute might not by any device, or means whatever, be evaded. For if resort in such cases could not be had to a Court of Equity, the consideration of such bonds could seldom be discovered, nor could the mischief

arising to the public, from such pernicious practices, be prevented. The confession of judgment in this case, cannot alter the rights of the parties; for the defendant may not always know, whether he can establish the fact, and unless he could prove it, it would be unnecessary to plead, or even to defend the cause. It was to obviate this inconvenience, that the remedy pointed out by the act was provided. He cited Dougl. 743, which recognizes the case of Bowyer & Bampton.

The PRESIDENT not sitting in the cause, LYONS, J. delivered the opinion of the court.—After stating the case, and that the assumpsit of Beverley to Dixon was after he came of age, he proceeded. It is not important to decide upon the propriety of admitting Mr. Smith's deposition. The principal objection is, that this was a gaming debt, contracted by an infant, which no subsequent act of his, nor any transfer could make valid. It is in general true, that an assignee of a bond of this sort, can be in no better situation than the obligee, and the cases cited at the bar sufficiently establish the point. But the present case is very different upon principle from those cases, and that difference, is produced by the conduct of Beverley, who by his assurances of payment, induced Mr. Dixon to receive an assignment of it. He not only concealed from him the legal objections to the bond, but afterwards assumed to pay it, and when sued, voluntarily confessed a judgment.

The privileges allowed to infants are intended to protect them from injury, not to furnish them with the means of deceiving, and of defrauding others; and if negotiable papers, accepted by others, under all the caution used by Mr. Dixon in this case, were permitted to be set aside, there would be an end put to the negotiability of such papers, and to all confidence between
300 man *and man. Why did not Beverley avail himself at law, of the supposed advantage, which he now relies upon in this court? But suppose he had pleaded it, and the plaintiff had replied the special matter, "that he had been induced by the defendant to receive the bond;" upon a demurrer, the law would have been decided in his favor. 2 Mod. 279. If he had pleaded infancy, he might have avoided the bond, but certainly in another action, the plaintiff upon proving his assumpsit after his attaining full age would have succeeded. If then, this would have been his fate at law, upon no principle can he expect, that a Court of Equity will assist him in imposing upon innocent third persons a loss produced by his own fraud.

Upon the whole the court affirm the decree.

Minnis, Executor of Aylett and Others v. Philip Aylett.

October Term, 1794.

Wills—Devise of All of Testator's Lands—Effect Where He Has Leasehold as Well as Freehold.*—Devise to A. and his heirs of "all the plantation on which he (the testator), then lived, and of all his lands in the County of King William. The testator was at the time seised in fee of a tract of land, in King William, on part of which he lived, the residue being under leases, and of a leasehold estate in another tract of land, in the same County, held adversely by others, but which was recovered after his death by his executors, only the freehold lands passed under the devise.

This was an appeal from a decree of the High Court of Chancery, and the question depended upon a clause in the will of William Aylett the father of the appellee, wherein he devised to the appellee and his heirs, "the plantation on which he then lived, and all his lands in the county of King William, also his land in Drummond's neck in James City county." The testator at the time of making his will, and at his decease, was seised of an estate of inheritance, in a tract of land in the county of King William, upon a part of which he lived, the residue being in the possession of others, under leases. He was also entitled to a leasehold interest for the term of 999 years in another tract of land lying in the same county, but of this last he was not possessed. He commenced a suit for the recovery of it, which abated by his death. His executors revived the suit after his death, and recovered the land. The appellee filed his bill in the High Court of Chancery, against the executors and residuary devisees of the testator, claiming the leasehold as well as the freehold lands. The only question was, whether the leasehold land passed under the above clause to the appellee, or was comprehended in the residuary clause in the will. The Chancellor decreed in favor of the appellee, upon
301 his giving *bond with condition to pay the proportion of the debts due from the testator, for which this land is liable; and also, an account of the rents and profits thereof, received by the executors. From this decree the executors appealed.

Warden for the appellants. The decisions, from the case of Rose v. Bartlett, Cro. Car. 292, down to the present day, have been uniform upon the subject; and they all establish this difference, that if the testator be entitled to both freehold and leasehold lands, and devise all his lands, the former only will pass; but if he have leasehold lands only; then they will pass; for in the first case, the freeholds lands will satisfy the words of the will. He cited Swinb. on wills 139, 318, devise of all his lands and tenements—only the freehold lands pass. 1 P. Wms. 286—3 P. Wms. 26—2 Atk. 450—1 Vern. 271.

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*The principal case is reported in Wythe 219, also cited in Wilkins v. Taylor, Wythe 347, 350, 353, 354.

Rules of Property—Decisions Establishing—Effect.—In Claiborne v. Henderson, 3 Hen. & M. 376, it is said: "The sanction of this court in relation to 'uniform decisions which establish rules of property' has been given in many cases; of which those of *Minnis, Executor of Aylett v. Aylett* (1 *Wash.* 302), and Boswell v. Jones (1 Wash. 322), and which are strong, are at present recollected."

Marshall for the appellee. If the weight of authorities were out of the way, there could be no question, in cases of this sort, about the intention, which certainly is, to pass all the testator's land, whether freehold or leasehold. The cases cited, do not apply. They have all of them been decided upon some expression in the will, shewing an intention to pass only the freehold lands. In those cases, the testator either gives all his lands and tenements, or all his freehold lands. As for instance, in the quotation from Swinburne, the author explains those cases, and shews, that by the word tenement, the testator is considered as meaning frank tenement or freehold, and thereby limiting the general meaning of the word lands. In this case the testator had but one tract of land in King William, except the leasehold, and the devise being of all his lands, in the plural, it cannot be satisfied unless the leasehold land shall be considered as passing.

Warden in reply. The case of Rose and Bartlett is a devise of all his lands; and the word tenements is not mentioned. It is true, that the court, in giving the opinion, put the case of a devise of all a man's lands and tenements, and this is conclusive to shew, that the insertion of that word makes no difference, since they would not have decided the case under consideration, and the case stated in argument, in the same manner, if there were any thing in the word tenement. But this case, upon intention, is stronger than any of those cited, because here, the testator not being in possession of the leasehold land, it is not presumable that he meant to devise it.

302 *The PRESIDENT delivered the opinion of the Court.

In the case of Shermer and Shermer's executors, the court declared their opinion to be, that where the intention of a testator is apparent, cases to over-rule that intention must be strong, uniform, and apply directly to the case before the court, or else they would be disregarded. If in this case, the intention appeared clear, that the leasehold land should pass, the court would give a decision according to this principle, in support of the intention; but we can discover no such intention. The rule is laid down in Rose and Bartlett, by all the judges, that where a testator having both freehold and leasehold lands in a particular place, devises all his lands in that place, only the freehold lands shall pass. Subsequent Judges and Chancellors have stated the rule, and uniformly decided accordingly, altho' in one case, the Chancellor acknowledged, that the testator intended the leasehold land should pass.

Thus settled, it has become a rule of property, which the court cannot depart from, without disturbing perhaps many titles, enjoyed under this long established principle. In this will, there are no words or circumstances, to shew an intention, which do not appear in the case of Rose and Bartlett.

The court are therefore of opinion, that the leasehold land did not pass under the clause in question to the appellee, but is comprehended within the residuary clause to the wife and children of the testator, and they reverse the decree, and remit the cause for further proceedings.

Brown's Executors v. Putney.

October Term, 1794.

Statute of Limitations—Abatement of Suit—Within What Time Plaintiff Must Recommence Suit.*—If the action be commenced within five years from the time the cause of action accrued, and then the suit abates, the plaintiff is within the equity of the proviso in the Act of Limitations, if he recommence his action within a year after the abatement, otherwise he is barred.

This was an action of assumpsit brought by Putney against the appellants in the District Court of Williamsburg. The defendant pleaded the act of limitations, upon which, issue was taken. The jury, by consent, found a verdict for the plaintiff, subject to the opinion of the court upon the following case, viz: that no assumpsit was proved after the 27th of March 1786, and that the writ in this suit issued the 23d of August 1791: that to avoid the act of limitations the plaintiff produced a writ which issued for the same cause of action from the Court of Hustings of Williamsburg, dated the 24th of October 1786, and which was not served upon Brown; but in 303 November following *it abated and was dismissed as to him, he being returned, no inhabitant: That the same writ was served upon Eaton another defendant, and abated by his death in August 1787. The verdict to stand if the law be for the plaintiff, otherwise to be set aside, and judgment entered for the defendant. The judgment of the District Court was in favor of the plaintiff, from which the defendant appealed.

Wickham for the appellant. It appears, that for four years no suit was depending. The clause in the act of limitations which allows the plaintiff one year to recommence his action, after the reversal of his judgment &c. is, I acknowledge, extended, by an equitable construction, to all cases where the plaintiff gets out of court; but a person coming within the benefit of this liberal construction of the law, must recommence his action within the same time after

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***Statute of Limitations—Abatement of Suit—Within What Time Suit Must Be Recommenced.**—If the plaintiff commence his action within the time prescribed by the statute of limitations and then the suit is abated, he is within the equity of the proviso in such statute if he recommence his action within a year after the abatement. Catlett v. Russell, 6 Leigh 373, citing *Brown v. Putney*, 1 *Wash.* 302. As regards this question, the principal case, in Cunningham v. Herndon, 2 Call 534, is said to have no application. See monographic *note* on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 591.

the abatement or dismission, as he must have done in cases coming within the letter of the act, he cited Wilcocks v. Huggins 2 Str. 907.

Marshall for the appellee submitted the case.

The PRESIDENT. The plaintiff according to the decision in the case of Wilcocks and Huggins, would have been entitled to the benefit of the proviso in the act of limitations, under the equity thereof, if he had recommenced his suit within a year after the former suit was abated. But as four years had nearly elapsed between the abatement of that suit, and the bringing of the present, he cannot avail himself of the proviso, but is barred.

The judgment must be reversed, and entered for the defendant.

Leftwitch et ux. v. Stovall and Others.

October Term, 1794.

Appeals—Errors in Ministerial Acts—Where Corrected.*—Upon an appeal from the judgment of an Inferior Court, errors in the execution or replevy bond, issued, or taken, after the judgment, will not be noticed. They are merely ministerial acts, and must be corrected in the same Court, upon motion; and if, on such motion, that Court give an erroneous opinion, the party injured may then appeal, and have it corrected here.

Practice—When Want of Declaration No Error.—An award for tobacco, made upon a reference under a rule of Court, in an action where no declaration was filed, but the damages laid in the writ were in money;—determined to be good. The want of a declaration in this case cannot be objected to as error.

The case was this:—Eight persons who were the defendants in error, sued out a writ in the County Court against Leftwitch and wife, in case; damage £300. No declaration was filed, but the defendants below pleaded that they did not assume; on which the parties were at issue. Afterwards, by a rule of court, they submitted all 304 matters in difference between *them to arbitrators, and agreed, that their award, should be made the judgments of the court. An award was made, that the defendants should pay to each of the plaintiffs 1,724½ lbs. of tobacco, and 31s. 3 in money, amounting in the whole to 13,812 lbs. of tobacco, and £12: 10, in money, and also the cost. Judgment was entered according to the award. An execution issued for the aggregate amount, and a replevy bond was taken. The judgment was affirmed by the District Court of New-London, upon a supersedeas, and execution issued upon that judgment and a replevy bond was taken, upon which a third execution issued. To the judgment of the District Court, a supersedeas was obtained from this Court.

Marshall for the plaintiffs in error. I object, 1st, to the original judgment, and 2dly, to the subsequent proceedings. The objections to the original judgment are: First, the want of a declaration. Tho' it has been determined in this court, in the case of Picket and Claiborne, that the want of a declaration is cured by a confession of judgment, yet no decision of this, or of any court in England, has ever gone so far, as to extend this rule to judgments entered in pursuance of awards.

Secondly, The arbitrators exceeded their power; for tho' the plaintiffs demand was in money, as appears from the writ, (the damages being laid in money) yet the award is for the payment of tobacco, which was improper, and not within the submission. Such a change from money, to an article so fluctuating in its value as tobacco, might be very material to the parties.

2d point. The judgment does not pursue the award, or the execution is variant from the judgment. The award is several, and the execution joint, so that tho' by the award, the receipt of one of the plaintiffs could extend no farther than to his share yet being made joint, he might receive the whole, and give a discharge, which proves the variance to be material.

Again; after the affirmance of the judgment by the District Court, the force of the replevy bond which is considered as a judgment, was revived; and consequently the last execution could not issue upon the original judgment which was discharged by the replevy bond. For suppose a motion had then been made upon the replevy bond, the court could not have refused to give a judgment upon it. He cited the case of Taylor and Dundass, (see ante p. 92) as decisive upon this point.

Campbell for the defendants in error. There are two ways, by which men settle their differences; either by the regu- 305 lar *course of law, in which case they must pursue the rigid forms and rules of law, and unless they do so, a judgment irregularly obtained will not be supported: or by agreement, and this may be, either by the acknowledgment of the parties absolutely, or by an acknowledgment dependent upon the judgment of their friends. In the latter case, where the parties withdraw their dispute from the regular mode of decision, and the defendant acknowledges the

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***Appeals—Failure to Find Error in Original Judgment—Effect upon Execution.**—In State v. Blair, 29 W. Va. 476, 2 S. E. Rep. 334, it is said: "While the reversal of the judgment which is the foundation of the execution and forthcoming bond, vacates and destroys the latter, it does not follow that the converse is true. Even in cases where the writ of error is to the original judgment, if the court finds no error in that judgment, it will decline to consider, upon such writ, the proceedings and judgment of the court below quashing or refusing to quash an execution issued upon such judgment. *Leftwich v. Stovall*, 1 *Wash.* (*Va.*) 303; Moss v. Moss, 4 Hen. & M. 293, 303." The principal case is cited in the last named case at pages 303, 314. See monographic *note* on "Appeal and Error" appended to Hill v. Salem & Pepper's Ferry Turnpike Co., 1 Rob. 263.

propriety of the plaintiff's demand absolutely, or acknowledges as much to be due, as their mutual friends shall decide to be due, the court will not notice those irregularities which might have been fatal, if they had not been thus tacitly waved by the conduct of the parties. And since it is conceded, that a confession of judgment is a release of errors, there can be no difference in reason between such an acknowledgment, and one which is dependent upon the opinion of arbitrators, who are appointed to decide for the parties.

As to the other objection made to the judgment, it is not supported by the facts in the cause. The writ states the damages in money, but the claim may have been in tobacco, the consequential injury arising from the non-payment of it, might be properly estimated in money. The parties understood this—the arbitrators will be presumed to have understood it. It cannot be denied, but that the defendant might have confessed judgment in tobacco, and it is the same thing, if the persons appointed to ascertain the claim, and to act for them, give their judgment in the same commodity.

In answer to the objections made to the proceedings which succeeded the judgment, I contend, that a Superior Court can only notice errors in the judgments of inferior tribunals, and must affirm or reverse them. As to acts merely ministerial, they are under the controul of the court, under whom the officers act, and may, and ought to be there corrected (if wrong) upon motion.

The PRESIDENT delivered the opinion of the court.

The objections to the judgment are, 1st, The want of a declaration. 2dly, That the arbitrators exceeded their power, in awarding tobacco, when the demand was for money.

First, The great purposes for which declarations, containing a regular statement of the plaintiff's claim, are required, are 1st, That the defendant may know with certainty, the nature of the charge against him, so that he may not be embarrassed, nor ensnared at the trial.

306 *2dly, That the demand should appear upon record, so as that a recovery in that suit, may be a bar to any future action, for the same cause.

This court in the case of Picket and Claiborn, determined, that both these ends were answered by a confession of judgment which implies a knowledge in the defendant of the cause of action, and that being stated in the judgment, would bar a subsequent suit for the same thing.

So in this case, the submission to arbitration, rendered it unnecessary to state the cause of action to the court, in the regular mode of proceeding, since they were not to try it; and the award stating the ground of the demand, will enable the defendant to plead the judgment in bar to any future action, for the same cause. But the principal answer, and one which applies also to the 2d objection is, that the parties by withdrawing their case from the ordinary judges, and submitting it to those of their own chusing, have waived all objections to the want of legal forms, and have confined themselves to considerations arising out of the award itself; such as partiality, corruption, ex parte proceedings, or that they exceeded their power. The latter, is chiefly applicable to bonds, submitting particular specified disputes. Here, the submission is of all matters in difference.

The objection made to the award, as exceeding the power of the arbitrators, is founded upon a comparison of the award with the writ, and not with the submission.

The next objections relied upon, are to the execution and replevy bonds; but as these are merely ministerial acts, unconnected with the judgment, which is alone before the court, they cannot be regarded. Errors of this sort, can only be rectified by the court from whence the execution issued, subordinate perhaps to the controul of this court, but it must come by appeal from the opinion of that court, given upon motion, and cannot be taken up collaterally upon an appeal from the original judgment.

The judgment must be affirmed.

Lee Executor of Daniel v. Cooke.*

October Term, 1794.

Slaves—Warranty Binding Vendor and Heirs—Effect as to Executors†—Notice of Suit.—An action of covenant by the vendee of a slave, upon a covenant of warranty binding the vendor and his heirs, (not naming the executors) will be against the executors;—and the declaration need not state, nor is it incumbent on the plaintiff to prove, notice to the vendor, of the pendency of the suit, to recover the negro. If the recovery was obtained by fraud, the defendant may, by plea, put that matter in issue.

Same—When Considered Chattels.‡—Except in questions of descent, slaves are considered as chattels.

This was an action of covenant, brought by Cooke in the District Court of King and

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*For monographic note on Covenant, The Action of, see end of case.

†**Personalty—Warranty Binding Vendor and Heirs—Effect as to Executor Though Not Named.**—The principal case is cited in Stout v. Jackson, 2 Rand. 138, to the point that in personal contracts, if the testator is bound, the executor is also bound, though not named.

Judgments—Presumption as to Fairness.—The principal case is cited in Hooe v. Tebbs, 1 Munf. 507, to the point that, every judgment of a court of justice is presumed to be fair till the contrary appear; and if there was any collusion between the parties in that action, it should have been pleaded and proved on the part of the defendant. See also, Bower v. Glendening, 4 Munf. 219; monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

‡**Slaves—Nature of Property.**—For the proposition that, slaves are considered as chattels in all cases except in matters of descent, the principal case is cited in Poindexter v. Davis, 6 Gratt. 500; *foot-note* to Walden v. Payne, 2 Wash. 1.

Queen, upon a warranty contained
307 *in a deed poll, dated in 1779, by which, the testator, for a valuable consideration, conveyed to Cooke, a negro, and covenanted for himself and his heirs to warrant the title against all persons whatsoever. The declaration charges; that the negro had been recovered by Wm. Morgan by the judgment of the County Court of King and Queen, in an action of detinue, and so neither the testator nor the executor had kept the testator's covenant, but had broken the same &c. Upon the plea of covenants performed, the jury found a conditional verdict, subject to the opinion of the court. If upon the bill of sale, an action of covenant can be supported against the defendant as executor, and if evidence can be admitted, or is necessary, to prove, that notice was given to the defendant of the action of detinue having been brought, (the notice not having been stated in the declaration, and the defendant having pleaded conditions performed,) then they find for the plaintiff £94: 10: 5, damages, but if the court be of a different opinion, on both, or either of those points, then they find for the defendant.

The District Court determined in favor of the plaintiff, from which the defendant appealed.

Warden for the appellant. The plaintiff most certainly ought to have charged in his declaration and established by testimony, that he had given notice to the warrantor, or to those liable under the covenant, of the pendency of the suit brought to recover the negro conveyed by that deed, in order that proper attention and assistance might have been afforded by those, so deeply interested in the defence of that suit. Otherwise, the judgment might have been recovered by covin, or negligence in the party; in which case the warrantor surely ought not to be bound. But it is not clear that this action could be maintained against executors. Negroes, at the time when that deed was made, were by the law of this state real property, and this being a covenant real, it descended upon the heir, who alone could be liable to this action. The heirs are specially named, and if this had been a deed for land, there could be no question, but that the executor in such a case could not have been sued upon the covenant.

Marshall for the appellee. The doctrine of warranty, has nothing to do with this case. This is a covenant to warrant the title of a slave, and in all conveyances of such property, whether by deed, or by will, they are considered as personal, and not real estate. The executor tho' not named, is bound to compensate in damages for a breach of covenant by his testator, and as no particular form of words is necessary to make a covenant, *the agree-
308 ment to warrant in this case must be considered as a covenant, which certainly binds the executor.

The notice which, it is supposed, ought to have been given to the warrantor, is not required by the deed; and it is only necessary for the plaintiff to lay the breach in the words of the deed, which he has done. If the judgment had been obtained by fraud, the defendant might, and ought to have pleaded it, that it might have been put in issue; and then the parties might have gone into the title.

The PRESIDENT. The objection, that a suit will not lie against the executor upon this warranty, because the testator bound only himself and his heirs, is novel and unfounded. Without inquiring, whether the executor is bound by such a covenant in a conveyance of real estate, wherein he is not named, (which the court forbear, it being hinted at the bar, that there is another case in court where that is to be a question) it is admitted and clear, that in personal contracts, if the testator be bound, the executor is also bound, tho' not named. This is such a personal contract; for in the sale of slaves, and in all transfers of them by deed, or will, they have ever passed as chattels, and were only considered as real estate in the case of descents.

The objection, as to the want of notice of the pendency of the action of detinue, stands curiously upon the statement in the verdict. It would seem, that the plaintiff was ready to prove such notice to the executor, if it were necessary. The objection comes from the defendant, that such was improper, because the notice was not charged in the declaration.

The court however are of opinion, that it was not necessary to charge such notice in the declaration, nor to prove it. Every judgment of a court is presumed to be fair, 'till the contrary appears, and if there were any collusion between Morgan and Cooke in that action, it should have been pleaded, and proven on the part of the defendant.

Judgment affirmed.

COVENANT, THE ACTION OF.

I. When the Action Lies.
II. Who May Bring the Action.
III. Against Whom the Action May Be Brought.
IV. The Pleadings.
1. The Declaration.
2. Pleas.
V. Evidence.
VI. Verdict.
VII. Judgment.

Cross References to Monographic Notes.

Assumpsit, appended to Kennaird v. Jones, 9 Gratt. 183.
Covenants, appended to Todd v. Summers, 2 Gratt. 167.
Debt, The Action of, appended to Davis v. Mead, 13 Gratt. 118.
Judgments, appended to Smith v. Charlton, 7 Gratt. 425.

I. WHEN THE ACTION LIES.

General Rule—On Sealed Contracts.—It may be laid down as a general rule that the action of covenant may be maintained upon any contract under seal, whether it be a promise to pay money or per-

form a collateral act. The action will not lie, however, upon a simple contract; and so strictly do the courts guard this rule, that it has been held that a demurrer lies to an action of covenant upon a deed of trust executed as collateral security for the payment of a promissory note. Wolf v. Violett, 78 Va. 57; Ward v. Johnston, 1 Munf. 45; Dickinson v. Hoomes, 8 Gratt. 353. See Grubb v. Burford, 98 Va. 553, 37 S. E. Rep. 4.

On Bond with Collateral Condition.—Applying this rule it is held that the action of covenant lies on a bond executed with collateral condition. In such case, if there is no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failure to pay the penalty; but where such stipulation is either expressed or implied, the failure to perform the covenant may be assigned as the breach. Ward v. Johnston, 1 Munf. 45. See *post*, "Declaration."

On a Proviso in a Mortgage Deed.—But the action does not lie upon a proviso in a mortgage deed that upon payment of a certain sum of money the deed shall be void, there being no express covenant for the payment of the money. Drummond v. Richards, 2 Munf. 337.

Where One of Two Covenants Has Been Performed.—A person having covenanted to do two things, one of which he has done, will be allowed to maintain an action for the part done; but if the failure of the parties suing on the covenant, to perform any of the acts which he had covenanted to perform, has been injurious to the other party to the covenant, he may set up this injury as a defence *pro tanto* to the action. Todd v. Summers, 2 Gratt. 167.

On Mutual Covenants.—Where, upon terms not specified in a writing signed and sealed, parties agreed to exchange lands, and by a writing of same date signed but not sealed, and referring to the other, it is agreed that $500 shall be the consideration for the exchange, the two writings constitute one agreement, and an action of covenant will lie for the recovery of the money. Horner v. Ebersole, 83 Va. 765, 3 S. E. Rep. 438.

On Covenants in Deeds of Conveyance.—So the action of covenant lies for the breach of any of the covenants contained in a deed of real estate, but until breach no action can be maintained. The covenant of seisin in a deed to convey land, where the grantor is in possession, if broken at all, is broken as soon as the deed is executed, for the covenant is a present one, and an action of covenant for damage resulting from the breach thereof may be maintained immediately. Dickinson v. Hoomes, 8 Gratt. 353, 397.

After Eviction in Case of Warranty of Title.—In Virginia there must be an actual or constructive eviction of the whole or part of the premises before an action of covenant can be maintained for the breach of warranty of title. Jones v. Richmond, 88 Va. 231, 13 S. E. Rep. 414; Marbury v. Thornton, 82 Va. 702, 1 S. E. Rep. 909. See monographic *note* on "Covenants" appended to Todd v. Summers, 2 Gratt. 167.

II. WHO MAY BRING THE ACTION.

General Rule.—As a general proposition, it may be stated that the party who has executed the deed under seal, and who is to receive the benefits of the acts covenanted to be performed, is the proper party plaintiff in the action for damages upon the breach of such covenant. Bullock v. Sebrell, 6 Leigh 560; Poindexter v. Wilton, 3 Munf. 183; Ross v. Milne, 12 Leigh 204; Stuart v. James River, etc., Co., 24 Gratt. 294; Newberry Land Co. v. Newberry, 95 Va. 120, 27 S. E. Rep. 899; Jones v. Thomas, 21 Gratt. 96.

Action by Parties Not Named in Deed—Common-Law Rule.—At common law an indenture or deed *inter partes* is only available between the parties to it and their privies; a third person can maintain no action on a covenant therein, though made for their benefit. Stuart v. James River, etc., Co., 24 Gratt. 294; Willard v. Worsham, 76 Va. 397; Newberry Land Co. v. Newberry, 95 Va. 120, 27 S. E. Rep. 899; Johnson v. McClung, 26 W. Va. 662; Jones v. Thomas, 21 Gratt. 96. This rule, however, does not apply to deeds poll, for at common law a person, though not a party to a deed poll, could sue upon it if the instrument showed upon its face that it was made for his benefit. Jones v. Thomas, 21 Gratt. 96; Stuart v. James River, etc., Co., 24 Gratt. 297; Newberry Land Co. v. Newberry, 95 Va. 120, 27 S. E. Rep. 899; Johnson v. McClung, 26 W. Va. 669.

Same—Statutory Rule.—Statutes upon this subject, however, have abolished the rule of the common law, and actions will now lie for any party who is to be benefited by the instrument. But in Newberry Land Co. v. Newberry, 95 Va. 119, 27 S. E. Rep. 899, it was held that sec. 2415 of the Va. Code which provides, in substance, that if a covenant or promise be made for the sole benefit of a person with whom it is not made, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only, does not authorize an action of covenant by one who is neither mentioned by name or referred to by indenture, nor a privy to some party to the instrument. In other words, in order to maintain an action under this section the party who is to be benefited by the instrument must be expressly referred to in the instrument itself. See Jones v. Thomas, 21 Gratt. 96, and *foot-note*.

The West Virginia statute upon this subject has been construed to mean that if a covenant or promise be made for the sole benefit of a person with whom it is not made, or if a covenant or promise is made for the sole benefit of a person with whom it is made jointly with others, such person may maintain in his own name an action thereon. Code, sec. 2, ch. 71; Johnson v. McClung, 26 W. Va. 659.

On Indenture of Apprenticeship.—The action of covenant will not lie in the name of an apprentice on an indenture of apprenticeship entered into by the overseers of the poor without any previous order of the court for binding out the apprentice; such indenture is not a statutory deed; and, therefore, covenant can only be maintained on it in the name of the overseers who are parties to it. Bullock v. Sebrell, 6 Leigh 560; Poindexter v. Wilton, 3 Munf. 183.

Party Who Has Sold Property Cannot Maintain Action for Breach of Covenant.—An action of covenant cannot be maintained by one who has parted with the title conveyed by the deed, the covenants of which are alleged to have been broken. Jones v. Richmond, 88 Va. 231, 3 S. E. Rep. 414.

Parties Described as Agent—Description Disregarded.—If persons contracting by a charter-party, under seal, bind themselves each to the other, as on their own behalf, each may maintain an action for covenant broken, against the other in his individual capacity; notwithstanding they were described, in the introductory part of the instrument, and in

their signatures, as agents for other persons. Hartshorne v. Whittles, 3 Munf. 357.

Beneficial Owner—Party Entitled to an Assignment.—Where the agreement upon which an action of covenant is predicated appears to have been assigned to a third party by written assignment attached thereto, and said written assignment appears to have been canceled by lines having been drawn across the same, the agreement being in the possession of the plaintiff, it is error to dismiss his action for want of a formal reassignment of the agreement thereon before the institution of the suit. Scraggs v. Hill, 37 W. Va. 706, 17 S. E. Rep. 185.

Upon a Covenant of Submission to Arbitration.—If one of two executors refer a matter in his own right, and the other in right of his testator, and the referees therein award one sum of money to himself, and another sum to him and his co-executor, the executor may sue upon the covenant of submission in his own name; and this does not constitute a variance. Macon v. Crump, 1 Call 575.

III. AGAINST WHOM THE ACTION MAY BE BROUGHT.

Against Executors Though Not Named in Covenant.—Upon a covenant to warrant the title of a slave, in which a covenantor binds himself and his heirs, an action will lie against the executors though they are not named in the covenant. Daniel v. Cooke, 1 Wash. 306. So, also, an action for breach of a covenant respecting real estate will lie against executors though they be not expressly named in the covenant. Harrison v. Sampson, 2 Wash. 155.

On a Personal Covenant after Death of Covenantor.—Where, in a deed of bargain and sale, the grantor covenants for himself and his heirs, to and with the grantee, that he will warrant and forever defend to the said grantee, his heirs and assigns, the title to the said parcels of land against all persons whatever, this is a mere personal covenant of warranty, for the breach of which, by eviction under judgment in ejectment, an action of covenant will lie against the bargainor's administrator. Tabb v. Binford, 4 Leigh 132, 26 Am. Dec. 317.

IV. THE PLEADINGS.

1. THE DECLARATION.

Averment of Performance of Conditions Precedent.—A declaration in an action of covenant which does not allege the happening of the event or condition upon which the obligation was to become due and payable is demurrable. Harris v. Lewis, 5 W. Va. 575. And where a contract is entire, and the covenants are dependent, the plaintiff is, in general, obliged to aver and prove a complete performance of the parts to be done and performed on his part, before he is entitled to demand payment from the other party. But to this well established rule, there is the equally well-established exception, that where the defendant has prevented the performance by the plaintiff on his part, it is not necessary that the plaintiff should aver or prove a complete performance to entitle him to his action. He may recover without doing so, and it is sufficient to show a readiness to perform, and that he was hindered by the defendant. Clark v. Franklin, 7 Leigh 1.

Thus where an action is brought for the violation of a covenant in a lease providing for its renewal, which is conditioned on the performance of the terms of the lease, the lessee must allege a performance of the conditions, or a valid excuse for nonperformance. Grubb v. Burford, 98 Va. 553, 37 S. E. Rep. 4.

Setting Out Covenant—Substance Only Need Be Set Out.—In declaring on a covenant, it is sufficient to set out the substance and legal effect only of such parts of the deed as are necessary to entitle the plaintiff to recover; and, in assigning a breach, it is not necessary to do it in the very words of the covenant; the intention of the parties to be collected from the instrument may alone be stated. Thus where the declaration charges a covenant to sell to the plaintiffs a certain quantity of land, and to refund all moneys paid therefor, in case the land or any part be lost, it is a sufficient assignment of the breach that "the defendant had no land at all" in the place specified. Buster v. Wallace, 4 H. & M. 82.

As has been said, it is not necessary, in a declaration for covenant broken, to recite the whole of the agreement, but only to describe substantially the material parts as to which breaches are alleged. Backus v. Taylor, 6 Munf. 488. See Macon v. Crump, 1 Call 575; Buster v. Wallace, 4 H. & M. 82.

Averment of Title in Plaintiff.—In an action by the heir for breach of covenants contained in a conveyance of lands to the ancestor, if the declaration avers the entry, seisen and death of the ancestor, "and that the lands, covenants and writings aforesaid have descended on plaintiff," without setting forth the manner in which he derived his title, it is good after verdict. Woodford v. Pendleton, 1 H. & M. 303.

But if one of two joint covenantors is dead, this fact must be alleged in the declaration, for a declaration which makes no mention of the survivorship is bad. Atwell v. Milton, 4 H. & M. 253.

Breach Need Not Be Assigned in Words of Covenant.—The breach need not be assigned in the particular words expressed in the covenant. It will be sufficient if the intention of the parties averred in the declaration, is apparent upon an examination of the instrument itself. Buster v. Wallace, 4 H. & M. 82.

Breach Should Be Stated So as to Come within Terms of Covenant.—All that can ever be required is that the declaration should state a breach which is clearly within the covenant declared upon. Austin v. Whitlock, 1 Munf. 487. And when the breach is not of the covenant set forth, the declaration is clearly defective and will not sustain a recovery. Laughlin v. Flood, 3 Munf. 255. Thus where a declaration in covenant states that in consequence of a prior lien and incumbrance upon the tract of land in question, the "plaintiffs have been disturbed in and evicted from the possession and enjoyment of said tract of land," and there is no averment that the plaintiffs were kept out of possession of the premises by any person or persons in possession under a paramount title, or that they were evicted by judgment of eviction followed by ouster, it is demurrable. Marbury v. Thornton, 82 Va. 702, 1 S. E. Rep. 909.

Breach of Warranty—Necessity of Averment of Eviction.—In an action on a covenant of warranty, it is necessary to aver an eviction, and a declaration not averring that the plaintiff had been kept out of possession by a person holding under a paramount title, is demurrable. Marbury v. Thornton, 82 Va. 702, 1 S. E. Rep. 909; Jones v. Richmond, 88 Va. 231, 13 S. E. Rep. 414. But where the land is in possession of a third person, at the date of the conveyance relied upon, claiming under a paramount title, the plaintiff need not aver and prove actual

entry or eviction in an action for breach of warranty. Sheffey v. Gardiner, 79 Va. 313.

Averment of Several Breaches.—In Jarrett v. Jarrett, 7 Leigh 93, an action was brought on a covenant whereby the defendant acknowledged that he had received from the plaintiff two bonds for collection, which when collected were to be credited on a bond of a third person held by the defendant. One count in the declaration assigned the breach, that though the defendant collected the two debts he did not give credit for the amount. Another count assigned the breach that the defendant did not and would not collect the debts, or make any endeavor to collect them, and failed in any manner to account for the same. A third count alleged that by the covenant the defendant promised to endeavor to collect the debts, and assigned for breach that he did not endeavor to collect. Upon oyer to the covenant and demurrer to the declaration it was held that all of the counts were good.

Immaterial Errors.—When two persons contract, the one to assign bonds, and the other to convey lands, at the same time, the covenants are dependent on each other, and neither party can insist upon performance of the other unless he himself has performed or has offered to perform his part of the agreement at the appointed time; and an allegation in the declaration of an offer to perform after that time is an immaterial error. Robertson v. Robertson, 3 Rand. 68.

Errors in Declaration Cured by Verdict.—On a covenant in which the plaintiff engaged to serve the defendant as his overseer for a year, and the defendant to pay to the plaintiff a certain part of all grain "made on the plantation" (after deducting the seed) oats excepted; a declaration charging that the defendant did not at the close of the year pay to the plaintiff such part of the grain "made on the plantation," but which does not set forth what crop was made, is good after verdict. Laughlin v. Flood, 3 Munf. 255.

Errors in Declaration Not Cured by Verdict.—In an action against the representatives of a deceased person, on a joint covenant entered into before the act "concerning partitions and joint rights and obligations," (1 Rev. Code, 31) if it appear from the declaration that one of the joint covenantees survived, it is a radical defect and not cured by verdict. Atwell v. Milton, 4 Hen. & M. 253.

In an action of covenant on an agreement to convey the party's interest in a certain suit, and in case the defendant in that suit was not legally bound by his undertaking, then to convey the right of such party to certain land, a declaration charging a refusal to convey the interest in the suit, or the right to the land without setting forth a failure to recover in the suit, and a subsequent refusal to convey the land, is substantially defective, and is not cured by a general verdict assessing damages. Austin v. Whitlock, 1 Munf. 487.

Variance—Error Cured by Statute of Jeofails.—In an action against the heir on a covenant entered into by the ancestor, if the breach is assigned to have been committed both by the heir and ancestor and the defendant pleads that "he has not broken the covenant," without saying anything as to the breach by the ancestor, and the jury finds for the plaintiff that "the defendant has broken the covenant," judgment ought not to be arrested, as the defect is cured by the statute of jeofails. Woodford v. Pendleton, 1 Hen. & M. 303. But if the writ is assumpsit and the declaration is covenant, the variance is fatal. Wainwright v. Harper, 3 Leigh 270.

Variance in Case of Profert and Oyer.—When profert is made of the deed, the declaration should be precisely drawn, for if oyer is craved the adverse party may take advantage of any variance in the deed produced and that stated in the declaration. Macon v. Crump, 1 Call 575; Austin v. Whitlock, 1 Munf. 487.

What Is Not a Substantial Variance in Declaration.—In covenant upon an agreement of lease, which, besides the stipulation to pay the rent, contained other clauses, binding the lessee to board the lessor and wife part of the term, and to return the premises uninjured, the declaration described so much of the agreement as related to leasing the property and paying the rent; charging the defendant with having broken the covenant generally, and particularly in having failed to pay the rent; but said nothing about the other stipulations. It was held that this was not a substantial variance. Backus v. Taylor, 6 Munf. 488.

Misjoinder of Counts—Arrest of Judgment.—It is a good ground for arresting judgment and awarding a repleader after a general verdict for the plaintiff, that there were two counts in the declaration, one beginning in covenant, and concluding in case, and, the other, entirely in case, to which the defendant pleads only, that he has not broken the covenants. Terrell v. Page, 3 Hen. & M. 118. But under the recent Virginia statute (Acts 1897-8, p. 103), providing that in any case where an action of covenant will lie, an action of assumpsit may be maintained also, common counts in assumpsit may be joined with covenant for the breach of an agreement under seal. Grubb v. Burford, 98 Va. 558, 37 S. E. Rep. 4.

2. PLEAS.

"Covenants Performed."—Where a defendant pleads "covenants performed," this plea can only be supported by the evidence which shows that the covenant has been performed; and evidence showing that nonperformance has been excused by the act of the plaintiff, or any other, does not support the issue, as this might tend to surprise the plaintiff at the trial. Fairfax v. Lewis, 2 Rand. 30; Wallace v. Shaffer, 12 Leigh 623; Long v. Colston, Gilmer 98; Scraggs v. Hill, 37 W. Va. 706, 17 S. E. Rep. 185.

Plea of Statute of Limitations.—A plea to an action of covenant that defendant "did not, within 20 years next before the bringing of this suit, break his covenant, as the plaintiff hath alleged," is a good plea of the statute of limitations, as it is equivalent to saying that the cause of action did not accrue within that time. But even if such plea were defective, it is cured after verdict, where it is not demurred to, by Code Va. 1873, ch. 177, sec. 3, which provides that no judgment shall be reversed for any defect or imperfection in the pleadings which might have been taken advantage of on demurrer, but was not so taken advantage of. Davis v. McMullen, 86 Va. 256, 9 S. E. Rep. 1095.

Covenant May Be Pleaded as a Release.—To avoid circuity of action, a covenant may be pleaded as a release, but it must be a covenant between those parties only; and if it contains no words of release it will not be so construed unless it gives the covenantor a right of action which will precisely countervail that to which he is liable; and unless, also, it was the intent of the parties that the last instrument should defeat the first. Garnett v. Macon, 6 Call 308.

Plea of "Not Guilty" Cured by Verdict.—A plea of

not guilty to an action of covenant is cured by a verdict. Hunnicutt v. Carsley, 1 Hen. & M. 153.

V. EVIDENCE.

Evidence of Future Profits Inadmissible in Action for Breach of an Agreement to Renew a Lease.—In an action for breach of a covenant to renew a lease, evidence of the future profits to be made from the property if a certain price can be obtained for the product thereof is inadmissible on the question of damages. Grubb v. Burford, 98 Va. 553, 37 S. E. Rep. 4.

Covenant as Evidence after Oyer Taken—Where a defendant by oyer has made a covenant itself a part of the record, he cannot object at the trial of the issue to the admissions of the covenant as evidence on the ground of variance between it and the covenant set forth in the declaration. Armstrong v. Armstrongs, 1 Leigh 491; Jarrett v. Jarrett, 7 Leigh 93.

When Proof of Covenants in Deed Not Necessary.—Where in an action of recovery for breach of warranty of title the declaration sets out the making of the deed and the general warranty of title therein contained, and no plea of *non est factum* is pleaded, but the only pleas are, "covenants performed" and "covenants not broken," the making of the deed and the warranty are admitted by the pleadings, and no proof thereof is necessary. Riddle v. Core, 21 W. Va. 530.

VI. VERDICT.

Province of Jury.—Upon a declaration in an action of covenant, charging in general terms the breach of the contract to deliver a quantity of corn at a given time, the jury, in assessing the damages, are not restricted to the value of the corn at the time it should have been delivered with interest thereon until payment, but may give such damages as upon the evidence the plaintiff appears to have sustained. Merryman v. Criddle, 4 Munf. 542.

Verdict Founded on Insufficient Evidence.—The existence of a deed of trust is not sufficient evidence of covenants broken, and a verdict founded on such evidence alone is unwarranted. Wolf v. Violett, 78 Va. 57.

Verdict for More Damages Than Claimed.—In the action of covenant, a verdict for a larger sum than the damages laid in the declaration or stated in the writ, must be set aside and a new trial awarded. Cloud v. Campbell, 4 Munf. 214.

VII. JUDGMENT.

See monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

Burnley v. Lambert.

October Term, 1794.

Detinue—What Plaintiff Must Prove.*—In detinue, the plaintiff must prove property in himself, and possession in the defendant; but proof of possession anterior to the bringing of the action is sufficient, unless the defendant can show that he was legally dispossessed.

Legacies—Assent of Executor—Rights of Creditors—Parties.†—After the assent of an executor to a specific legacy, the property is changed, and a creditor obtaining a judgment against the executor, cannot levy an execution upon the property in the hands of the legatee. He may pursue the executor at Law, or follow the property in Equity, making all the legatees parties.

Legatees—Execution on Property in Hands of—Title of Purchaser.—A purchaser, under the execution levied on the property in the hands of the legatee, acquires no title thereto.

Judgment—Reversal—Effect as to Purchaser—A purchaser, under an execution issued on a judgment which is afterwards reversed, shall not have his title impeached; but the injured party shall be restored to the money arising from the sale.

This was an action of detinue for slaves, brought in the District Court of Fredericksburg. On the plea of non detinet, a verdict was found for the plaintiff, and an appeal prayed to this court, upon exceptions 309 taken to the instruction given *to the jury by the District Court. The bill states. "That the defendant's counsel moved the court to instruct the jury, that the possession of the slaves in question not being proved to have been in the defendant at the date, or service of the writ, the law was for the defendant: That it was proved by the defendant, he was out of possession of the slaves before the date or service of the writ, and at all times since; and that the only evidence of a demand, was the writ. But the court instructed the jury that it was not necessary to maintain the issue on the part of the plaintiff, to prove possession in the defendant at the date, or

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*Detinue—What Plaintiff Must Prove.—In the action of detinue it is necessary that the plaintiff should aver and prove that he has title to the property, with present right of possession in himself, and actual possession by the defendant anterior to the bringing of the suit. And if the plaintiff proves an anterior possession in the defendant the burden is shifted, and it devolves upon the latter to prove that he has been legally dispossessed. Burns v. Morrison, 36 W. Va. 424, 15 S. E. Rep. 63, citing *Burnley v. Lambert*, 1 *Wash.* 308. See also, citing the principal case upon this question, Austin v. Jones, Gilm. 353, 354; Lynch v. Thomas, 3 Leigh 694; Allen v. Harlan, 6 Leigh 43; Catlett v. Russell, 6 Leigh 361, 367; Arthur v. Ingels, 34 W. Va. 643, 12 S. E. Rep. 874; Williamson v. Ringgold, 30 Fed. Cas. 29; Woodruff v. Bentley, 30 Fed. Cas. 522; monographic *note* on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

†**Legacies—Assent of Executor—Rights of Creditors—Parties.**—In the second headnote of the principal case it is held that after the assent of the executor to a legacy, the property is changed, and a creditor obtaining a judgment against the executor cannot levy an execution upon the property in the hands of a legatee; but he may pursue the executor at law, or follow the property in equity, making all the legatees parties. As bearing on this general subject, the principal case is cited in Woodley v. Abby, 5 Call 341; Lewis v. Bacon, 3 Hen. & M. 107; Gordon v. Justices of Frederick, 1 Munf. 17; Whitehorn v. Hines, 1 Munf. 585; Hopkirk v. Dennis, 2 Munf. 328; Gallego v. Attorney General, 3 Leigh 489; Nicholas v. Burruss, 4 Leigh 303; Burchard v. Wright, 11 Leigh 470; Davis v. Newman, 2 Rob. 667. The principal case is also cited in Hurst v. Morgan, 31 W. Va. 521, 8 S. E. Rep. 291; Wilcocks v. Phillips, 29 Fed. Cas. 1201. See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

service of the writ, but that proof of possession at a day anterior thereto, namely, on the day mentioned in the declaration was sufficient.

"That it was proved, that the defendant purchased the slaves in question, belonging to the estate of John Jones, at a coronor's sale, under an execution against the executors of the said John Jones, altho' the defendant was warned by the plaintiff of his title to the property. That the plaintiff (who intermarried with one of the legatees of the said John Jones) had received from the executors (upon a division of the said estate) the negroes in question, the same having been devised to his wife, by the will of the said Jones. That the personal estate of the testator (independent of the negroes in question) was fully sufficient to have satisfied the execution, but that the same had been distributed by the executors amongst the different legatees. That the defendant moved the court to instruct the jury, that the sale was a compleat transfer of the property to the defendant. But the court instructed the jury, that such sale was not a transfer of the property to the defendant, to which opinions the defendant excepted."

Warden for the appellant. Detinue will not lie, where the defendant has parted with the possession of the property, before the commencement of the suit. There can be no stronger evidence of this, than the judgment in such action, which is to recover the property itself, and damages for the detention, which could not be, if the defendant had not the property to deliver. He cited Southcotes case 4 Rep. 83—Bull. 49—51; the latter, to prove that the detainer is the gist of the action.

But 2dly, The title of a vendee under a sheriff's sale, cannot be questioned in any instance; for if it could, the inconvenience to the public would be indefinite, since no person would purchase from a sheriff, and thus executions, which are the life of the law, would be rendered entirely ineffectual. 3 Wills. 309, 1 Burr. 20—8 Co. 96—Cro. El. 278—Cro. Jac. 246—5 Co. 90b.

310 *Duval on the same side, insisted, that in an action of detinue, it was incumbent upon the plaintiff to prove a demand, and that the record in this case, shewed that none had been made.

Washington for the appellee. I will consider the last point made in the bill of exceptions first; and that is, whether the assent of the executor to a specific legacy, does not so compleatly vest the property in the legatee, and divest the executor of any legal right thereto, that it is not liable to be seised in execution to satisfy a judgment against the executor? This point has not been argued by the counsel on the other side, from a conviction, I presume, that it is too well settled to be now controverted. The creditor does not lose his remedy by this conduct in the executor; for he may either pursue the executor at law upon a devastavit, or follow the assets in equity against the legatees; and in this latter case, it would be essentially necessary to make them all parties, in order that they may all equally contribute to bear the burthen. But if the summary mode pursued by Burnley were permitted, suits in equity against legatees would never be heard of.

It is contended that a sale by a sheriff of A's property, taken under an execution against B, so compleatly divests the right out of A, that he cannot recover it in an action against the vendee. The case of Cooper and others v. Chitty and Backiston, 1 Burr 20, cited by the appellant's counsel, strikes me to be an authority as expressly against the doctrine, as could possibly have been brought forward. It would be monstrous if the law were otherwise. That case, as well as the others which have been cited, lay it down, that if the sheriff seize and sell, by authority, (as under a judgment which is afterwards reversed) the rightful owner is bound: but surely in the case just mentioned, or in the present, the sheriff does not sell by authority; because the writ, which is his warrant, directs him to levy the debt of the property of the testator in the hands of the executors.

As to the first point, there is more difficulty in it. But it will be sufficient for me to contend, that the defendant does not state upon the record a case sufficiently strong to bar the plaintiff, and of course the judgment ought not to be reversed. For tho' there may be a case, where detinue will not lie against a person out of possession, yet there are many cases, where it may lie. Thus, it will not lie where the defendant is lawfully dispossessed before action brought. But it will lie as Southcote's case proves, against a bailee, who is robbed before action brought, and in

311 *other instances there mentioned. So if the defendant make a fraudulent conveyance, or with a view to a secret trust, or indeed if he be dispossessed in any manner, unless by a legal recovery, I am inclined to think that this action will lie. Since therefore the case stated in the exceptions for the opinion of the judge, is not such an one, as will in all instances render this action improper (and such a case I contend ought to have been made out, not a doubtful, or uncertain one,) I submit it, whether the direction was not proper and legal. The verdict in detinue being in the alternative, is evidence of the law being so.

Marshall in reply. The pleadings are in general the best evidence of the law. Let us examine them. The declaration states a present possession and detention: the plea denies it in the present tense also, upon which issue the verdict is taken. Consequently, if the defendant be not in possession, or does not detain at that time, viz. at the time when the suit is brought, it is evident that this form of action is not sustainable. I admit that trespass or trover might lie. The direction of the judge is not such as is supposed by Mr. Washington. The exceptions do not state an uncertain case for the defendant, but the judge has,

even upon Mr. Washington's own ground, given an opinion clearly wrong. For he lays it down generally in his instruction to the jury, "that it is not necessary for the plaintiff to prove possession in the defendant when the suit is brought, but that proof of an anterior possession is sufficient." He does not qualify the opinion by speaking of a fraudulent dispossession, or of such an one as, it is contended, will not preclude this form of action, but he lays down the principle generally, which is unquestionably erroneous, since it would even apply to a case of dispossession produced by a legal recovery, in which case, it is admitted, this action would not lie. It is true, the verdict is in the alternative; but this does not arise from the possibility that the defendant may have parted with the property, and therefore cannot deliver it specifically. There are other sufficient reasons for that; for the property might perish, or be disposed of after action brought; and in such a case, it would be hard if the plaintiff could not get the alternative.

The PRESIDENT. The question is, whether the judge misdirected the jury upon both, or either of the points submitted to his opinion. If he did, then the verdict must be set aside, and a new trial awarded. A majority of the court are of opinion, that it was not a misdirection. Mr. Marshall's argument, *drawn from a critical examination of the declaration, plea, and verdict, would prove too much, and that gentleman knows the consequence. For it goes to shew, that the defendant must not only be in possession at the time of the writ issued, but that it must continue in him to the time of the plea, and indeed to the time of the verdict, all of them being in the present tense. The plea is the general issue, and leaves the whole merits of the case to be brought forward upon the trial.

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We come next to inquire what is necessary for the plaintiff to prove in this action? The books agree that he must prove a title in himself, and possession in the defendant; but as to the time at which the possession should appear to have been in him, whether at the date of the writ, or whether an anterior possession would be sufficient, the cases are totally silent.—This court agrees with the District Judge in declaring that the latter is sufficient, for otherwise the plaintiff might by contrivance be kept in a perpetual round of suits without effect. Thus A. finds B. in possession of his slaves which are refused to be delivered; he sets off to the clerk's office perhaps at a considerable distance for a writ. B. knowing of this, takes a witness to prove the delivery of possession to C. before the writ can issue; upon the trial, and after a tedious prosecution of the suit, this fact is made to appear, and A is defeated. He then sues C. who plays the same game, and so on, as often as persons can be found to take part in the fraud. This can never be right, and proof of possession prior to the suit ought to charge the defendant, unless he be legally evicted, which it is incumbent upon him to shew.

As to the next question which arises from an objection to the plaintiff's title, it requires very little consideration. It is true, that a testator should be just before he is bountiful; but if he can be both, who is to restrain him? And who is the proper judge of this ability, but his legal representatives, who by delivering up a specific legacy, acknowledge that ability in their testator.—After the assent of the executor, the legal property is completely vested in the legatee, and cannot at law be divested by the creditors. The creditors have a double remedy 1st, against the executors at law, in which case the executors have their remedy in equity against the legatees, to compel them to refund; or 2dly, the creditors may in equity pursue the estate in the hands of the legatees; and in either case, all the legatees must be made parties, that the charge may not fall upon one, but may be equally borne by the whole. But if this direct mode against a particular legatee were permitted, it *would put it in the power of the creditor, to mark out the person who should in the first instance sustain the whole weight.

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But a doctrine still more extraordinary was contended for at the bar: That the owner of the slaves in question lost his right thereto, by the seizure and sale of the coroner. Some of the cases, which were cited in support of this position, directly contradict it, and the others, such as Mathew Manning's case, only state, that where a judgment is reversed, the execution and sale under it, shall not be avoided, having been lawfully made, under authority; but that the party aggrieved shall be restored, not to the property, but to the money arising from the sale. But if an execution issue against the goods of A. and the sheriff seize and sell the property of B, will it be said that this is done by lawful authority, as in the other case? Surely not.

Judgment affirmed.

Cooke v. Beale's Executors.

October Term, 1794.

Special Bail—Surrender of Principal to Sheriff—Effect.—If the special bail, before or after judgment, surrender the principal to the Sheriff, his discharge is complete by the surrender, whether he return the receipt forthwith to the Clerk or not; and if any injury from an omission so to return it, result to the plaintiff, his remedy is by action against the bail.

Special Pleas—Conclusion—When Demurrable.—A special plea concludes thus, "and this &c." The et cætera cannot be construed to imply a verification, or a conclusion to the country, and is bad on special demurrer.

Appellate Practice—Refusal of Lower Court to Allow Amendment of Pleadings in Proper Case*—Effect.—If

*Amendment of Pleadings.—The principal case is cited on this point in Bowles v. Elmore, 7 Gratt. 389, which case also cites Graham v. Graham, 4 Munf. 205.

the inferior Court refuse leave to a party to amend his pleadings where it should be allowed, the appellate Court will reverse for that, as error.

The case was as follows: In April 1785 Beale recovered a judgment against Willis, for whom Cooke was special bail. Upon the return of a ca. sa. "not found," a sci. fa. issued against Cooke on the 18th of May following, who pleaded in bar, that on the 2d of November 1784, he rendered the body of the said Willis to the jail of the county of Frederick (where the writ was served) according to the act of Assembly in that case made and provided, and took a receipt, for the body of the said Willis, from the sheriff, in the following words: viz, received &c. and this &c.—To this plea the plaintiff demurred specially, stating for a cause thereof 1st, that the defendant doth not set forth in his plea, that he returned the receipt forthwith to the clerk of the court where the suit was depending: 2dly, because the defendant in his plea neither tenders an issue to the country, nor offers to verify his plea by the record. The County Court gave judgment for the plaintiff upon the demurrer. The defendant then moved to amend his plea on payment of costs by inserting these words: "That he forthwith lodged the receipt with the clerk of the court, agreeably to the act of Assembly in that case made and provided, and this he is ready to verify" which motion was over-ruled by the court. He then moved to have leave to put in a new plea which was likewise over-ruled. In 314 the record *is a certificate of the clerk of Frederick court, that the receipt mentioned in the plea was filed in his office on the 6th of May 1785.

Upon an appeal to the District Court, the judgment of the County Court was affirmed, from which the defendant appealed to this court.

Marshall for the appellant. The judgment against Willis was entered up in April 1785, and the sci. fa. issued in May of the same year. The surrender of the principal was in November 1784, and the receipt appears, from the record, to have been lodged with the clerk on the 6th of May 1785. The 1st question is, whether the appellant, was discharged, tho' the receipt was not lodged immediately with the clerk? And this will depend upon the construction of the act of Assembly, 5th Geo. III, C. 6. Upon the literal construction of the act, it is evident, that if the sheriff refuse to give the receipt, or if the receipt be not returned to the clerk, still the bail is discharged. The latter part of the 4th section, which says, "that the receipt shall be by the bail forthwith delivered to the clerk of the court where the suit is depending," is merely directory to the bail, who is discharged by the act of surrendering the principal, tho' he should fail to return the receipt. But if there be a doubt upon this clause, it is completely explained and removed by the 5th section which speaks of the right of a special bail to discharge himself by surrendering the principal, without qualifying that right by any condition whatever. The words are, "that where the special bail, in any action or suit, where judgment hath been, or shall be given, are or shall be entitled to discharge themselves by surrendering the principal, it shall and may be lawful for such bail to make such surrender, either before the court where judgment was obtained, or to the sheriff of the county, where the original writ in such suit was returned, and thereupon the bail shall be discharged:" So that the bail is discharged upon the surrender.

If I am right in giving to the act its literal exposition, I feel great confidence in saying that it is founded upon good reason. For it would be strange, if the sheriff, by refusing to give the receipt, should prevent the bail from relieving himself. If then the returning of the receipt forthwith is not a prerequisite to the bail's discharge, it was unnecessary to aver it in the declaration. But if I am wrong in my construction of the law, I then contend that the court should have permitted the defendant to amend his plea. He cited 1 Burr. 317—322. I admit that the court possesses a discretionary power in allowing 315 amendments, but *this is a legal discretion, and if it be improperly exercised, a superiour court will correct their judgment in this respect. It is to advance the justice of the case, that the defendant should be permitted to try the cause upon its merits.

As to the 2d cause of demurrer, I answer that the et cætera is tantamount to the tendering of an issue, for it will be construed to supply what the defendant ought to have added—the case of Sayer v. Pocock. —Cow. Rep. 407 is a strong authority as to this point.

Wickham for the appellee. There is an essential difference in reason, between a surrender before and after judgment. In the first case, the sheriff is not authorised to keep the body a moment after the judgment is rendered, unless the plaintiff pray him in custody. But in the latter case, the sheriff is to keep the body in the same manner, as he must have done, if he had been prayed in custody in the former case. This distinction will enable us the more clearly to give the law in question its true exposition. It is to be observed that the fourth section relates to a surrender before judgment; the 5th and 6th sections to a surrender after. If it be before judgment, and made in court, nothing farther is necessary for the bail to do; for this reason, because the plaintiff, who is supposed to be always in court, having notice of the surrender, may, if he chuse, pray the principal in custody, and therefore he cannot suffer but from his own neglect. But if the surrender be before judgment, and to the sheriff out of court, as the plaintiff is not presumed to have notice of what is done in pais, it is reasonable, and by this law, it is made an essential part of the duty of the bail, as a

condition of his discharge, that he forthwith return the receipt to the clerk, that the plaintiff may have notice of it, so as to pray the principal in custody. So much for the 4th section. But if the surrender be made after judgment, then the 5th section does not require a receipt to be returned; for this reason; because, by the 6th clause, the sheriff is directed in such case to keep the principal in his custody, in the same manner, and subject to the like rules, as are provided for debtors committed in execution, during the space of 20 days, &c. This, which I conceive to be the fair and liberal construction of the law, seems to be strongly supported by the reason and justice of the case. For were it otherwise, the sheriff and the debtor might, by collusion, defeat the plaintiff of his security by a surrender made out of court, and by keeping out of sight that sort of notice, which is required by the law to be given him, and which, if given, would en-
316 able him *to claim the body of the principal. Nay, this might happen without collusion. For the sheriff, not being bound to give the creditor notice of the surrender, the creditor would most frequently be ignorant of the fact till judgment was given, and the body discharged. It has been argued as a hardship on the other side, that the sheriff might refuse to give a receipt. To this I answer, 1st that the sheriff, in such case, would be liable to the bail, and 2dly the bail might avail himself of such refusal by pleading it, and would be excused; for it is a rule, that if an officer be bound and is required to do a particular act, his refusal shall not place the party for whose benefit it was to be done, in a worse situation, than if he had done it.

As to the 2d objection, the case relied upon from Cowper is not apposite to the present in any respect. The omission, there, was of words merely formal, and the question was made after a trial and verdict. The defect in this case is in a substantial part of the plea, and is specially demurred to. So that the statute of Jeofails, which might cure a great deal after verdict, cannot help even formal defects, if stated as cause of demurrer. But it is contended, that the et cætera must necessarily mean "and this he is ready to verify." But may it not as well mean a conclusion to the country?

As to the amendment: The motion was made after demurrer, argument and judgment thereon. I admit, that the discretion of the court in allowing amendments, is a legal one, and subject to the correction of a Superior Court, if improperly exercised. Yet I ask, will this court permit an amendment against the justice of the case. If the defendant in this case could claim it upon Mr. Marshall's principle, namely, that the cause might be tried upon its merits, then it might be always claimed as of right; and if so, a defendant who wished for delay, would always put in a frivolous plea, so as to force the plaintiff to demur, and, after taking that chance, claim the privilege of amending. If it be quite indifferent, whether the justice of the case favored the amendment asked for, (the reverse of which I think appears in the record) this court will presume that the Inferior Court did right, unless the party seeking to impeach their judgment, had stated enough upon the record to destroy this presumption. Besides, will this court do a vain thing? For if I am right upon first point, what good purpose could it answer to allow the amendment, since by correcting the plea according to the facts appearing in the rec-
ord, the defendant could not succeed.
317 *Marshall in reply. The 4th section of the law relates to surrender, both before and after judgment. Mr. Wickham contends for his exposition of the laws because otherwise the creditor might be entirely defeated of his security by not having it in his power to pray the principal in custody.

But if I can shew, that even his construction would not in every instance remedy the supposed inconvenience, then there can be no necessity, for giving the law that construction. Now it is to be recollected, that when that law was made, there was a General Court in Virginia, embracing the whole state within its jurisdiction. Of course, the surrender might be made in some remote county, far distant from the court, a day or two before the judgment was rendered. So that it would be impossible to return the receipt in time for the plaintiff to pray the principal in custody. In this case, therefore, the supposed inconvenience, which it is contended was meant to be prevented, would happen even upon Mr. Wickham's construction, and, since it is not presumable that the legislature would attempt a vain thing; so it is not to be supposed they meant it. The 6th section supposes that the creditor will in 20 days obtain notice of what is doing in pais, and therefore compels him to do so, under pain of losing his security. And why may he not also get notice by the same means, where the surrender is made before judgment? As to collusion, this may as well happen between the sheriff and the creditor, to prevent the surrender, as between the sheriff and the principal, or bail, in order to deprive the creditor of his security. So that we must at last resort to the literal meaning of the words, which seems plainly with the appellant.

This plea, if wrong, was most probably entered by the clerk, and is his mistake; for there appears in the record a letter from the defendant's attorney to the clerk, desiring him to plead a surrender generally, and the formal defect arises from his want of skill, and therefore ought to be amended.

The PRESIDENT delivered the opinion of the court.

The question upon the first point. depends upon the law, which has been so fully commented upon at the bar; and is this, whether the special bail be discharged by the surrender to the sheriff, without his

also returning forth with to the clerk the receipt obtained from the sheriff. The 4th section of the law upon which this question rests, points out two kinds of surrender; the first in court, upon which
318 the bail is discharged, *whether the directory part of the clause (which says that the defendant shall be committed to the custody of the sheriff) be complied with, or not. The other alternative is, "that such special bail may discharge themselves, by surrendering the principal to the sheriff of the county, where the original writ was served." The discharge of the bail therefore is compleat by the surrender, and the following parts of the clause are directory only, and do not impose a condition, the non-compliance with which can prevent the discharge. This appears the stronger, since it begins with a direction to the sheriff what he is to do with the prisoner, and then goes on to direct what the bail shall do with the receipt. And this construction is farther enforced by a view of the 5th and 6th sections, respecting surrenders after judgment. The 5th makes no distinction between a surrender in court, and a surrender to the sheriff out of court, as to the discharge of the bail. The 6th, without taking notice of the discharge of the bail, proceeds to direct what shall be done in the case of a surrender in the country. The sheriff is to keep the prisoner in custody for 20 days; and the bail is to give immediate notice to the creditor. So that in both cases of a surrender in the country, either before, or after judgment, the discharge of the bail is compleat, and the plaintiff has a new remedy, if the directory part be not complied with, either against the sheriff, if he fail in his duty, or against the bail, if he neglect to do what the law requires of him. The difference in these remedies is important; since in an action founded upon the directory part, the sheriff or bail would be let in to shew a reasonable excuse for not complying with the law, or to shew that no damage thereby arose to the creditor. But they might be precluded from these advantages upon the sci. fa. if the bail were considered as not being discharged.

The court have given their opinion upon this point for the satisfaction of the parties, and as it may prevent further litigation. As to the second cause of demurrer, we think that the plea is insufficient for want of a proper conclusion. An et cætera may be allowed to supply what must necessarily be inferred from what is expressed. But in this plea the words inserted will equally admit of a conclusion to the court or jury, and therefore the court cannot supply the words omitted by any necessary implication; besides this defect is specially demurred to.

But the court are clearly of opinion that the defendant ought to have been permitted to amend his plea upon payment of costs: and upon this point, the judgment is
319 to be reversed, and the cause *remanded to the District Court, with directions to admit such amendment. The parties will consider whether it be worth their while to prosecute the suit farther, after the decision of the court upon the first point in which the Judges are unanimous.

Turner v. Stip.

October Term, 1794.

Deeds—Execution—Proof*—Case at Bar.—If the proof, or acknowledgment, of a deed, made by a non-resident, of land lying in Virginia, be not certified according to law, though it should be admitted to record, it cannot be read in evidence as a recorded deed. But it will be sufficient at the trial, to prove the execution by one witness, though he be not a subscribing witness, if the subscribing witness be dead, or cannot be procured.

Same—Unrecorded—Effect between Parties.†—A deed, though not recorded, is valid between the parties.

This was an ejectment, brought by Stip in the County Court of Berkeley. The plaintiff at the trial, offered in evidence in support of his title, a deed from Benjamin Halsey and wife and Margaret Halsey to him, dated in June 1785; to which deed is annexed a certificate of two persons who stile themselves justices of the peace for the district of Camden in South Carolina, stating that the three subscribing witnesses to the deed had declared upon oath, made before them as justices aforesaid, that they saw the grantors sign seal and deliver the said deed to the said Stip as and for their act and deed.

That upon this certificate, the deed was admitted to record in Berkeley County Court, where the land was situated on the 19th of July in the year 1785. The plaintiff also produced upon the trial, a witness to prove the execution of the deed. The defendant objected to the evidence of the deed, because it had not been theretofore legally proved and legally recorded? and to the testimony of the witness, because it was improper to prove the execution of the deed by one witness only at that time. The court rejected the evidence of the deed, as well as of the witness, to which the plaintiff excepted. A verdict and judgment was given for the defendant from which the plaintiff appealed; the District Court reversed the judgment of the County Court from which the defendant appealed to this court.

***Deeds—Recordation—Validity.**—On the question as to what is a valid recordation of a deed, the principal case is cited in Currie v. Donald, 2 Wash. 58; Baker v. Preston, Gilm. 285; Ben v. Peete, 2 Rand. 548; Doswell v. Buchanan, 3 Leigh 379; Johnston v. Slater, 11 Gratt. 325, and *note*; Raines v. Walker, 77 Va. 95; Bowman v. Hicks, 80 Va. 809; Herring v. Lee, 22 W. Va. 672.

†Same—Unrecorded—Validity as between Parties.—For the proposition that, a deed, though unrecorded, is valid between the parties, the principal case is cited and approved in McCandlish v. Keen, 13 Gratt. 630; Raines v. Walker, 77 Va. 95. See monographic *note* on "Deeds" appended to Flott v. Com., 12 Gratt. 564.

Lee for the appellant. 1st, I shall insist that the deed in question, not having been legally recorded, is void. The act of 1748, 1st Geo. II. c. 1, declares, that no estate of inheritance shall pass, alter, or change, from one to another, unless by deed indented sealed and recorded, within a particular time, upon the acknowledgment of the parties to the deed, or upon proof of the execution thereof, by three witnesses. By the 4th section of the law, the deed is declared to be void as to all creditors and subsequent purchasers, unless the same be recorded according to the directions of the act. As to persons residing out of
320 this *state, that law provides no mode for proving deeds made by them, different from that which is prescribed as to residents. But the act of October 1776. Ch. 16 permits the deeds of nonresidents to be recorded, upon a certificate of two magistrates, that the deed was acknowledged before them, or proved by the oaths of three witnesses, with the testimonial of the governor of the estate where the deed is so proved, that the persons giving the certificates, are magistrates.—Now in this case, their being no such certificate by the governor, the deed ought not to have been admitted to record, and therefore is now to be considered as an unrecorded deed, and therefore void. For the act of 1748 declares all deeds, not recorded according to the directions of the act, void, except as between the parties, or those claiming under them, and the parties to this suit do not appear to be within the exception.

But 2dly, If the deed be not void, still the evidence produced at the trial to prove its execution was insufficient. The certificate of the probate in Carolina is not to be regarded as evidence at all, as the persons receiving the probate do not appear judicially to this court to have been magistrates agreeably to the act of Assembly, and consequently the deed has obtained no additional authenticity by having been admitted to record in Berkeley Court. To obviate this difficulty, the plaintiff produced one witness to prove the execution of the deed; to which there are two objections—1st, that one witness was not sufficient, the law of 1748 above referred to requiring three,—2d, if one witness were sufficient, yet he ought to have been a subscribing witness, and from this record it does not appear that he was, or if a subscribing witness could be dispensed with, it could only be by proving that they were all dead, or could not be procured, and this should have been stated upon the record.

Washington for the appellee. The first point in this cause depends upon the true exposition of the act of 1748, which has been read. The first and 4th clauses must be considered together. The first declares, that "no estate of inheritance, or any estate for life shall pass, alter, or change from one to another, by deed, unless the same be made in writing, indented, sealed and recorded in manner following," &c. And then it goes on to limit the time of recording the deeds of residents, and of non-residents, and concludes with declaring, that "no such deed shall be admitted to record unless the same be acknowledged in court by the grantor, to be by his act and deed, or else that proof thereof be made in open court by the oath of three witnesses."
321 *The 4th clause declares, that "all such deeds shall be void as to all creditors and subsequent purchasers, unless they be acknowledged, or proved and recorded according to the directions of this act, but the same, as between the parties; shall nevertheless be valid and binding."

Now the true construction of the clauses taken together seems to be this. To pass a freehold interest, the deed must be recorded, and to give it validity against creditors and subsequent purchasers, the deed must also be recorded according to the directions of the act; that is to say, upon the acknowledgment of the grantor or proof by three witnesses, within eight months, in the cases of residents, and within two years in those of non-residents. But in all cases except where creditors and subsequent purchasers are concerned, tho' the deed must be recorded, it need not be recorded according to the directions of the act. The reason of the distinction is apparent. As between the parties or those claiming under them, it is of little consequence, how, or when the deed be recorded; but it is highly important as to creditors and purchasers, who may be affected by relation to the date of a deed, tho' it be not recorded until after they had given credit or made the purchase.

In this case then, the deed in question was recorded, tho' not according to the directions of the act, and is valid under the 4th clause, the defendant below not appearing to be a subsequent purchaser or creditor.

If this be the true exposition of the law, the deed must be considered as valid; and if so, the second objection cannot be maintained. Three witnesses are necessary to prove a deed, to entitle it to be recorded, and therefore I admit that the deed itself, or a copy certified to have been proved by less than that number of witnesses, could not be received as evidence in any court; because if this sort of evidence, which the statute authorises, be resorted to, the statute must be pursued. But surely the proof of the deed at the trial by one witness, is as good as if it had been proved by twenty. For at common law, one witness would be sufficient to prove the execution of a deed, and the act of 1748, which requires three, relates entirely to the proof necessary to admit the deed to record, and not to the evidence necessary in legal trials. As to the objection to the witness himself, it admits of two answers. 1st, That if he were not a subscribing witness, yet it is no good objection to his testimony, the law not requiring the witnesses to a deed to subscribe their names, as the statute respecting
322 wills does; and this will *account for the necessity of producing the sub-

scribing witnesses to prove a will. 2dly, It is not sufficient to suggest possible exceptions to the witnesses, but they should appear to be stated upon the record. It is the business of the appellant to state, and also to prove the ground of his objections, and it is not incumbent upon us, to shew that the witness was properly admitted; since this will be presumed until the contrary appears.

The PRESIDENT. Upon the first point, the court are of opinion, that the deed offered in evidence was neither legally proved, nor legally recorded under the act of 1776, C. 16, because it wanted the governor's testimonial, that the persons who certified the probate were magistrates. The court below would therefore have done right in rejecting this as a recorded deed, in support of the plaintiff's title. But since by the act of Assembly passed in the year 1748, such deeds, though not recorded, are valid between the parties, though void as to creditors and subsequent purchasers, (neither of which the defendant is stated to have been,) the actual execution of the deed was a fact which the plaintiff was at liberty to prove, as in other cases by evidence satisfactory to the jury, whether it were by one or more witnesses. As to the objection, that the witness does not appear to have been a subscribing witness, and that none other could properly be admitted, the answer is, that the act does not require the three witnesses to a deed to subscribe their names, as in the case of wills. But another sufficient answer to the objection is, that it does not appear that he was not a subscribing witness, nor that the subscribing witnesses might not have been proved to be dead. The court improperly stopped the examination, and therefore the District Court rightly reversed the judgment.

Judgment of the District Court affirmed.

Boswell & Johnson v. Jones.*

October Term, 1794.

Trespass against Two—Verdict of Guilty as to One—Right to New Trial.†—In trespass against two, if one be found guilty, and the other be acquitted, a new trial cannot be awarded on the motion of the convicted defendant.

New Trials—When Grounds Should Be Stated.‡—Although, in general, the inferior Court need not state the facts on which they ground their opinion in granting a new trial, yet where they grant it against an established rule of practice, they ought to disclose the circumstances which induced them to depart from the rule.

Same—Costs.§—It is error to grant a new trial except upon the terms of paying the costs.

This was an action of trespass, brought by Jones against the appellants, in the District Court, who pleaded jointly, 323 *not guilty. A verdict was rendered against Johnson for £15, and the defendant Boswell was found not guilty. Upon the motion of Johnson alone, a new trial was awarded, and a verdict was afterwards found, for £60, against both defendants. A motion in arrest of judgment being made by Boswell, and over-ruled, both defendants applied for, and obtained a supersedeas to the judgment of the court, rendered upon the last verdict.

The plaintiff's in error, being both dead, it was submitted to the court, whether a new supersedeas, or writ of error, should be awarded, or whether a sci. fa. to revive the former ought to issue; and, in the latter case, whether it should be revived in the names of the executors of both plaintiffs, or of the survivor only. The court being of opinion, that a sci. fa. should issue in the names of the executors of both the plaintiffs, the counsel for the defendant consented to revive without a sci. fa. actually issuing, and now the cause came on to be argued upon the objections to the judgment of the District Court.

Washington for the plaintiffs, insisted, that where one defendant is acquitted by the verdict, the court cannot grant a new trial upon the motion of the other defendant, and referred to the following authorities, 2 Str. 813—12 Mod. 275—2 Blac. Rep. 1030—3 Salk. 362.

Wickham for the defendant. The rule

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*For monographic note on New Trials, see end of case.

†**New Trials—Effect Where One of Two Is Convicted.**—In the first headnote of the principal case it is held that, in trespass against two, if one be found guilty and the other acquitted, a new trial cannot be awarded on motion of the convicted defendant.

In Guerrant v. Tinder, Gilm. 36 (citing the principal case at page 41), it is held, in an action of malicious prosecution against several defendants some of whom were found not guilty, on motion for a new trial, by those found guilty, because the evidence for them was improperly excluded, a new trial will be given, as to those found guilty only.

In Kemp v. Com., 18 Gratt. 978, the rule laid down in the principal case is quoted. That case (Kemp v. Com.) holds that where several persons are tried for the same felony, are found guilty, the court may grant a new trial to one of them, and render a judgment against the others.

And in Tracy v. Cloyd, 10 W. Va. 19 (citing the principal case at page 33), it was held, in an action of trover and conversion against two, where the defendants appear and file a joint plea of not guilty and issue is thereon joined, it is competent for the jury to acquit one of the defendants and find the other guilty and assess damages against him.

‡**Same—When Grounds Should Be Stated.**—Where a court grants a new trial against an established *rule of practice* they ought to disclose the circumstances which induced them to depart from the rule. As bearing on this question, see the principal case cited in Lomax v. Hord, 3 Hen. & M. 277; Claiborne v. Henderson, 3 Hen. & M. 376.

§**Same—Costs.**—For the proposition that the party to whom a new trial is granted is liable for the costs, the principal case is cited in Macy v. DeWolf, 16 Fed. Cas. 360. See monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

contended for, considered as a general one, cannot upon principle be found. It is possible, that the jury may erroneously find a verdict against the wrong defendant. They may in writing their verdict, by mistake, convict the defendant, whom they intended to acquit.

In such a case it would neither be just nor reasonable, that the court should not have a power of setting aside the verdict. And if there be a possible case, where it would be proper to set aside such a verdict, it is enough for my purpose, because this court presuming, as they ought, every thing in favor of the judgment of the Inferior Court, will not reverse that judgment, unless the record exhibit such a case, as to authorise them in saying, that the Inferior Court decided erroneously. If the Inferior Court might, or might not award a new trial, according to the circumstances of the case, the party attempting to impeach their decision in granting it, ought to have spread upon the record those circumstances, which might satisfy this court, that this was a case in which the verdict ought not to have been set aside.

324 *As to the authorities which have been cited, I would premise my observations upon them with this remark: That upon no subject have the adjudications varied so materially, as upon that of new trials. It is considered as a part of practice, and to be controlled by the court in such a manner, as best to answer the ends of substantial justice; and if the English courts have considerably changed the doctrine of new trials, so as to render it more perfect, and more consistent with the real principles of justice, why may not this court exercise the same power over the subject, if they are satisfied, that the rule now contended for be unreasonable? The cases from Strange and Blackstone, are merely obiter opinions. 3 Salk. is not authority—in the case from 12 Mod. the court say, they cannot grant a new trial except against all, which rather proves, that they might grant it against all, if the justice of the case required it.

Washington in reply. It is to be observed, that the motion for a new trial in this case was not made by the plaintiff, but by one of the defendants. If this were permitted, the acquitted defendant being out of court, it would be in the power of the other, without any authority, to put the successful defendant into jeopardy again, by stating a hardship as to himself, when the other defendant might not be present, nor have it in his power to shew that the verdict as to him was proper. I hold it to be sound law, that the court cannot set aside a verdict but upon motion, and this motion was not made by the plaintiff, nor by Boswell, but by Johnson, who had no more authority to make it for Boswell, than a stranger would have had; and surely it would have been as much an error to set aside the verdict upon the motion of a stranger, having no authority, as if the court had done it without any motion at all. So that the authorities cited, which stand uncontradicted, are fortified by the strongest reason. But if they were not, I trust that law is bottomed upon more solid and certain grounds, than the mere opinion of the judge, upon what is right, or wrong; reasonable, or otherwise; and known only when that opinion is pronounced.

If the rule, which is so firmly settled by the authorities before referred to, can be varied or destroyed, according to the opinions of different Judges who may decide upon it; with equal propriety may they unsettle every other rule of law, which does not meet their approbation. A position big with mischief! The principle decided in the case from Salk. tho' not directly determined in Str. and Black. is fully recognized, and admitted to be well founded.

325 *The PRESIDENT. The cases cited prove, that in trespass against two defendants, if one be found guilty, and the other be acquitted, a new trial cannot be granted on the motion of the convicted defendant, and a majority of the court are of opinion, that the rule is not without reason, since the plaintiff being satisfied, it ought not to be in the power of the convicted defendant to bring his co-defendant into jeopardy again, by obtaining a new trial. Upon authority, the rule is fixed. One judge doubted as to the reason of it, since the ground of new trials being to attain real justice, if the court perceive that injustice has been done in the acquittal of one defendant, upon principle it would seem right to grant a new trial, from whomsoever the motion might come. And as to authority, the same judge is of opinion, that tho' uniform decisions which establish the rules of property ought to be adhered to, yet he does not view them as sacred in points of practice, which may be varied as experience shall evince their convenience or inconvenience. But the court are unanimously of opinion, that tho' in general, the subordinate courts need not state the facts on which they ground their opinion for a new trial, yet in this case, where they granted it, against an established rule of practice, they ought to have disclosed the circumstances which induced them to depart from that rule. We are also of opinion, that the District Court erred in awarding a new trial without payment of costs.

The judgment, and all proceedings from the granting of the new trial inclusive, is to be reversed with costs. Judgment to be entered against Johnson for the damages assessed by the first verdict and costs, and to be entered for Boswell for his costs.

NEW TRIALS.

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Cross References to Monographic Notes.

Appeal and Error, appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.
Arguments of Counsel, appended to Coleman v. Com., 25 Gratt. 865.
Assumpsit, appended to Kennaird v. Jones, 9 Gratt. 183.
Bills of Exception, appended to Stoneman v. Com., 25 Gratt. 887.
Bills of Review, appended to Campbell v. Campbell, 22 Gratt. 649.
Debt, The Action of, appended to Davis v. Mead, 13 Gratt. 118.
Ejectment, appended to Tapscott v. Cobbs, 11 Gratt. 172.
Homicide, appended to Souther v. Com., 7 Gratt. 673.
Instructions, appended to Womack v. Circle, 29 Gratt. 192.
Issue Out of Chancery, appended to Lavell v. Gold, 25 Gratt. 473.
Judgments, appended to Smith v. Charlton, 7 Gratt. 425.
Juries, appended to Chahoon v. Com., 20 Gratt. 733.
Jurisdiction, appended to Phippen v. Durham, 8 Gratt. 457.

I. DEFINITION.

A new trial is a rehearing of the legal rights of the parties, upon disputed facts, before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose. Bouv. Law Dict.

II. GROUNDS FOR NEW TRIAL.

1. EXCESSIVE DAMAGES.

Passion or Prejudice Must Influence Jury.—While, under sec. 3392 of the Virginia Code, the question as to a new trial, where the damages are excessive or inadequate, is under the control of the court, yet the verdict will not be disturbed unless it shows that the jury were actuated by passion, prejudice, or undue influence. Bertha Zinc Co. v. Black, 88 Va. 303, 13 S. E. Rep. 452; Bailey v. McCance, 2 Va. Dec. 630; Sweeney v. Baker, 13 W. Va. 158.

Personal Injury Cases.—There is no legal measure of damages in personal injury cases, and their estimation is peculiarly within the province of the jury, who are deemed especially competent to determine such matters. It is well settled that the court will not disturb the verdict and grant a new trial in such a case, unless the amount allowed is so great as to evince prejudice, partiality, or corruption on the part of the jury, or to show that they were misled by some mistaken view of the merits of the case. Farish v. Reigle, 11 Gratt. 697; Norfolk, etc., Ry. Co. v. Shott, 92 Va. 48, 22 S. E. Rep. 811; Richmond Ry., etc., Co. v. Garthright, 92 Va. 635, 24 S. E. Rep. 267; Norfolk v. Johnakin, 94 Va. 287, 26 S. E. Rep. 830; Virginia Mid. R. R. Co. v. White, 84 Va. 508, 5 S. E. Rep. 573; Norfolk, etc., R. Co. v. Anderson, 90 Va. 9, 17 S. E. Rep. 757; Norfolk, etc., R. Co. v. Ampey, 93 Va. 137, 25 S. E. Rep. 226; Trice v. Chesapeake, etc., R. Co., 40 W. Va. 277, 21 S. E. Rep. 1025; Boster v. Chesapeake, etc., Ry. Co., 36 W. Va. 324, 15 S. E. Rep. 160. See also, Vinal v. Core, 18 W. Va. 1.

Where Exemplary Damages Are Proper.—Where the case is one in which the jury might properly and legally award exemplary damages the verdict will not be set aside on the ground that the damages are excessive, unless they are so enormous as to furnish evidence of partiality, passion, corruption, or prejudice on the part of the jury. Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 485.

Where Exemplary Damages Are Improper and Jury Award Them Verdict Will Be Set Aside.—Where it is clear, upon the facts proven by evidence introduced before the jury, that it is not a case where the jury could legally award exemplary damages, and it is obvious from their verdict that the damages must have included exemplary damages, it is the duty of the court, on the motion of the plaintiff, to set aside such verdict and award a new trial. Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 485.

Verdict for More Than Claimed—Release of Excess.—A verdict for more damages than claimed should be set aside and a new trial awarded unless the plaintiff will release the excess of damages recovered. Gibson v. The Governor, etc., 11 Leigh 600; Cloud v. Campbell, 4 Munf. 214; Tennant v. Gray, 5 Munf. 494; Hook v. Turnbull, 6 Call 85.

Verdict for More Than Claimed in Writ but for Less Than Laid in Declaration.—But a new trial will not be granted after a verdict, because the amount of

damages assessed by the verdict exceeds the amount claimed in the writ, where they do not exceed the amount laid in the declaration. Roderick v. Railroad Co., 7 W. Va. 54.

When Release of Portion of Damages by Court is Improper.—Where the court is justified in setting aside the verdict because of excessive damages allowed by the jury, it is error in the court to allow the plaintiff to elect to take a less sum suggested by the court, when there is no data before the court by which the smaller sum could be rightly and definitely ascertained, but which is fixed by the discretion of the court unaided by the evidence. Unfried v. Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. Rep. 512. See also, Vinal v. Core, 18 W. Va. 1.

Where Verdict, in Action on Contract, Is Contrary to Evidence in Giving Excessive Damages.—Where the damages awarded in an action on a contract are substantially in excess of the amount justified by the evidence, the court will award a new trial, though it is claimed that the motion for the new trial did not request the setting aside of the verdict on that ground. Rowland Lumber Co. v. Ross (Va.), 40 S. E. Rep. 922.

Objection as to Damages Cannot Be Made for First Time on Appeal.—Where a bill of exceptions, taken by the defendant in the trial court, to the opinion of that court in overruling a motion for a new trial, does not shew that the objection was taken to the damages given by the jury as excessive, the objection cannot be made for the first time on appeal. Law v. Law, 2 Gratt. 366.

Instances of Verdict Objected to as Excessive.—$5,000 is not excessive damages in an action for death by a wrongful act against a railroad corporation. Dimmey v. Railroad Co., 27 W. Va. 32.

Verdict for $1,600 for damages caused by fires set from a locomotive will not be set aside as excessive where witnesses who examined the damage estimated it as more than twice that amount. Norfolk, etc., R. Co. v. Draper, 90 Va. 245, 17 S. E. Rep. 883.

In Bertha Zinc Co. v. Black, 88 Va. 303, 14 S. E Rep. 452, it was held error to set aside a verdict of $10,000 rendered in an action for death by wrongful act, and the appellate court entered judgment on this verdict and did not notice the proceedings on the second trial.

Where it appears, that the jury assessed more than $100 in excess of what the evidence, which is all certified, warrants, the judgment will be reversed with costs, and the verdict set aside, and a new trial granted. Morgan v. King, 28 W. Va. 1. See, on this subject, monographic *note* on "Damages" appended to Norfolk, etc., R. Co. v. Ormsby, 27 Gratt. 455

2. INADEQUACY OF DAMAGES.

At Common Law.—Smallness or inadequacy of damages seems not to have been ground for a new trial at common law, at least in actions of trespass, for the reason that actions of trespass *vi et armis* were considered as being analogous to prosecutions for crime, as to which it is an admitted doctrine that, while a new trial may be granted upon the application of the accused, upon the ground that the punishment inflicted by the jury is too great, no such application is allowed on the part of the commonwealth because the penalty assessed by the jury is too small. Jackson v. Boast, 2 Va. Cas. 49, and *foot-note*: Rixey v. Ward, 3 Rand. 52; Humphreys v. West, 3 Rand. 516.

By Statute.—In Virginia, a statute has been passed which provides that, "in any civil case or proceeding, the court before which a trial by jury is had may grant a new trial unless it be otherwise specially provided. A new trial may be granted as well where the damages awarded are too small as where they are excessive." Va. Code, sec. 3392; Rixey v. Ward, 3 Rand. 55; Watterson v. Moore, 23 W. Va. 406; Moses v. Old Dominion, etc., Co., 82 Va. 29; 4 Min. Inst. (3d Ed.) 930; Norfolk, etc., R. Co. v. Shott, 92 Va. 34, 22 S. E. Rep. 811.

When a new trial is granted under this statute it is not necessary to state on the record the ground for awarding it, since it will be presumed that the order of the court, upon a subject appearing to be clearly within its jurisdiction, is correct unless the contrary appears. Rixey v. Ward, 3 Rand. 55.

In Action for Defamation.—The court will set aside a verdict rendered by the jury in an action for slander where the damages allowed are plainly inadequate. Thus in a case in which the plaintiff, a girl of unblemished character, brought a suit for damages against one who had made gross charges of unchastity against her, the court set aside the verdict of the jury giving her five dollars and costs and awarded a new trial. Blackwell v. Landreth, 90 Va. 748, 19 S. E. Rep. 791. In this case it was said by the court that, "It is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and implies no dubious conviction of their prejudice and passion, that the courts have found themselves compelled to interfere. This is a striking illustration of this rule; a more striking can perhaps not be found. It is so obviously inadequate and unjust as to call for the interference of an appellate court." See monographic *note* on "Libel and Slander" appended to Bourland v. Eidson, 8 Gratt. 27.

3. SURPRISE.

Different Testimony by Adverse Witness on Second Trial.—Where, on the second trial of a case, the defendant calls upon the plaintiff to testify upon a point provable by no other witness, and his testimony differs materially from his testimony at the first trial upon the same point, such variance is a surprise to the defendant, and is therefore a circumstance proper for the consideration of the court upon a motion for a new trial. Brown v. Rice, 76 Va. 629.

Where Evidence Is Closed during Temporary Absence of Party.—Where a party left the court room during the trial, to go three squares to procure the attendance of a witness, who was indisposed and was stopping at a hotel, without asking the court to wait for his return, or stating that they desired to offer other evidence, and it did not appear but that the evidence was closed with their consent, it was held that a new trial would not be granted upon the ground of surprise. Thompson v. Updegraff, 3 W. Va. 629.

Trial by Special Judge in Absence of One Party.—Where the plaintiff allows the case to sleep upon the docket for a great length of time, and, when the regular judge of the court is disqualified to try it, causes a special judge to be elected, who tries the case in the absence of the defendant, this is a sufficient ground for a new trial, as it is not the duty of the defendant to be constant in his attendance upon the court, when he knows that there can be no trial unless some proceedings out of the usual course are had in respect to the court. Bennett v. Jackson, 34 W. Va. 62, 11 S. E. Rep. 734.

Trial at a Different Date Than That Agreed upon.—In a case in which the plaintiff's and defendant's counsel and the judge before whom the case was to be tried, agreed that the trial should take place on Tuesday, and the trial took place on Monday before a special judge and in the absence of the defendant and his counsel, it was held that a new trial should be awarded upon the ground of surprise. Simpkins v. White, 48 W. Va. 200, 27 S. E. Rep. 241.

Trial before Defendant Has Filed Offsets—Negligence of Defendant in Filing.—In a case in which an action of assumpsit had been pending four years, and in which the court rendered judgment for the plaintiff, the defendant applied for an injunction to the judgment, on the ground that he had offsets which he intended to plead, but that, owing to the sickness of his family at the time the court sat and for some time prior thereto, he was not able to attend the court or prepare for trial, and that his counsel to whom he had communicated his defence was also absent. It appeared that the offsets were neither pleaded or filed, and though one of the defendant's counsel was present, no application for a continuance was made, nor was any affidavit filed upon which an application could have been based. It was held that there was no ground for an injunction and new trial. Griffith v. Thompson, 4 Gratt. 147.

Indictment for Obstructing Road—Mistake as to Point Where Obstruction Was Charged to Be.—On the trial of an indictment for obstructing the public road, it is no reason for a new trial on the ground of surprise, that the defendant was mistaken as to the point where the obstruction was charged to be, and so was not prepared to defend himself. Wholford v. Com., 4 Gratt. 553; Dimmey v. Railroad Co., 27 W. Va. 55.

Absence of Material Witness.—That a material witness for the prisoner is absent is no ground for a new trial, where the facts which the prisoner states the witness could have proved, are deposed to by other witnesses who are examined. Young v. Com., 4 Gratt. 550.

Mistake of Counsel on Question of Law.—A new trial will not be granted upon the ground that a party was surprised at the trial, where the surprise arises from a mistake of the counsel upon a question of law. Law v. Law, 2 Gratt. 366.

False Statements by Defendant Made in Plaintiff's Absence.—In a case in which certain property levied on by the defendant was claimed by the plaintiff under a previous execution sale, against the debtor in the defendant's execution, the action was tried on the first day of the term in the plaintiff's absence and the court refused a continuance to enable him to be present. Written evidence of plaintiff's title was produced, to avoid which the defendant testified to certain statements made by the plaintiff that the property had been released to the execution debtor, which had induced him to make the levy. A verdict having been rendered for the defendant, the plaintiff filed his affidavit, showing that he started to the courthouse in time for the trial, and that his absence was due to the delays in the railroad trains, and their failure in making connections; that he never made the statement sworn to by the defendant; that he owned the property, and had never released it; that in the alleged statements he was referring to other matters; and that he would testify accordingly. It was held that a new trial should be granted. Smith v. Rawlings, 83 Va. 674, 3 S. E. Rep. 238.

Surprise Caused by Unexpected Evidence.—When a plaintiff suffers a verdict and judgment to go against him at law, he cannot apply to a court of equity for new trial, on the ground of his having been surprised at the trial at law by unexpected evidence, unless he was prevented by fraud or accident from suffering a nonsuit. Oswald v. Tyler, 4 Rand. 19.

Exclusion of Evidence.—A new trial should be granted, with leave to amend the pleadings so as to present the real merits of the controversy, where it appears that the party was surprised by the exclusion on the second trial of evidence which had been admitted at the first trial without objection, whereby a recovery had been obtained far exceeding the real damage. Knifong v. Hendricks, 2 Gratt. 212, and *foot-note*, 44 Am. Dec. 385.

4. ACCIDENT AND MISTAKE.

Mistake of Judgment by Counsel.—Mistake of judgment, or want of attention or capacity of counsel, afford no just grounds for granting a new trial. Smith v. Parkersburg, etc., Ass'n, 48 W. Va. 232, 37 S. E. Rep. 645.

Mistake as to Conclusiveness of a Defence.—An executor, being sued on a bond of his testator of more than twenty years' standing, was advised by his counsel to rely on the presumption of payment arising from the lapse of time. Acting upon such advice, he neglected to fortify this defence by other testimony which he could have procured. In consequence of evidence given by one of the jurors given in the jury-room, a verdict was found against him. His motion for a new trial upon this ground being overruled, he applied to a court of equity and obtained a new trial on the ground of accident and mistake. Price v. Fuqua, 4 Munf. 68.

Mistake in Verdict.—In Woods v. Macrae, 1 Wythe 258, a new trial was awarded for a mistake in the verdict which the jurors were examined to prove.

In ejectment, the court should hold a stricter course towards plaintiffs moving for new trials than towards defendants. But where, in such case, a verdict in favor of the defendant is founded in mistake, and is for that reason liable to produce an injustice, it is both the right and the duty of the court to grant a new trial. Deems v. Quarrier, 3 Rand. 475. See also, monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

5. NEWLY-DISCOVERED EVIDENCE.

a. IN GENERAL.—Courts, both of law and equity, sometimes grant new trials on the ground of after-discovered evidence, but always with great reluctance and never except under special circumstances, which may be summed up thus: (1) The evidence must have been discovered since the trial; (2) it must be evidence that could not have been discovered before the trial by the exercise of reasonable diligence; (3) it must be material in its object and such as ought on another trial to produce a different result on the merits; and (4) it must not be merely cumulative, corroborative, or collateral. Wynne v. Newman, 75 Va. 811; Baccigalupo v. Com., 33 Gratt. 807; Read v. Com., 22 Gratt. 924; Thompson v. Com., 8 Gratt. 637, and *foot-note*; St. John v. Alderson, 32 Gratt. 140; State v. Betsall, 11 W. Va. 703; Halstead v. Horton, 38 W. Va. 727, 18 S. E. Rep. 953; Bennett v. Com., 8 Leigh 745; Lewis v. McMullin, 5 W. Va. 583; Whitehurst v. Com., 79 Va. 561; Field v. Com., 89 Va. 694, 16 S. E. Rep. 865; Gillilan v. Ludington, 6 W. Va. 145; Carder v. Bank, 34 W. Va. 41, 11 S. E. Rep. 717; State v. Hobbs, 37 W. Va. 824, 17 S. E. Rep. 385; Zickefoose v. Kuykendall, 12 W. Va. 23;

Brown v. Speyers, 20 Gratt. 296; Adams v. Hubbard, 25 Gratt. 135; Cody v. Conly, 27 Gratt. 324; Grayson v. Buchanan, 88 Va. 258, 13 S. E. Rep. 457; Akers v. Akers, 83 Va. 633, 8 S. E. Rep. 260; Smith v. Watson, 82 Va. 712, 1 S. E. Rep. 96; Tate v. Tate, 85 Va. 205, 7 S. E. Rep. 352; Kern v. Wyatt, 89 Va. 885, 17 S. E. Rep. 549; Roderick v. Railroad Co., 7 W. Va. 54.

b. MUST HAVE BEEN DISCOVERED SINCE TRIAL.—A motion for a new trial upon the ground of after-discovered evidence should not be granted unless it appears that the evidence was discovered after the trial. City of Norfolk v. Johnakin, 94 Va. 285, 26 S. E. Rep. 830; St. John v. Alderson, 32 Gratt. 140; Wynne v. Newman, 75 Va. 817; Whitehurst v. Com., 79 Va. 559; Roderick v. Railroad Co., 7 W. Va. 54.

c. NECESSITY FOR EXERCISE OF DILIGENCE BEFORE TRIAL.—Where, with the exercise of ordinary diligence, all the evidence might have been procured before the trial, it would encourage negligence to grant a new trial, and it is well settled that under such circumstances a new trial will never be granted. Arthur v. Chavis, 6 Rand. 141; Smith v. McLain, 11 W. Va. 654; Corey v. Moore, 86 Va. 721, 11 S. E. Rep. 114; De Lima v. Glassell, 4 Hen. & M. 369; Strader v. Goff, 6 W. Va. 257; Lucas v. Locke, 11 W. Va. 81; Nadenbousch v. Sharer, 4 W. Va. 203.

Evidence Not Produced because Witnesses Believed to Be Hostile.—A new trial on ground of newly-discovered evidence will not be granted for evidence known before the trial, but omitted because the witnesses were believed to be hostile. Norfolk, etc., R. Co. v. Draper, 90 Va. 245, 17 S. E. Rep. 883.

Suit for Freedom—Inability to Procure Evidence.—Where a pauper suing for his freedom could not obtain his testimony in the first trial, equity gave relief by granting a new trial at law. Isaac v. Johnson, 5 Munf. 95.

Ignorance of Defence in Action against Surety.—A new trial ought not to be awarded by a court of equity because of after-discovered evidence, unless such evidence ought to produce a different verdict, and unless it was prevented from being produced on the trial at law by fraud or by ignorance unmixed with negligence. Therefore a surety cannot rely on his ignorance of a substantial defence known to his principal, unless he alleges in his bill and proves that he took proper steps to ascertain from his principal or otherwise a true state of the case, or that he was prevented from so doing by circumstances over which he had no control. Sayre v. King, 17 W. Va. 562.

Negligence in Summoning Witnesses.—Where the defendant only asks one witness to attend the trial, and sends a summons by a servant to another, which reaches him on the day of the trial at such a distance from the court where the cause is being tried that it is impossible for him to attend, this is such gross negligence as will prevent him from obtaining a new trial upon the ground that the evidence of the absent witness was newly discovered. Hoomes v. Kuhn, 4 Call 274.

Effect of Failure to Move for Continuance.—If a party believes that he can procure other testimony, he should move for a continuance of the cause, and not wait until there is a verdict against him, and then bring it forward as ground for a new trial, after having taken his chance with the jury. Gordon v. Harvey, 4 Call 450.

d. PROBABILITY OF PRODUCING DIFFERENT RESULT.

General Rule.—A court should never set aside a verdict and grant a new trial upon the ground of after-discovered evidence, unless the evidence is such that, on the granting of the new trial, its introduction ought to produce a different result. Hall v. Lyons, 29 W. Va. 410, 1 S. E. Rep. 582; Field v. Com., 89 Va. 690, 16 S. E. Rep. 865.

Immaterial Facts Concerning Robbery.—As evidence showing that the accused and his companion assailed a party at a stated time and that the companion held the party whilst the accused took from his person a pocket-book of the value of fifty cents, containing $15 in currency, is sufficient to warrant a conviction of robbery, where these facts are established, a new trial will not be awarded for newly-discovered evidence that a witness who had testified at a trial, since remembered that the scene of the robbery was examined by lamplight and not by moonlight. Wheeler v. Com., 86 Va. 658, 10 S. E. Rep. 924.

That Evidence May Have Been Given in Mitigation of Damages Is Not Sufficient.—Where it does not appear that the newly-discovered evidence would have gone to the merits of the case if it had been in evidence upon the former trial, it is no ground for a new trial that it would have been proper to have been considered by the jury in mitigation of damages. Nadenbousch v. Sharer, 4 W. Va. 203.

e. MUST NOT BE MERELY CUMULATIVE OR CORROBORATIVE.

Generally.—To entitle one to a new trial upon the ground of after-discovered evidence, the evidence must be material and not merely cumulative or corroborative, and must not be such as ordinary diligence might have previously discovered. Booth v. McJilton, 82 Va. 827, 1 S. E. Rep. 137; Whitehurst v. Com., 79 Va. 556; Cody v. Conly, 27 Gratt. 313; Bond v. Com., 83 Va. 581, 3 S. E. Rep. 149; Tate v. Tate, 85 Va. 205, 7 S. E. Rep. 352; Smith v. Watson, 82 Va. 712, 1 S. E. Rep. 96; Nuckols v. Jones, 8 Gratt. 267; Harnsbarger v. Kinney, 13 Gratt. 511, and *foot-note*: Hoomes v. Kuhn, 4 Call 274; White v. Ward, 35 W. Va. 418, 14 S. E. Rep. 22; Sisler v. Shaffer, 43 W. Va. 769, 28 S. E. Rep. 721; Bales v. State, 3 W. Va. 685; Randolph v. Randolph, 1 Hen. & M. 181; Kern v. Wyatt, 89 Va. 885, 17 S. E. Rep. 549.

What Evidence Is Cumulative.—In determining whether or not evidence is cumulative, the courts must see if the kind and character of the facts offered and those adduced on the former trial are the same, and not whether they tend to produce the same effect. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition and yet be so dissimilar in kind as to afford no pretense that they are cumulative. St. John v. Alderson, 32 Gratt. 140, and *foot-note*: Grogan v. Chesapeake, etc., R. Co., 39 W. Va. 415, 19 S. E. Rep. 563; Wynne v. Newman, 75 Va. 811.

The admission of a party in direct conflict with his testimony and his theory of defence, and bearing upon the issue, is not cumulative merely; and if his opponent had no reason to suspect its existence, and could not by reasonable diligence have discovered it before the trial, and if it would probably have produced a different verdict, the subsequent discovery thereof will entitle the latter to a new trial. Preston v. Otey, 88 Va. 491, 14 S. E. Rep. 68.

New Evidence Collateral—Discrediting Witnesses.—Where the sole object and purpose of new evidence is to discredit a witness on the opposite side, the general rule, subject to few exceptions, is to refuse a new trial. Gillilan v. Ludington, 6 W. Va. 145; State v. Betsall, 11 W. Va. 733; Hall v. Lyons, 29 W. Va. 422,

1 S. E. Rep. 592; Carder v. Bank, 34 W. Va. 41, 11 S. E. Rep. 717; Thompson v. Com., 8 Gratt. 637, and *footnote*.

f. AFFIDAVIT OF APPLICANT.

Generally.—With reference to the form of application, and the nature of the evidence, requisite for obtaining a new trial on the ground of newly-discovered evidence, the usual practice requires, that the party file his own affidavit, stating that he has, since the trial, and without previous neglect, discovered material testimony going to the merits of the case, and giving the names of the witnesses and setting forth the facts they will swear to on the trial, unless it be shown that the latter cannot be obtained. It is not sufficient for the applicant to state that he did not know of the testimony in time to produce it for the trial; it must also appear that he could not have ascertained it by the exercise of reasonable diligence. State v. Williams, 14 W. Va. 851.

Allegation of Diligence.—An affidavit for a new trial upon the ground of newly-discovered evidence, is not sufficient unless it state that the party seeking the benefit of it has used diligence to discover and procure the evidence before the trial, and discloses the facts he can prove and by whom he can do so. Snyder v. Myers, 3 W. Va. 195; Buchanan v. Reynolds, 4 W. Va. 681. See also, Sisler v. Shaffer, 43 W. Va. 769, 28 S. E. Rep. 721.

Evidence Must Be Set Forth in Affidavit.—Upon a motion for a new trial on the ground of newly-discovered evidence, the evidence of the newly-discovered witness should be substantially set forth in the affidavit of the witness as it can be testified to in the court before the jury, or a satisfactory excuse shown excusing the affidavit. State v. Williams, 14 W. Va. 851; Strader v. Goff, 6 W. Va. 257.

The party asking a new trial on the ground of after-discovered evidence must produce the affidavits of the witnesses stating what they will testify to. Brown v. Speyers, 20 Gratt. 296; Strader v. Goff, 6 W. Va. 271; Varner v. Core, 20 W. Va. 475; Kern v. Wyatt, 89 Va. 885, 17 S. E. Rep. 549; Nuckols v. Jones, 8 Gratt. 267.

An affidavit which states that the defendant has discovered new and material evidence which was not in his knowledge or control at or before the trial, but which does not state what the evidence is, or that it could not have been obtained by due diligence before the trial, is not sufficient to authorize the court to grant a new trial. Varner v. Core, 20 W. Va. 473.

Relevancy and Materiality Must Be Apparent.—A motion to set aside the verdict and award a new trial, founded upon an affidavit of newly-discovered evidence, which fails to show the character, relevancy, and materiality thereof, will be overruled. Swisher v. Malone, 31 W. Va. 442, 7 S. E. Rep. 439; State v. Betsall, 11 W. Va. 703.

Where the affidavit of a conversation between the affiant and the defendant, relied on as after-discovered evidence in support of a motion for a new trial, fails to state the date and details of the conversation, a new trial will be denied, as the relevancy of the testimony is not apparent. Grayson v. Buchanan, 88 Va. 251, 13 S. E. Rep. 457.

A new trial will not be granted on the ground of after-discovered testimony, when it appears from the affidavits that the after-discovered testimony tends only to impeach a witness on the trial, by disproving facts to which he has testified; and especially when it appears that the witnesses proposing to give testimony will speak only from their belief, and not from absolute personal knowledge. Gillilan v. Ludlington, 6 W. Va. 128.

7. MISCONDUCT OR INCOMPETENCY OF JURORS.—See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

a. IN GENERAL.

Improper Conduct in Another Case.—The improper conduct of a juror, who has served in another case tried at the same term of the court, is not ground for a new trial, where it is not shown that he had made up or expressed any opinion in respect to the case, or that he was in any manner so connected with any parties as to render him incompetent. Nadenbousch v. Sharer, 4 W. Va. 203.

Mode of Arriving at Verdict.—Where the jury in a criminal case concur in opinion as to the guilt of the accused, but differ as to the length of time for which he should be sentenced to the penitentiary, it is not such misconduct as to be ground for a new trial for them to agree that each one shall state the time for which he thinks the accused should be confined and that the aggregate of these periods divided by twelve shall be the verdict, where they all afterwards agree to the verdict understanding what it is. Thompson v. Com., 8 Gratt. 637, and *footnote*.

Remarks of Juror during Trial.—Remarks of a juror during the trial, even if reprehensible, cannot be taken advantage of after verdict; and for a juror, upon hearing a fact testified to by a witness, to say, "Yes, sir, I know all about it—that's so," is only in obedience to sec. 3168 of the Code of Virginia, which declares that "a juror, knowing anything relative to a fact in issue, shall disclose the same in open court," and is under no circumstances objectionable. Atlantic, etc., R. Co. v. Peake, 87 Va. 190, 12 S. E. Rep. 348.

b. SEPARATION OF JURY.

Generally.—A mere separation of the jury will not entitle a party to a new trial; but where there has been an improper separation of the jury during the trial, if the verdict is against the prisoner, he is entitled to the benefit of the presumption that such separation has been prejudicial to him, and the burden of proof is upon the state to show beyond a reasonable doubt that the prisoner has suffered no injury by reason of the separation. If the prosecution fails to do this the verdict will be set aside. State v. Harrison, 36 W. Va. 729, 15 S. E. Rep. 982.

The same rule should be applied to all cases of misconduct or irregularity by the jury during the trial which are of such a character as to raise a presumption that the prisoner was prejudiced thereby. State v. Harrison, 36 W. Va 729, 15 S. E. Rep. 982.

Separation for Short Time to Direct Servant.—Where a juror, who was proceeding with the rest of the jury to his room, accompanied by the sheriff, separated from his fellows and the sheriff for a few minutes in order to direct his servant to take care of his horse, and was immediately pursued by the sheriff and brought back after an absence which did not exceed one minute, it was held that such separation of the juror from his fellows was no ground for a new trial. McCarter v. Com., 11 Leigh 633. See also, Tooel v. Com., 11 Leigh 714.

Placing Jury in Separate Rooms.—Placing the jury in the third story of a large hotel, and in five different rooms opening upon a common passage which communicates with the street below by a flight of stairs, the doors of the rooms being unlocked dur-

ing the night because the jurors are unwilling to have them locked from fear of fire during the night, and there being no doors or other fastenings at either end of the passage, is not such a separation of the jury as to give a good ground to the accused to move for a new trial. Thompson v. Com., 8 Gratt. 637, and *foot-note*; Kennedy v. Com., 2 Va. Cas. 510.

Separation without Seeing Any One.—Where a juror, called by the prisoner as a witness, states that on a certain morning during the progress of the trial, before the rest of the jury had risen, he rose, dressed himself and went down stairs to the pavement before the door of the hotel where the jury were lodged for the night, for the purpose of meeting with a passer-by to send a message to his family; and after remaining there about five minutes and seeing no one passing he returned to the rest of the jury, this is not sufficient grounds for granting a new trial, as the only proof of the separation of the jury is that of the juror who negatives all abuse, tampering or improper influence. Thompson v. Com., 8 Gratt. 637, and *foot-note*.

Going into Another County Accompanied by Sheriff.—Where the jury, on the morning before the court meets, walk out, accompanied by the sheriff, for relaxation and exercise, and pass the boundary line separating the county in which the trial is progressing from an adjoining county, and remain in the adjoining county a few minutes, but there is no separation, conversation or communication with any one by any of the jurors, this is not sufficient ground for a new trial. Thompson v. Com., 8 Gratt. 637, and *foot-note*.

Innocent Conversation in Absence of Sheriff.—Where after the retirement of the jury one of them called to a friend from the window, desiring him to inform his family of the cause of his absence, and requesting him to procure his watch and deliver it to the sheriff, this was held no ground for a new trial, although the sheriff did not hear the conversation. Kennedy v. Com., 2 Va. Cas. 510.

Mere business conversation by a juror with another person, entirely foreign to the case on trial, in the presence and hearing of the sheriff and the other jurors, will not avoid the verdict. State v. Harrison, 36 W. Va. 729, 15 S. E. Rep. 982.

Separation for Innocent Purposes Accompanied by Officer.—A separation of one or more of the jury from the rest, for innocent purposes, such as going to see a horse taken care of, to procure overcoats, cushions, etc., from the bar of the tavern to wear or rest on in the jury-room, to wash at the tavern porch, etc., is no ground for granting a new trial, provided the separation is with the authority of, and the juror is accompanied by, one of the officers who has charge of the jury, and there is no improper communication between them and other persons. Thomas v. Com., 2 Va. Cas. 479.

Short Separation after Impanelment.—Where, after the impanelment of the jury, before any evidence was given, three of them separated from their fellows, for a brief space of time, the court held that such separation was no cause for setting aside the verdict and granting a new trial; the separation in this case being so brief as to exclude possibility of the jury having been tampered with. Martin v. Com., 2 Leigh 745.

Separation after Verdict Agreed upon but before it is Rendered.—Where a jury agreed on its verdict, and it was signed by the foreman, but the justices not being on the bench at the time, two of the jurors separated from their fellows, and conversed with others, though not on the subject of the cause, and when the justices resumed their seats the verdict was rendered, it was held that this separation was no ground for a new trial. Ragland v. Wills, 6 Leigh 1.

Separation before Fixing Term of Imprisonment.—On a trial for a felony, the jury found the prisoner guilty, but the verdict ascertained no term of imprisonment. The court then discharged the jury but recalled it instantly,—eleven of them still being in the courthouse and one having gone a short distance accompanied by the deputy sheriff—and they then ascertained the term of the prisoner. It was held that the verdict should be set aside and a new trial awarded. Mills v. Com., 7 Leigh 751.

c. DRINKING SPIRITUOUS LIQUORS.—A new trial will not be allowed a person convicted of murder upon the sole ground that the jury, previous to rendering their verdict, were permitted to converse and drink spirituous liquors with persons during the absence of the sheriff, without the permission or authority of the court. Com. v. Wormley, 8 Gratt. 712, 56 Am. Dec. 162.

The drinking spirituous liquors in moderation, between the adjournment of the court in the evening and its meeting next morning, is not misbehavior in a juror for which a new trial may be granted. Thompson v. Com., 8 Gratt. 637, and *foot-note*.

Drinking at Invitation of State's Witnesses.—That a witness for the commonwealth, who is accidentally present at the hotel where the jury is brought in by the sheriff to be lodged for the night, inadvertently and as an act of courtesy invites the jury to drink with him, the sheriff being present at the time, is not sufficient to invalidate the verdict of the jury and give a ground for a new trial, though some of the jurors accept the invitation. Thompson v. Com., 8 Gratt. 637, and *foot-note*.

Affidavit of Sheriff That Jurors Were Not Drunk—Weight.—Where the deputy sheriff having the jury in charge admits that liquor, in sufficient quantities to make the jury or some of them intoxicated, was taken by him to the jury-room on the day the verdict was rendered, the presumption arising therefrom that the prisoner was injured thereby, is not rebutted by the deputy's affidavit that none of the jury were intoxicated. State v. Greer, 22 W. Va. 803.

d. FORMED OPINIONS AS TO GUILT OR INNOCENCE OF ACCUSED.—One who has formed a decided opinion that the prisoner is guilty or innocent of the offence for which he is about to be tried, whether that opinion be formed on the evidence of witnesses whose testimony he has heard on a former trial, conversation with witnesses, or common report, is not competent as a juror; it is immaterial whether the opinion has been expressed or not. Oslander v. Com., 3 Leigh 780.

But the previous expression of an opinion by a juror of the prisoner's guilt is not cause for a new trial if the opinion was casual and hypothetical, and not deliberate and decided, nor indicative of malice. Smith v. Com., 2 Va. Cas. 6; Kennedy's Case, 2 Va. Cas. 510; Poore v. Com., 2 Va. Cas. 474; Curran's Case, 7 Gratt. 623.

To set aside a verdict and grant a new trial because of an opinion entertained by a juror before he was sworn, it ought to appear that such opinion was not merely unsubstantial and hypothetical, but such as would have excluded him from the

jury had it been known before he was sworn. State v. Harrison, 36 W. Va. 729, 15 S. E. Rep. 982.

Must Have Caused Injustice:—A new trial will not be granted upon the ground that the juror had formed an opinion on the merits of the case before he was called upon to serve upon the jury, unless it appears that the party seeking a new trial suffered injustice from the fact that this juror served. Sweeney v. Baker, 13 W. Va. 158.

What is Not Sufficient to Show Deliberate Opinion.—Proof that a juror said, before being summoned, that the prisoner "was doomed to the penitentiary; that he would go, if he had even attempted to commit the crime" with which he was charged, was held not sufficient to show that the juror had formed a deliberate opinion touching the prisoner's guilt, and was no ground for a new trial. Kennedy v. Com., 2 Va. Cas. 510.

Where a prisoner was convicted of murder in the second degree, and the term of his imprisonment fixed at ten years, a motion for a new trial on the ground that one of the jurors had expressed an unfavorable opinion before the trial, saying that the prisoner should be hung, was overruled, it not appearing that it was a deliberate opinion. Smith v. Com., 2 Va. Cas. 6.

Expression of Opinion without Malice.—The fact that a juror expressed himself, before the impanelment of the jury, as determined to punish the prisoner if taken on the jury, not from any malice towards him, but from an opinion of his conduct, is no ground for setting aside the verdict and granting a new trial. Curran's Case, 7 Gratt. 619.

What Does Not Amount to Expression of Opinion.—Where, after a verdict of murder in the second degree, a juror, on the motion for a new trial on the ground that he had previously expressed his opinion, admitted that he might have said that the prisoner "would be" hung, but denied having said that she "should be" hung, and further said that he did not then know that he had been put on the venire; that he never expressed an opinion as to her guilt or innocence; that his sympathies were with her, and that he at first favored fixing her imprisonment at the lowest term, the motion was properly overruled. Hodges v. Com., 89 Va. 265, 15 S. E. Rep. 513.

e. WHERE CAUSE FOR CHALLENGE EXISTS AGAINST JUROR.—A new trial will not be granted on account of the disqualification of a juror for the matter that is a principal cause of challenge, which existed before he was elected and sworn, but which was unknown to the objecting party until after the trial, and which could not have been discovered by the exercise of ordinary diligence, unless it appear from the whole case, made before the court on the motion for a new trial, that the party suffered injustice from the fact that such juror served upon the jury in the trial of the case. Beck v. Thomson, 31 W. Va. 459, 7 S. E. Rep. 448; State v. McDonald, 9 W. Va. 456; State v. Strauder, 11 W. Va. 745; Sweeney v. Baker, 13 W. Va. 158; State v. Greer, 22 W. Va. 800; Zickefoose v. Kuykendall, 12 W. Va. 23; Simmons v. McConnell, 86 Va. 494, 10 S. E. Rep. 838; State v. Harrison, 36 W. Va. 729, 15 S. E. Rep. 982; Com. v. Jones, 1 Leigh 598.

The meaning of the words, "unless it appears from the whole case that the party suffered injustice from the fact that such juror served upon the case," is, unless it appears from the whole case, as shown by the evidence submitted to the court on a motion for a new trial (and not from the evidence before the jury), that the party suffered injustice from the fact that such juror served upon the case. State v. Greer, 22 W. Va. 800; Beck v. Thomson, 31 W. Va. 459, 7 S. E. Rep. 447.

In Beck v. Thomson, 31 W. Va. 459, 7 S. E. Rep. 447, a juror, who was, under the statute, disqualified for service upon the jury because he had a similar case ready for trial in the same court, was allowed to serve upon the jury without objection by the defendant, though the defendant knew he was disqualified for service after he was sworn and before verdict. It was held that, as it did not appear that the defendant had been injured by the juror serving upon the jury, a new trial would not be granted to the defendant.

The verdict of the jury will not be set aside because of grounds of challenge against a juror which might have been known to the challenger or his counsel by the exercise of ordinary diligence: the failure to exercise such diligence being deemed equivalent to a waiver of the cause of challenge. Wagoner v. Iaeger, 49 W. Va. 61, 38 S. E. Rep. 528.

It is the settled law of this state, in both criminal and civil trials, that the verdict of a jury will not be set aside for objections to jurors, on grounds which existed before they were sworn, unless it appears that by reason of the existence of such grounds the party objecting has suffered wrong or injustice; and the ignorance of the parties of the existence of such grounds until after verdict is immaterial. Flesher v. Hale, 22 W. Va. 44.

f. WHERE JURY ARE IMPROPERLY INFLUENCED.

After Swearing of Jury—Necessity of Objection.—If after the jury has been sworn facts are established which show that improper influences were brought to bear upon it, or that its members, or any of them, were guilty of improper conduct, such as might have resulted prejudicially to the losing party, a presumption arises against the purity of the verdict; and unless there is testimony which shows the verdict was not affected by such influences or conduct, it will be set aside; and the burden of producing such testimony is upon the party claiming the right to keep the verdict. Flesher v. Hale, 22 W. Va. 44.

If, however, a new trial is asked on account of such improper influences or misconduct of the jury, it must appear that the party so asking called the attention of the court to the same at the time it was first discovered or as soon thereafter as the course of the proceedings would permit; and if he fail to do so, he will be held to have waived all objection thereto, unless it be a matter which he could not waive or which could not have been obviated by attention having been promptly called to it at the time it was discovered. Flesher v. Hale, 22 W. Va. 44.

Hearing Evidence Out of Court.—A motion for a new trial on the ground of misconduct of the jury will not be granted where it appears that the misconduct consisted in hearing a statement of a witness out of court in the presence of the accused, but without objection on his part, and that, after the jury returned into court, the matter was called to the attention of the court, in the presence of the accused and his counsel, and an opportunity afforded them of cross-examining the witness, of which they refused to avail themselves, and no objection or exception was made till after the jury had rendered their verdict, and then for the first time on a motion for a new trial. Williams v. Com., 93 Va. 769, 25 S. E. Rep. 659.

Visiting Scene of Homicide.—A mere casual visit to

the scene of homicide by the jury during recess whilst taking exercise under the custody of an officer, in prisoner's absence, when there is no proof of prejudice, or of conversation regarding the scene, or of any influence on the jury thereby, is no ground for setting aside the verdict. Com. v. Brown, 90 Va. 671, 19 S. E. Rep. 447.

Where Juror Is Prejudiced by Charges Having Been Made against Him during Trial.—On the trial of an indictment for passing a counterfeit bank note, the jury on retiring and being enclosed, found a placard stuck against the wall of their room, charging one of the jurors with being a counterfeiter himself, and insinuating that he had attended the court for the purpose of getting on the jury. The paper was read by the whole jury and a verdict of guilty rendered. On a motion for a new trial, it was held that the fact that this placard so put up and read by the jury, was no ground for setting aside the verdict, unless it appeared that the mind of the juror impugned, was thereby prevented from a deliberate exercise of judgment, or that the placard had the effect of a menace upon him or influenced the verdict of the jury. Hall v. Com., 6 Leigh 615.

Information Received in Jury-Room.—A new trial should not be granted on the affidavits of two jurors, that they were influenced in their verdict by information given by one of their own body in the jury-room. Price v. Fuqua, 1 Hen. & M. 385.

In Hague v. Stratton, 4 Call 84, a new trial was granted because one of the jurors declared that he had misunderstood the testimony and its application to the law.

7. VERDICT CONTRARY TO EVIDENCE.—See *post*, this note, "Principles Governing Court in Deciding Motion." And see monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

a. GENERAL RULE.—A new trial will be granted where the verdict is contrary to the evidence. This occurs when the issue involves matters of fact only, and the facts proved require a different verdict from that found by the jury. Grayson v. Com., 6 Gratt. 712, and *foot-note*; Blosser v. Harshbarger, 21 Gratt. 216; Bell v. Alexander, 21 Gratt. 9; Read v. Com., 22 Gratt. 942; Pryor v. Com., 27 Gratt. 1010; Noell v. Noell, 93 Va. 439, 25 S. E. Rep. 242; McBride's Case, 95 Va. 826, 30 S. E. Rep. 454; Younger v. State, 2 W. Va. 586; Campbell v. Lynn, 7 W. Va. 671; State v. Yates, 21 W. Va. 766; State v. Smith, 24 W. Va. 826; State v. Harr, 38 W. Va. 65, 17 S. E. Rep. 794; State v. Zeigler, 40 W. Va. 608, 21 S. E. Rep. 768; Altizer v. Buskirk, 44 W. Va. 256, 28 S. E. Rep. 790; Cash v. Com., 2 Va. Dec. 4; State v. Morgan, 35 W. Va. 277, 13 S. E. Rep. 391; Ritz v. Wheeling, 45 W. Va. 264, 31 S. E. Rep. 994.

b. WEIGHT ATTACHED TO VERDICT.

Should Be Set Aside with Great Caution.—Where a case has been fairly submitted to the jury, and a verdict fairly rendered, it should not be interfered with by the court, unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the facts proved. Hence a new trial should not be granted merely because the court, if upon the jury, would have rendered a different verdict. Blosser v. Harshbarger, 21 Gratt. 214, and *foot-note*; Pryor v. Com., 27 Gratt. 1010; Hilb v. Peyton, 21 Gratt. 392; Smith's Case, 21 Gratt. 813; Georgia, etc., Ins. Co. v. Kinnier, 28 Gratt. 114; Johnson v. Com., 29 Gratt. 820; Dean v. Com., 32 Gratt. 917; Baccigalupo v. Com., 33 Gratt. 811; Powell v. Tarry, 77 Va. 260; Priest v. Whitacre, 78 Va. 158; Montague v. Allan, 78 Va. 598; Benn v. Hatcher, 81 Va. 83; Noell v. Noell, 93 Va. 439, 25 S. E. Rep. 242; Nicholas v. Com., 91 Va. 818, 23 S. E. Rep. 507; Steptoe v. Flood, 31 Gratt. 342; Gwynn v. Schwartz, 32 W. Va. 494, 9 S. E. Rep. 880; Black v. Thomas, 21 W. Va. 713; Robertson v. Com., 2 Va. Dec. 142; Cash v. Com., 2 Va. Dec. 1; Campbell v. Lynn, 7 W. Va. 672; Sheff v. Huntington, 16 W. Va. 321; Welch v. County Court, 29 W. Va. 63, 1 S. E. Rep. 841; Jones v. Singer Mfg. Co., 38 W. Va. 149, 18 S. E. Rep. 478.

Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court would have given a different verdict. To warrant a new trial in such case, the evidence should be plainly insufficient to warrant the finding of the jury; and this restriction applies with peculiar force to new trials by the appellate court. Grayson v. Com., 6 Gratt. 712, and *foot-note*; Blosser v. Harshbarger, 21 Gratt. 214, and *foot-note*; Meredith v. Johns, 1 Hen. & M. 585; Cash v. Com., 2 Va. Dec. 1; Ross v. Overton, 3 Call 309; Valley, etc., Ins. Co. v. Burke, 1 Va. Dec. 508; Brown v. Handley, 7 Leigh 119; Mahon v. Johnston, 7 Leigh 317; Randolph v. Hill, 7 Leigh 383; Goode v. Love, 4 Leigh 635; McWhirt's Case, 3 Gratt. 594; Pryor's Case, 27 Gratt. 1010; McDaniel's Case, 77 Va. 281; Priest v. Whitacre, 78 Va. 151; Russell's Case, 78 Va. 400; Montague v. Allan, 78 Va 592; Muse v. Stern, 82 Va. 33, 3 Am. St. Rep. 77.

Verdict of Jury and Judgment of Trial Court Entitled to Respect on Appeal.—The appellate court will not grant a new trial, when asked upon the sole ground that the verdict is contrary to the evidence, unless the verdict is manifestly wrong, as great weight is attached to the verdict rendered by the jury, and approved by a judge, both of whom saw the witnesses and had an opportunity to judge as to their credibility. Lewis v. Com., 81 Va. 416.

The verdict of a jury which has been approved by the judge who presided at the trial ought not to be set aside without the strongest reasons therefor. But if the trial judge is dissatisfied with the verdict, and grants a new trial, some latitude must be allowed to his discretion, especially where the propriety of its exercise is affirmed by a verdict on such new trial for the party to whom it was granted. Chapman v. Virginia Real Estate, etc., Co., 96 Va. 177, 31 S. E. Rep. 74; Marshall v. Valley R. Co., 97 Va. 653, 34 S. E. Rep. 455.

In a case in which an accomplice was allowed to testify, he testified upon matters which he had formerly denied having any knowledge of under oath, and the jury found a verdict of conviction on his testimony. Upon an appeal from the judgment of the trial court overruling a motion for a new trial, it was held that, as the trial court was satisfied with the verdict, a new trial would not be granted. Brown v. Com., 2 Leigh 769.

Province of Jury—Fixing Grade of Offence.—In cases of homicide, as the grade of the offence, whether murder or manslaughter, depends on whether the homicide was committed through actual malice, or during sudden passion, and can be ascertained only from the circumstances, where the jury, with all those circumstances before them, have found the grade of the offence and fixed the punishment of the accused accordingly, their finding will not be

disturbed and a motion for a new trial will be overruled. Briggs v. Com., 82 Va. 554.

c. EVIDENCE INSUFFICIENT TO SUPPORT VERDICT.—Where all the evidence introduced is clearly insufficient to warrant a verdict in favor of the plaintiff, but the jury nevertheless find a verdict in his favor, it is reversible error to overrule the defendant's motion for a new trial. Hatfield v. Workman, 35 W. Va. 578, 14 S. E. Rep. 153; Wandling v. Straw, 25 W. Va. 692; McCune v. Com., 2 Rob. 771; Sheff v. City of Huntington, 16 W. Va. 307; Fields v. Grenils, 89 Va. 606, 16 S. E. Rep. 880; Brown v. Com., 89 Va. 379, 16 S. E. Rep. 250; Hite v. Com., 88 Va. 882, 14 S. E. Rep. 696; Roadcap v. Com., 88 Va. 896, 14 S. E. Rep. 625.

In a case where the plaintiff, who had driven across a railroad track immediately after the passage of a train, was injured in consequence of his horse balking and backing on the track, so that the engine being reversed the train ran into him, it was held that since the engineer was unable, from his position in the cab, to see plaintiff after he had driven over the crossing, and since he could not have anticipated that plaintiff's horse would balk, a verdict in plaintiff's favor should be set aside for lack of evidence and a new trial granted. Richmond, etc., R. Co. v. Yeamans, 86 Va. 860, 12 S. E. Rep. 946.

That Evidence Furnishes Ground of Suspicion is Not Sufficient to Sustain Verdict.—Where the facts certified in the record present strong grounds of suspicion against the prisoner, but are not sufficient to establish the guilt of the prisoner beyond a reasonable doubt a new trial should be awarded. Tilley v. Com., 90 Va. 99, 17 S. E. Rep. 895; Anderson v. Com., 83 Va. 326, 2 S. E. Rep. 281; Grayson v. Com., 6 Gratt. 712; Burch v. Com., 1 Va. Dec. 861.

Rule in Ejectment Cases—Burden on Plaintiff.—As the plaintiff in ejectment must recover, if at all, on the strength of his own title, and not upon the weakness of his adversary's, the court will not set aside the verdict for the defendant and grant a new trial to the plaintiff, where the jury were properly instructed on the law of the case and the evidence was conflicting. Blackey v. Morris, 89 Va. 717, 17 S. E. Rep. 126.

d. EVIDENCE CONFLICTING.—The verdict of the jury ought not to be interfered with and a new trial awarded by the court, when the evidence is contradictory, if, when most favorably considered in support of the verdict, it does not still appear that the verdict was plainly not warranted by the evidence. Gwynn v. Schwartz, 32 W. Va. 487, 9 S. E. Rep. 880.

In cases where there is a real conflict in the testimony of witnesses as to a material fact directly involved in the issue, and the determination involves the credibility of witnesses, as a general rule, the finding of the jury upon the fact will not be disturbed by the court; nor will such finding of the jury be disturbed on appeal where it is approved by the trial court. Miller v. Ins. Co., 8 W. Va. 515; Dew v. Baldwin, 89 Va. 870, 17 S. E. Rep. 548; Shanks v. Fenwick, 2 Munf. 478; Grayson v. Buchanan, 88 Va. 251, 13 S. E. Rep. 457.

A verdict ought not to be set aside by the appellate court because contrary to evidence where the evidence is conflicting, unless it manifestly appears that it was moved by passion, prejudice, or other evil influence, or is plainly against the clear and decided preponderance of evidence, and its setting aside is called for by the demands of justice. Gilmer v. Sydenstricker, 42 W. Va. 52, 24 S. E. Rep. 566.

A verdict obtained at law on the testimony of a single witness, whose answer is contradictory when he is brought into equity, should be set aside and a new trial directed. Verdier v. Hume, 4 Hen. & M. 497.

Where, because of conflicting testimony, an issue is directed, the solution of which depends on the weight of evidence, and the verdict is sanctioned by the trial court, the settled rule is that the appellate court will consider, not merely whether the evidence warrants the verdict, but also whether upon the whole further investigation is necessary to obtain justice; and it will not grant a new trial if in considering all the evidence the verdict seems to be right. Barnum v. Barnum, 83 Va. 365, 5 S. E. Rep. 372; Snouffer v. Hansbrough, 79 Va. 166.

Where the evidence is conflicting, and involves the credibility of witnesses, and the trial court sets aside the verdict and certifies the evidence, the appellate court will look to the whole evidence and sustain the verdict, unless there has been a plain deviation from right and justice, and the verdict is against the law or evidence, or without evidence. Muse v. Stern, 82 Va. 33, 3 Am. St. Rep. 77.

8. VERDICT WITHOUT EVIDENCE.—That the verdict is without evidence to support it is another ground upon which a new trial will be granted. This occurs when there has been no proof whatever of a material fact, or not sufficient evidence of the fact or facts in issue. Grayson v. Com., 6 Gratt. 712, and *foot-note*; Bell v. Alexander, 21 Gratt. 9; Blosser v. Harshbarger, 21 Gratt. 216; Read v. Com., 22 Gratt. 942; Pryor v. Com., 27 Gratt. 1010; Noell v. Noell, 93 Va. 439, 25 S. E. Rep. 242; McBride's Case, 95 Va. 826, 30 S. E. Rep. 454; Younger v. State, 2 W. Va. 586; Campbell v. Lynn, 7 W. Va. 671; State v. Yates, 21 W. Va. 766; State v. Smith, 24 W. Va. 826; State v. Harr, 38 W. Va. 65, 17 S. E. Rep. 794; State v. Zeigler, 40 W. Va. 608, 21 S. E. Rep. 768; Altizer v. Buskirk, 44 W. Va. 256, 28 S. E. Rep. 790; Cash v. Com., 2 Va. Dec. 1; State v. Morgan, 35 W. Va. 277, 13 S. E. Rep. 391; Ritz v. Wheeling, 45 W. Va. 264, 31 S. E. Rep. 994.

9. VERDICT AGAINST LAW.

Rule Stated.—It is well settled that a new trial will be granted where the verdict is against law. This occurs when the issue involves both fact and law, and the verdict is against the law of the case on the facts proved. Grayson v. Com., 6 Gratt. 712, and *foot-note*; Bell v. Alexander, 21 Gratt. 9; Blosser v. Harshbarger, 21 Gratt. 216; Read v. Com., 22 Gratt. 942; Pryor v. Com., 27 Gratt 1010; Noell v. Noell, 93 Va. 439, 25 S. E. Rep. 242; McBride's Case, 95 Va. 826, 30 S. E. Rep. 454; Younger v. State, 2 W. Va. 586; Campbell v. Lynn, 7 W. Va. 671; State v. Yates, 21 W. Va. 766; State v. Smith, 24 W. Va. 826; State v. Harr, 38 W. Va. 65, 17 S. E. Rep. 794; State v. Zeigler, 40 W. Va. 608, 21 S. E. Rep. 768; Altizer v. Buskirk, 44 W. Va. 256, 28 S. E. Rep. 790; Cash v. Com., 2 Va. Dec. 4; State v. Morgan, 35 W. Va. 277, 13 S. E. Rep. 391; Ritz v. Wheeling, 45 W. Va. 264, 31 S. E. Rep. 994; Preston v. Otey, 88 Va. 491, 14 S. E. Rep. 68; Chesapeake, etc., R. Co. v. Anderson, 93 Va. 650, 25 S. E. Rep. 947.

Application of Rule to Unlawful Entry and Detainer Case.—Where the jury find a verdict for the plaintiff in an action of unlawful detainer, if it is proven that the defendant had been in actual continuous possession of the land in controversy for more than two years, and it does not appear that the cause of action arose within two years prior to the commencement of the action, a new trial should be awarded. Hays v. Altizer, 24 W. Va. 505.

10. NONJOINDER.—Where there is no plea filed in the cause, and the jury, being sworn to try the issue, find a verdict in favor of one of the parties, the verdict will be set aside and a new trial awarded. McMillion v. Dobbins, 9 Leigh 422, and *foot-note*; Baltimore, etc., R. Co. v. Christie, 5 W. Va. 325; Preston v. Salem Imp. Co., 91 Va. 583, 22 S. E. Rep. 486; Petty v. Frick Co., 86 Va. 501, 10 S. E. Rep. 886; Bennett v. Jackson, 34 W. Va. 62, 11 S. E. Rep. 734; Totty v. Donald, 4 Munf. 430; Rowans v. Givens, 10 Gratt. 250, and *foot-note*, citing many cases.

So where there are more pleas than one filed in the cause and issue is not joined on some one of such pleas, the judgment will be set aside and a new trial awarded. Totty v. Donald, 4 Munf. 430; Bennett v. Jackson, 34 W. Va. 62, 11 S. E. Rep. 734.

11. ERRORS OF LAW AT TRIAL.

a. IN ADMITTING OR REJECTING EVIDENCE.

In Common-Law Cases.—The rule in common-law cases is that if the court rejects the legal evidence offered by a party and the jury finds the verdict for the other party, the verdict will be set aside on a motion for a new trial, even though the court may believe that the verdict of the jury ought not and would not have been different, had the rejected evidence been considered by the jury. Corder v. Talbott, 14 W. Va. 277.

A new trial will not be granted, however, for refusal to permit certain evidence to be introduced, when substantially the same evidence was received without objection at a later stage of the trial. Norfolk, etc., R. Co. v. Marpole, 97 Va. 594, 34 S. E. Rep. 462.

In Trials of Issues Out of Chancery.—A different rule however prevails in trials of issues out of chancery; for where on a trial of an issue out of chancery a court rejects evidence which ought to have been received, or receives evidence which ought to have been rejected, though a court of law would grant a new trial, if the appellate court is satisfied that the error is such as did not prejudice either party, it will not grant a new trial. Nease v. Capehart, 15 W. Va. 299; Repass v. Richmond, 99 Va. 508, 39 S. E. Rep. 160; Watkins v. Carlton, 10 Leigh 560; Brockenbrough v. Spindle, 17 Gratt. 28; Powell v. Manson, 22 Gratt. 192; Miller v. Wills, 95 Va. 337, 28 S. E. Rep. 337.

Refusal to Admit Written Statement Discrediting Former Testimony.—Any written statement made by a witness, before he gives his evidence before the jury, which tends to contradict his evidence upon any material point, is competent; and, if the court refuses to admit it, the judgment will be reversed and a new trial awarded. State v. Kinney, 26 W. Va. 141.

Excluding Cross-Examination.—Where the trial court, by reason of a too rigid adherence to the technical rules of procedure, excludes the proper cross-examination of a claimant of property in controversy from the consideration of the jury, the judgment will be reversed, the verdict set aside, and a new trial awarded, unless the evidence, taken as a whole, including the excluded evidence, plainly and decidedly preponderates in favor of the verdict, and does not involve the credibility of contradicting witnesses. Wagoner v. Iaeger, 49 W. Va. 61, 38 S. E. Rep. 528.

Denial of Right to Read Answer to Jury.—Prior to the passage of the Code of West Virginia, on the trial of an issue out of chancery, the defendant had a right to have his answer read to the jury as evidence, and where he was not permitted to read his answer to the jury, this was sufficient grounds for the granting of a new trial, unless the chancellor was satisfied that if such answer had been read it would have had no effect upon the verdict. Tompkins v. Stephens, 10 W. Va. 156.

Omission to Direct Evidence to Be Received on Second Trial.—Where a superior court of common law, in reversing a judgment and awarding a new trial, assigns the reason to be that certain evidence should have been received on the former trial, but fails to direct that, upon the new trial, such evidence shall be received, the court of appeals, in affirming its judgment, will add the proper direction concerning the evidence. Brooke v. Shelly, 4 Hen. & M. 266.

Necessity for Prejudice.—Where the appellate court cannot see that the party objecting to the admission of evidence would be injured thereby it will not reverse the judgment on account of such admission, though it may have been erroneous, and *vice versa*. Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. Rep. 553; Johnson v. Jennings, 10 Gratt. 1.

To authorize the granting of a new trial for the reason that irrelevant evidence has been admitted, the evidence must not only be irrelevant but it must be of such a nature that its admission may have prejudiced the prisoner. State v. Kinney, 26 W. Va. 141. See also, State v. Yates, 21 W. Va. 761.

Where, in a criminal case, the evidence clearly establishes the guilt of the accused, an erroneous ruling of the trial court in excluding evidence offering to impeach one of the commonwealth's witnesses is no ground for a new trial. Sawyers v. Com., 88 Va. 356, 13 S. E. Rep. 708.

Where evidence, which tends to prove an item which may or which may not have been taken into account by the jury in fixing their verdict, is improperly rejected, and it is manifest and plain that outside of such item under the evidence, there was ground for finding a verdict for at least the amount found by the jury, and a new trial is refused by the lower court, the appellate court will not, for that cause, reverse the judgment. Bartlett v. Patton, 33 W. Va. 71, 10 S. E. Rep. 21.

b. IN GIVING OR REFUSING INSTRUCTIONS.

Right of Accused to Instructions.—The accused is entitled to a full and correct statement by the court of law applicable to the evidence in his case, and any misdirection by the court in point of law, on matters material to the issue, is ground for a new trial. Honesty v. Com., 81 Va. 283; Muscoe v. Com., 86 Va. 443, 10 S. E. Rep. 534.

Misleading Instructions.—Where the trial court in charging the jury, states matters as being in a written deposition, and instructs them that the matter is legal evidence, when in point of fact no such matter is in the deposition, the instruction is calculated to mislead the jury, and is error for which the verdict should be set aside and a new trial awarded. Gregory v. Baugh, 2 Leigh 665.

Where the jury is erroneously charged that the minimum punishment which they can impose upon the prisoner is two years, when it is in fact one year, and the jury find the prisoner guilty and fix his imprisonment at two years, the mistake in charging the jury furnishes a sufficient ground for a new trial, and it is not competent for the commonwealth's attorney to remit one year of the punishment imposed by the jury and let the court sentence the prisoner for one year. Allen v. Com., 2 Leigh 727.

Instructions Correctly Propounding Law Supported by Law and Evidence.—Where an instruction given

by the court is responsive to an enquiry propounded by the jury, it is not ground for a new trial that the instruction states an abstract proposition of law, if it correctly states the law. Thus in a case in which the jury requested an instruction as to what constituted the act of forgery, and were instructed that either the actual forgery of the instrument, by the prisoner, or his actual presence aiding and assisting, with felonious intent, when the instrument was forged, constituted the offence of forgery, a new trial was denied. Perkins v. Com., 7 Gratt. 651.

Where Defect in One Instruction is Cured by Another.—Although an instruction, standing alone, may have been misleading, the verdict will not be set aside on that account where it appears that the objection thereto was corrected by other instructions given by the court. Russell Creek Coal Co. v. Wells, 96 Va. 416, 31 S. E. Rep. 614.

Necessity for Prejudice.—Error in giving or refusing to give certain instructions, or in admitting or refusing to admit certain evidence, affords no ground for reversing a judgment, when it is evident that the appellant could not have been injured thereby. Payne v. Grant, 81 Va. 164; Brighthope R. Co. v. Rogers, 76 Va. 443; Harman v. Lynchburg, 33 Gratt 43; Baltimore, etc., R. Co. v. McKenzie, 81 Va. 71; Snouffer v. Hansbrough, 79 Va. 166.

Opinion of Court in Giving or Refusing Instruction Should Be Excepted to.—It is improper to make a motion to the judge who tried the cause, for a new trial upon the ground of misdirection to the jury, and to except to his refusal of it, as the exception should have been taken to his original opinion. But, in such case, if the whole matter is stated in the record, the appellate court will pass over the form and look at the substance of the direction. Johnston v. Macon, 4 Call 367; Johnson v. Macon, 1 Wash. 4.

When an instruction is given to the jury without objection at the time, and no exception or notice of exception is taken or given before the verdict is returned by the jury, the giving of the instruction cannot be a ground for setting aside the verdict and granting a new trial. Core v. Marple, 24 W. Va. 354. See monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

c. IN OVERRULING DEMURRER.—An error of law committed by the court in overruling a demurrer by the defendant to the declaration of the plaintiff is sufficient ground for the trial court to set aside the verdict of the jury and to award a new trial. Lambert v. Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. Rep. 431.

12. IRREGULARITIES AT TRIAL.

Comment by Judge on Weight of Evidence.—Comment of the judge upon the weight of the evidence of the case, when excluding other evidence offered, is calculated to mislead the jury, and, where made, is proper ground for a new trial. McDowell v. Crawford, 11 Gratt. 377.

In Virginia, questions of law, such as the admissibility of evidence, are for the court, while questions of fact, such as the weight of the evidence, are for the jury. When evidence is parol any expression of opinion by the court as to its weight, effect, or sufficiency, or any assumption of a fact as proved, will be an invasion of the province of the jury, for which the verdict will be set aside, and a new trial awarded. Tyler v. Chesapeake, etc., R. Co., 88 Va. 389, 13 S. E. Rep. 975.

Remarks on the Case by Judge.—Where the court, on the trial of an issue, makes a remark calculated to prejudice the minds of the jury against the defendant, but at the same time says that the remark has nothing to do with the cause and should not influence the verdict, and a verdict is afterwards rendered for the plaintiff, the remark is no ground for a new trial. Brooks v. Calloway, 12 Leigh 466.

Failure to Permit Party to Open and Close.—Though it may be proper for the defendant to open and close the argument in certain cases, still the refusal of the court to allow him to do so is not sufficient ground for the appellate court to grant a new trial. Steptoe v. Harvey, 7 Leigh 501.

Omission of Record to Show Venire.—Virginia Code, sec. 3156, provides that in civil cases no irregularity in a writ of *venire facias* shall be sufficient to set aside a verdict unless the party making objection was injured thereby, or unless the objection was made before the juror is sworn. By act January 18, 1888, this provision is made to apply to felony cases. But in Lewis v. Com., 1 Va. Dec. 737, it was held that this provision did not apply where the record failed to show any venire in a felony case, and the omission of the writ was an error for which a new trial would be awarded.

Defective Verdict.—On the plea of "no assets" a verdict finding that the administrator has in his hands assets belonging to the estate of his intestate, without saying to what amount, is defective, and a new trial should be awarded. Eppes v. Smith, 4 Munf. 466. See also, Booth v. Armstrong, 2 Wash. 301.

Where the verdict is set aside as insufficient because amended in the absence of one of the jurors, a *venire facias de novo* may be awarded, and a new trial had either on the same indictment or another. Com. v. Gibson, 2 Va. Cas. 70.

The verdict of the jury in a criminal case will not be set aside merely because the jury was put in custody of a deputy sheriff who had testified for the commonwealth. Reed v. Com., 98 Va. 817, 36 S. E. Rep. 399.

When the meaning of the jury can be clearly collected from the verdict, it ought not to be set aside for irregularity or for want of form. But where the verdict is so irregular and vague as not to show the intention of the jury clearly it should be set aside and a new trial granted. In ejectment cases, where the jury find for the plaintiff, it is essential that the verdict should describe the land, which the plaintiff claims, with sufficient certainty to enable possession to be delivered. Lewis v. Childers, 13 W. Va. 1. See, on this subject, monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

Where a declaration in assumpsit charges common carriers or bailees for hire, for loss or damage generally, and an agreement is proven showing that the transportation was at the plaintiff's risk, which imposes a different liability than that charged, and a verdict is rendered against the carriers, it should be set aside and a new trial granted for reason of the variance. Baltimore, etc., R. R. v. Rathbone, 1 W. Va. 87.

Argument of Counsel—Reading from Law Books.—Whether counsel, in an argument before a jury, shall read from law books and reported cases, and comment thereon, is within the discretion of the court, subject to review in case of abuse of discretion. If the law read be good law, and relevant to the case, it is clearly no ground for a new trial. If

bad law, or irrelevant to the case, and calculated to mislead the jury, yet, if the court has given instructions correctly stating the law on the subject, it would not be ground for a new trial; but in the absence of such instructions to counteract the danger, it would be a sufficient ground. Gregory v. Ohio R. R. Co., 37 W. Va. 606, 16 S. E. Rep. 819, *distinguishing* Ricketts v. Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. Rep. 801. See also, Michael v. Roanoke Machine Works, 90 Va. 492, 19 S. E. Rep. 261; Norfolk, etc., R. Co. v. Harman, 88 Va. 565, 8 S. E. Rep. 251; monographic *note* on "Arguments of Counsel" appended to Coleman v. Com., 25 Gratt. 865.

But objections to the argument of counsel come too late, when made for the first time after verdict, if the court can see that a proper verdict has been rendered. Norfolk, etc., R. Co. v. Shott, 92 Va. 34, 22 S. E. Rep. 811; Price v. Com., 77 Va. 393.

III. IN CRIMINAL CASES.

See monographic *note* on "Homicide" appended to Souther v. Com., 7 Gratt. 673.

Grantable in All Criminal Cases.—New trials are grantable at the instance of the accused in all criminal cases. Grayson v. Com., 6 Gratt. 712, and *foot-note*; Younger v. State, 2 W. Va. 586; State v. Williams, 14 W. Va. 861; State v. Thompson, 21 W. Va. 753.

Same Rules Govern in Criminal as in Civil Cases.—Motions for new trials are governed by the same rules in criminal as in civil cases. Grayson v. Com., 6 Gratt. 712, and *foot-note*; Vaiden v. Com., 12 Gratt. 717; Read v. Com., 22 Gratt. 944; Trogdon v. Com., 31 Gratt. 874; Nicholas v. Com., 91 Va. 752, 21 S. E. Rep. 364; Williams v. Com., 93 Va. 773, 25 S. E. Rep. 659; Younger v. State, 2 W. Va. 586; State v. Williams, 14 W. Va. 861; State v. Thompson, 21 W. Va. 753.

There is nothing peculiar about new trials in criminal cases which causes them to deserve a separate treatment. The principles laid down in other parts of this note are applicable alike to criminal and civil cases.

IV. IN EQUITY.

See monographic *note* on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

Party Applying Must Show Diligence at Law.—A court of equity will not grant a new trial after a trial at law merely because injustice has been done, but the party applying for the new trial must show that he has done every thing that could be reasonably expected from him to obtain relief at law. Faulkner v. Harwood, 6 Rand. 123.

Where Party Was Prevented from Making Motion at Law.—Where a party is prevented from moving for a new trial by the dispersion of the judges who composed the court, at the time of the trial, it is a proper case for relief in equity, which may award a new trial. Knifong v. Hendricks, 2 Gratt. 212, and *foot-note*, 44 Am. Dec. 385; Grafton, etc., R. Co. v. Davisson, 45 W. Va. 12, 29 S. E. Rep. 1029.

Loss of Papers.—Where a case is tried before a justice and a bill of exceptions essential to enable a party to obtain a *certiorari* is lost, if signed, or, if not signed, the justice died before signing it, and there appears probable ground for a writ of *certiorari*, it is a proper case for equitable relief against the judgment, and for a retrial. Grafton, etc., R. Co. v. Davisson, 45 W. Va. 12, 29 S. E. Rep. 1028.

Where Court Thought Verdict against Evidence.—A court of equity will not grant a new trial merely because the judges thought that the weight of evidence was against the verdict. Ross v. Pynes, 3 Call 568.

Practice Where New Trial Is Awarded.—Upon an application to a court of equity to enjoin a judgment at law, and grant a new trial in the case, it is error in the court to perpetuate the injunction, set aside the judgment, and grant a new trial in the cause which has been terminated, and to finally dispose of the suit in equity. In such case the court of equity should continue the injunction, direct the proper issues, and, upon the coming in of the verdict, perpetuate the injunction or dissolve it according to the finding of the jury; the judgment at law remaining as security for anything the plaintiff at law may be entitled to. Knifong v. Hendricks, 2 Gratt. 212, and *foot-note*, 44 Am. Dec. 385; Wynne v. Newman, 75 Va. 815. See also, Bank v. Hupp, 10 Gratt. 33; Grafton, etc., Co. v. Davisson, 45 W. Va. 12, 29 S. E. Rep. 1028.

Upon a bill in equity to enjoin a judgment at law, and for a retrial, there must not be a decree before such retrial annulling the judgment and granting a new trial in the law court; but the judgment is allowed to stand as security for what may be found to be justly due, and the injunction allowed to stand until after the retrial, and the decree should direct an issue or issues to be tried in the circuit court to find what the nature of the case requires, and upon the verdict the court should perpetuate or dissolve, wholly or partially, the judgment. Grafton, etc., R. Co. v. Davisson, 45 W. Va. 12, 29 S. E. Rep. 1029.

V. MOTION FOR THE NEW TRIAL.

Motion Must Specify Grounds.—A motion to set aside the verdict and grant a new trial must specify grounds. Where the record states that it is because improper evidence was admitted, it is too general. Hughes v. Frum, 41 W. Va. 445, 23 S. E. Rep. 604.

A motion for a new trial should indicate, in a way sufficient to call the attention of the court to them, the grounds for such new trial, unless the point has been made the subject of a bill of exceptions. Where it is claimed that evidence is improperly admitted, and an exception noted, but no bill of exceptions taken, and the record states that the motion for a new trial was based on certain specific grounds, not naming the admission of such evidence, that exception will not be considered in the appellate court, but will be treated as waived. Gregory v. Ohio River R. Co., 37 W. Va. 606, 16 S. E. Rep. 819.

But when a motion is made before a court to set aside a verdict and grant a new trial, and the counsel puts his motion on a particular ground, the court is not confined to the ground upon which the motion is based, but if it sets the verdict aside for any sufficient reason, there is no error in so doing. Shrewsbury v. Miller, 10 W. Va. 115.

Time of Making.—If the defendant means to move for a new trial upon the ground that the verdict is contrary to the law and the evidence, he is not bound to do it at the time the verdict is rendered but may postpone it until another day of the term. But if one of the justices who tries the cause does not attend on the day of the motion, so that a quorum cannot be had to decide upon it, that is no ground for relief in equity. Foushee v. Lea, 4 Call 279.

Accused Must Be Present When Motion Is Made.—In felony cases the prisoner must be present at every stage of the trial where anything is done by which he is to be affected. (Code 1873, ch. 202, sec. 3.)

Therefore his presence must be shown by the record when a motion for a new trial is made and overruled. Hooker v. Com., 13 Gratt. 763. But if in his absence a motion for a new trial is made and overruled, and afterwards during the same term, in his presence, the overruling is withdrawn, and he is invited to renew the motion, which invitation is refused, the irregularity is thereby cured. Boswell v. Com., 20 Gratt. 865; Bond v. Com., 83 Va. 581, 3 S. E. Rep. 149.

If the record shows that a prisoner was present in court when a motion for a new trial was made, the presumption is that he remained until the court adjourned for the day, unless the contrary is made to appear either directly or by necessary inference. When once shown to have been present, it is not necessary to show that he was remanded to jail at the conclusion of the proceedings for the day, though it usually so appears. Williams v. Com., 93 Va. 769, 25 S. E. Rep. 659. See monographic *note* on "Constitutional Law" appended to Adcock v. Com., 8 Gratt. 661.

Necessity of Motion in Trial Court.—It was never necessary for a motion for a new trial to be made in the trial court in order to have a judgment on a demurrer to evidence reviewed in the appellate court. Norfolk, etc., R. Co. v. Dunnaway, 93 Va. 29, 24 S. E. Rep. 698; Green v. Judith, 5 Rand. 1; Briggs v. Hall, 4 Leigh 484; Western Union Tel. Co. v. Virginia Paper Co., 87 Va. 418, 12 S. E. Rep. 755; Humphreys v. West, 3 Rand. 516. The case of Richmond, etc., R. Co. v. Scott, 1 Va. Dec. 871, holding the contrary, is overruled in Norfolk, etc., R. Co. v. Dunnaway, 93 Va. 29, 24 S. E. Rep. 698, and in Fidelity, etc., Co. v. Chambers, 93 Va. 138, 24 S. E. Rep. 896.

But in all other cases the Virginia courts formerly held, and the West Virginia courts still hold, that unless the record show that a motion was made for a new trial in the court below and was overruled, and that such action of the court was excepted to, the appellate court cannot review the judgment complained of. Newberry v. Williams, 89 Va. 298, 15 S. E. Rep. 865; State v. Phares, 24 W. Va. 657; Brown v. Brown, 29 W. Va. 777, 2 S. E. Rep. 808; Danks v. Rodeheaver, 26 W. Va. 274; Sammons v. Hawvers, 25 W. Va. 678; Bridgewater v. Allemong, 93 Va. 542, 25 S. E. Rep. 595.

By Acts of Virginia 1897-8, p. 704 (Pollard's Suppl. sec. 3385a), the doctrine of Newberry v. Williams, 89 Va. 298, 15 S. E. Rep. 865, is abrogated, it being declared: "The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to a higher court shall not be deemed a waiver of any objection made during the trial, if such objection be properly made a part of the record."

When Motion in Trial Court Is Unnecessary.—It is unnecessary to make a motion for a new trial in the trial court in order to have the judgment reviewed on appeal, where the whole matter of law and fact is submitted to and determined by the trial court without the intervention of a jury. Citizens' Nat. Bank v. Walton, 96 Va. 435, 31 S. E. Rep. 890.

Error in Pleadings—No Motion Necessary.—Where there is error in the declaration, pleadings, or judgment, committed against the protest, or over the demurrer or other objection, of a party, the same may be reviewed and corrected in the appellate court, although no motion has been made for a new trial in the court below, and no exception was reserved by bill of exception or otherwise. Spence v. Robinson, 35 W. Va. 313, 13 S. E. Rep. 1004.

Motion by One of Several Defendants.—Where, upon an indictment against two, one is found guilty and the other acquitted, a new trial cannot be awarded as to both parties upon a motion of the convicted defendant, as this would be putting the other defendant twice in jeopardy for the same offence. Boswell v. Jones, 1 Wash. 322. It is well settled, however, that in such case a new trial may be granted on the motion of the party convicted as to him only. Kemp v. Com., 18 Gratt. 969; Guerrant v. Tinder, Gilmer 36; Tracy v. Cloyd, 10 W. Va. 19.

In an action of trover and conversion against two, where the defendants appear and file a plea of not guilty upon which issue is joined, the jury may acquit one and find the other guilty. And if the jury find both of them guilty, by a joint verdict, and a motion is made by the defendants to set aside such verdict and grant a new trial, it is competent and proper for the court to grant the motion, if it is clearly of the opinion that there was no evidence against one of the defendants. Tracy v. Cloyd, 10 W. Va. 19.

Motion for First Time on Appeal Because of Irregularity in Swearing Jury.—Where the record states that the jury was sworn according to law and the case is tried, a verdict responsive to the issues rendered, a new trial asked and refused, but no objection is made in the court below that the jury were not properly sworn, the motion cannot be made for the first time on appeal. Douglass v. Central Land Co., 12 W. Va. 502.

VI. EVIDENCE IN SUPPORT OF MOTION.

Motion Should Rest on Evidence Actually Given in at Trial.—A motion for a new trial on the ground that the verdict is contrary to the evidence, ought to rest on the evidence actually given in at the trial, exclusive of all other. Affidavits taken *ex parte* should not be heard on such motion. Street v. St. Clair, 6 Munf. 457.

Testimony of Jurors Is Inadmissible to Impeach Verdict.—As a general rule, the testimony of jurors is inadmissible to impeach their verdict; especially is this rule true where it is sought to impeach the verdict on the ground of their own misconduct. Bull v. Com., 14 Gratt. 613; Howard v. McCall, 21 Gratt. 212; Read v. Com., 22 Gratt. 949, and *foot-note*; Steptoe v. Flood, 31 Gratt. 344, and *foot-note*; Danville Bank v. Waddill, 31 Gratt. 483; Moses v. Cromwell, 78 Va. 676; Taylor v. Com., 90 Va. 117, 17 S. E. Rep. 812; Vanmeter v. Kitzmiller, 5 W. Va. 381; State v. Cartright, 20 W. Va. 43; Probst v. Braeunlich, 24 W. Va. 359; Elam v. Commercial Bank, 86 Va. 92, 9 S. E. Rep. 498; State v. Cobbs, 40 W. Va. 718, 23 S. E. Rep. 310; Chesapeake, etc., R. Co. v. Patton, 9 W. Va. 648; Lewis v. McMullin, 5 W. Va. 582; Thomas v. Jones, 28 Gratt. 383; Steptoe v. Flood, 31 Gratt. 323, and *foot-note*; Thompson v. Com., 8 Gratt. 641; Read v. Com., 22 Gratt. 947; Shobe v. Bell, 1 Rand. 39; State v. Robinson, 20 W. Va. 713; Reynolds v. Tompkins, 23 W. Va. 229; State v. Cartright, 20 W. Va. 33; Street v. Broaddus, 96 Va. 823, 32 S. E. Rep. 466; Price v. Warren, 1 Hen. & M. 386; Bartlett v. Patton, 33 W. Va. 71, 10 S. E. Rep. 21.

Testimony of Jurors Is Admissible to Sustain Verdict.—The testimony of jurors may be received to disprove or explain a separation, misconduct, or irregularity, but their testimony will not be received to show the motive by which they were actuated, or that any admitted fact, misconduct, or irregularity had no influence or effect upon their minds in producing the verdict. And in all cases, even when

such testimony is proper, it should be received with great caution. State v. Harrison, 36 W. Va. 729, 15 S. E. Rep. 982.

Affidavits of Newly-Discovered Evidence—Counter Affidavits.—Application for new trials are addressed to the sound discretion of the court, and are based on the ground that there has not been a fair trial on the merits. Where the application is based on the ground of newly-discovered evidence, supported by affidavits, counter affidavits, may be received to show that the alleged ground for the new trial does not exist. Nicholas' Case, 91 Va. 741, 21 S. E. Rep. 364. See *ante*, this note, "Newly-Discovered Evidence."

Affidavits as to Method of Arriving at Verdict.—An affidavit by a juror that the verdict was arrived at by each juror setting down the amount he regarded as just, and aggregating them, and then dividing by twelve, it having been agreed that the amount so ascertained should be the verdict, ought not to be received or considered on a motion for a new trial. Chesapeake, etc., R. Co. v. Patton, 9 W. Va. 648. See *ante*, this note, "Misconduct or Incompetency of Jurors."

That some of the jurors are persuaded by others that a majority agreeing to the verdict is sufficient and for this reason they had as well join in, which they do, is sufficient ground to set aside the verdict, and award a new trial in equity where the objection to the verdict comes to the knowledge of the party too late to enable him to move for a new trial at law. Cochran v. Street, 1 Wash. 79.

Affidavit That Material Witnesses Were Not Summoned.—An affidavit of a party, that he failed to summon material witnesses at the trial, owing to advice of counsel that their testimony was not necessary, is no ground to set aside a verdict and grant a new trial. Pleasants v. Clements, 2 Leigh 474.

VII. PRINCIPLES GOVERNING COURT IN DECIDING MOTION.

See *ante*, this note, "Verdict Contrary to Evidence."

Motion Is Addressed to Discretion of Court.—A motion for a new trial is always addressed to the discretion of the court. This is not an arbitrary but a sound and rational discretion which must be exercised in a prudent and reasonable manner. What constitutes a prudent exercise of this discretion it is often very difficult to determine, and each case must be decided with reference to its own particular facts. The rule which exacts from litigants a reasonable degree of diligence and promptness is the better one and is founded in obvious reason and policy. Tefft v. Marsh, 1 W. Va. 38.

In Action of Ejectment.—See monographic *note* on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

The court should hold a stricter course towards plaintiffs, moving for new trials in actions of ejectment than towards defendants, yet where a verdict in favor of a defendant in ejectment is founded in mistake and produces injustice it is both the right and the duty of the court to grant a new trial. Deems v. Quarrier, 3 Rand. 475.

Same—Putting Party upon Terms.—New trials being addressed to the discretion and authority of the court, in order to prevent a material and manifest injustice, the court, as the alternative of a new trial, may impose terms upon the party, requiring him to consent to such a modification of the verdict as will meet the substantial justice of the case. So the new trial may be limited to a single point, as to a single issue in the case, or a particular question, without reopening the whole case, or even, it seems, as to part of the demand sued for, letting the judgment stand for the residue. The new trial may be granted upon any terms which, in the discretion of the court, shall seem requisite to achieve the ends of justice in the particular case. Fry v. Stowers, 98 Va. 417, 36 S. E. Rep. 482; 4 Min. Inst. 930. Accordingly it is now held that the plaintiff in ejectment may be put upon terms; that is, the court, when it thinks that the plaintiff has recovered too much land, may require him to release part of it to the defendant or else it will grant a new trial at the defendant's request. It was formerly held that this rule did not apply to actions of ejectment because of the Virginia statute which provides that the verdict in ejectment shall "specify the land, particularly as the same is proved, and with the same certainty of description as is required in the declaration." Shiflet v. Dowell, 90 Va. 745, 19 S. E. Rep. 848. But this case was *disapproved* in Fry v. Stowers, 98 Va. 417, 36 S. E. Rep. 482.

Principles Governing Appellate Court When Evidence Is Conflicting.—It is the peculiar province of the jury to decide a question of fact arising in a cause, and upon the weight of the testimony upon which it depends. They see and hear the witnesses testify in the cause, and when the judge who presides at the trial and who also sees and hears the witnesses testify, refuses to set aside the verdict, the appellate court, which has not that advantage, will not reverse the verdict upon the ground that it is contrary to the weight of the evidence. Steptoe v. Flood, 31 Gratt. 342; Goode v. Love, 4 Leigh 635; Brugh v. Shanks, 5 Leigh 598; Patteson v. Ford, 2 Gratt. 18, and *foot-note*; Bell v. Alexander, 21 Gratt. 1; Blosser v. Harshbarger, 21 Gratt. 214; Hilb v. Peyton, 23 Gratt. 550; Blair v. Wilson, 28 Gratt. 165; Ruffner v. Hill, 31 W. Va. 432, 7 S. E. Rep. 15; State v. Maier, 36 W. Va. 757, 15 S. E. Rep. 991; State v. Zeigler, 40 W. Va. 503, 21 S. E. Rep. 763; Richmond, etc., R. Co. v. Snead, 19 Gratt 354; Johnson v. Burns, 39 W. Va. 658, 20 S. E. Rep. 686; Akers v. DeWitt, 41 W. Va. 229, 23 S. E. Rep. 669; Sisler v. Shaffer, 43 W. Va. 769, 28 S. E. Rep. 721; Weaver v. Bliven, 82 Va. 53; Alleghany Iron Co. v. Teaford, 96 Va. 372, 31 S. E. Rep. 525; Reusens v. Lawson, 96 Va. 285, 31 S. E. Rep. 528; State v. Cooper, 26 W. Va. 338; State v. Morgan, 35 W. Va. 277, 13 S. E. Rep. 391; Proctor v. Spratley, 78 Va. 264; National Bank v. National Bank, 7 W. Va. 551; Campbell v. Lynn, 7 W. Va. 671; Henry v. Davis, 7 W. Va. 724; Miller v. Ins. Co., 12 W. Va. 122; Grayson v. Com., 6 Gratt. 712, and *foot-note*; State v. Yates, 21 W. Va. 761; Michie v. Cochran, 93 Va. 641, 25 S. E. Rep. 884; Caldwell v. Craig, 21 Gratt. 136; Grayson v. Buchanan, 88 Va. 255, 13 S. E. Rep. 457.

Though great weight is always—and justly—attributed to the verdict of the jury in a case where the evidence is conflicting and the credibility of witnesses is involved; and though the power of the court to grant a new trial, because the verdict is contrary to the evidence, should be very cautiously exercised, and never in a doubtful case merely because the court, if upon the jury, would have given a different verdict; yet it cannot be successfully controverted that the power exists. Muse v. Stern, 83 Va. 39; Patteson v. Ford, 2 Gratt. 18, and *foot-note*; Brugh v. Shanks, 5 Leigh 598; Ross v. Overton, 3 Call 309; Green v. Ashby, 6 Leigh 150; Hill v. Com., 2 Gratt. 595; Downey v. Morrison, 2 Gratt. 240; Grayson v. Com., 6 Gratt. 712, and *foot-note*.

But while a court may grant a new trial, in such case, where the verdict is contrary to the evidence, yet the duty to do so is not always imperative; as for instance, where the verdict is adverse to a hard and unconscionable action or defence, or where it conforms to the substantial justice or equity of the case. In such cases, the court may refuse to set aside the verdict and grant a new trial, although it is not warranted by a close deduction, or rigid analysis, or strict adherence to legal principles. M'Clung v. Ervin, 22 Gratt. 530; Hill v. Peyton, 22 Gratt. 558; Patteson v. Ford, 2 Gratt. 18, and *foot-note*; Grogan v. Chesapeake, etc., R. Co., 39 W. Va. 421, 19 S. E. Rep. 564.

In Cases of Issues Out of Chancery.—Where, upon a motion for a new trial of an issue out of chancery, on the ground that the verdict is contrary to the law and the evidence, the judge, overruling the motion, refuses to certify the facts proved, because the testimony was conflicting, but all the oral testimony is certified, the court will consider not merely whether the evidence adduced before the jury warrants the verdict, but, also, whether, having regard to the whole case, further investigation is necessary to attain the ends of justice. In such case, although there may have been a misdirection by the court, or evidence may have been improperly rejected, a new trial will not be granted, if the verdict appears to be right upon a consideration of all the evidence, including that which was rejected. Powell v. Manson, 22 Gratt. 177.

Distinction between Order Granting and One Refusing New Trial.—In setting aside the verdict the trial court must, to some extent, pass upon the weight of the evidence before the jury, and a stronger case must be made in order to justify an appellate court in disturbing an order granting a new trial than one refusing it, because the refusal operates as a final adjudication of the rights of the parties, while the granting of the new trial simply invites further investigation, and affords an opportunity for showing the truth, without concluding either party. Chapman v. Virginia, etc., Inv. Co., 96 Va. 177, 31 S. E. Rep. 74; Laidley v. Kanawha Co. Court, 44 W. Va. 566, 30 S. E. Rep. 109; Miller v. Insurance Co., 12 W. Va. 116; Reynolds v. Tompkins, 23 W. Va. 229.

Evidence That Jurors Were Not Freeholders.—An affidavit made after the rendition of the verdict, in a condemnation proceeding, that some of those serving on the jury were not freeholders as required by law, is not a good ground for setting aside the verdict. Chesapeake, etc., R. Co. v. Patton, 9 W. Va. 648.

In another case, it was held not good ground to set aside a verdict rendered in an action of ejectment that one of the jury made affidavit that the jury would have found a different verdict if they had believed that at the time certain declarations were made to witnesses, by an old man, as to the location of a corner, that the old man was of sound mind and reasonable judgment. Lewis v. McMullin, 5 W. Va. 582.

Ignorance of Law by Juror.—Affidavit of jurors that they were ignorant of the law that it is with the jury to say whether murder in the first degree shall be punished with death or confinement in the penitentiary cannot be read to impeach the verdict. State v. Cobb, 40 W. Va. 718, 22 S. E. Rep. 310.

VIII. REVIEW OF ORDER GRANTING OR DENYING NEW TRIAL.

See monographic *note* on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

1. POWER TO REVIEW.—The court of appeals may grant a new trial. Power v. Finnie, 4 Call 411. But it cannot grant a new trial upon affidavit taken after the appeal was pending in the appellate court. Porter v. Harris, 4 Call 485.

Judgment or Decree Granting or Refusing New Trial Is Appealable.—A decree of the circuit court granting or refusing a new trial on an issue out of chancery, may be reviewed in the supreme court of appeals. Tompkins v. Stephens, 10 W. Va. 156; Knox v. Garland, 2 Call 241; Briscoe v. Clarke, 1 Rand. 213; Pleasants v. Clements, 2 Leigh 474.

The judgment granting or refusing a new trial may be the subject of a writ of error or supersedeas and is reversible. Grayson v. Com., 6 Gratt. 712, and *foot-note*.

As an appellate court will review an order of an inferior court overruling a motion for a new trial and reverse the proceedings of new trial improperly refused, so it will review an order granting a new trial and reverse the proceedings if improperly granted. Pleasants v. Clements, 2 Leigh 474.

Appeal from Order Granting New Trial.—By the Code of West Virginia (see cl. 9, sec. 1, ch. 135), an appeal may be taken from an order granting a new trial without waiting for the new trial to be had. Lambert v. Ensign Mfg. Co., 42 W. Va. 818, 26 S. E. Rep. 431.

2. RECORD ON APPEAL.—See monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

a. FACTS PROVEN OR EVIDENCE GIVEN AT TRIAL.—When a motion is made to set aside the verdict on the ground that it is against the evidence and the motion is overruled, the record must show, either expressly or by necessary implication, that it contains all the facts proven or the evidence given to the jury at the trial before such judgment will be reviewed. Mann v. Bryant, 12 W. Va. 516; Sheff v. City of Huntington, 16 W. Va. 307.

Although, in general, the inferior court need not state the facts on which they ground their opinion in granting a new trial, yet where they grant it against an established rule of practice, they ought to disclose the circumstances which induced them to depart from the rule. Boswell v. Jones, 1 Wash. 322.

Where Evidence Is Certified.—It is provided in Virginia by statute that, "when a case at law, civil or criminal, is tried by a jury, and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence; or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that it is contrary to the evidence; and the evidence (not the facts) is certified, the rule of decision in the appellate court, in considering the evidence in the case, shall be as on a demurrer to the evidence by the party excepting." Va. Code, sec. 3484; Cunningham v. Com., 88 Va. 37, 13 S. E. Rep. 309; Virginia, etc., Ins. Co. v. Buck, 88 Va. 517, 13 S. E. Rep. 973; Richmond, etc., R. Co. v. Burnett, 88 Va. 538, 14 S. E. Rep. 372; Wytheville Ins. Co. v. Stultz, 87 Va. 629, 13 S. E. Rep. 77; Adams v. Hays, 86 Va. 153, 9 S. E. Rep. 1019; Woods v. Com., 86 Va. 929, 11 S. E. Rep. 798; Jones v. Rixey, 79 Va. 656; Town of Suffolk v. Parker, 79 Va. 660; Payne v. Grant, 81 Va. 164; Farley v. Tillar, 81 Va. 275; Proctor v. Spratley, 78 Va. 254; S. W. Imp. Co. v. Andrew, 85 Va. 270, 9 S. E. Rep. 1015. See also, Reherd v. Clem, 86 Va. 374, 10

S. E. Rep. 504; Coleman v. Com., 84 Va. 1, 1 S. E. Rep. 878. For a full discussion of this subject, see monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

b. BILLS OF EXCEPTION.—Nothing that transpired during the trial will be considered a part of the record on appeal unless made so by a bill of exceptions or order of the court; and the mere statement on the record that certain pleas were rejected and that parties excepted to various rules of the court, is not sufficient. Lawrence v. Com., 86 Va. 573, 10 S. E. Rep. 840. See monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

3. PRESUMPTIONS.

That the Trial Court Acted Properly.—Where there is nothing in the record to show upon what ground the court below acted, in granting a new trial, and in the absence of anything to show the contrary, this court must presume that the court acted properly. Harris v. Lewis, 5 W. Va. 575; Shrewsbury v. Miller, 10 W. Va. 115.

Where, for reasons appearing to the court, though not specified, a verdict is set aside, without requiring payment of costs, the appellate court will take it for granted those reasons were sufficient, no bill of exceptions being filed. Hume v. Beale, 3 Munf. 226.

Where the defendant moves the court to set aside its finding and grant him a new trial, which motion is overruled, and he fails to except to the opinion of the court and procure the court to certify all the facts proven at the trial, if the finding is substantially sufficient, the appellate court will generally presume that the opinion and judgment of the court in overruling the motion was right. Zumbro v. Stump, 38 W. Va. 325, 18 S. E. Rep. 448; Campbell v. Hughes, 12 W. Va. 183.

No Presumption That Evidence Is True.—The appellate court is not obliged to accept as true what, in the nature of things, could not have occurred in the manner and under the circumstances narrated, or what is not susceptible proof. Thus in a case in which the plaintiff testified that, while riding upon one of the defendant's cars, he was kicked by its servant, and the evidence showed that from the top of the car to the plaintiff's shoulder, where he said he was kicked, was three and one quarter feet, and that it was impossible for a man to stand upon the top of the car and kick down three and one quarter feet while the cars were in motion, it was held that a verdict for the plaintiff was contrary to the law and the evidence and would be set aside and a new trial awarded. Chesapeake, etc, R. Co. v. Anderson, 93 Va. 650, 25 S. E. Rep. 947.

Where the Case Is Remanded for a New Trial.—If a cause is remanded to an inferior court for a new trial, the superior court must be presumed to have thought the declaration sufficient, consequently, on the new trial, or on a second appeal, no exception can be taken to the declaration. Murdock v. Herndon, 4 Hen. & M. 200.

4. REVIEW.

Where Action of Lower Court in Granting or Refusing Is Not Excepted to.—Where no exception is taken, or objection made, to the opinion of the trial court in granting or refusing a new trial, such opinion cannot be objected to as error in the appellate court. Snodgrass v. Copenhaver, 34 W. Va. 171, 12 S. E. Rep. 695; State v. Rollins, 31 W. Va. 363, 6 S. E. Rep. 923; Brown v. Brown, 29 W. Va. 777, 2 S. E. Rep. 808; Congrove v. Burdett, 28 W. Va. 220; Danks v. Rodeheaver, 26 W. Va. 274; State v. Thompson, 26 W. Va. 149; State v. Phares, 24 W. Va. 657; Riddle v. Core, 21 W. Va. 530; Shrewsbury v. Miller, 10 W. Va. 115. See *ante*, this note, "The Motion for the New Trial."

Case in Which Error Does Not Have to Be Assigned.—While as a general rule, where there is no bill of exceptions taken in the cause, to the judgment of the court below in granting a new trial, the error cannot be considered on appeal, still there are cases in which, for an error appearing in the record, although no motion was made for a new trial in the court below, the appellate court will reverse the judgment of the inferior court, and remand the cause for a new trial, as, for example, where the record shows that there was no issue taken on a material plea, or where there was no issue at all filed, or where the damages assessed by the jury exceed the amount claimed in the writ or declaration, unless the plaintiff will release the excess. Shrewsbury v. Miller, 10 W. Va. 115; Totty v. Donald, 4 Munf. 430; McMillion v. Dobbins, 9 Leigh 422; Baltimore, etc., R. Co. v. Christie, 5 W. Va. 325; Tennant v. Gray, 5 Munf. 494.

Distinction between Order Granting and Order Denying.—It takes a stronger case to reverse an order granting than it does one refusing a new trial. Probst v. Braeunlich, 24 W. Va. 356; Miller v. Ins. Co., 12 W. Va. 116; Reynolds v. Tompkins, 23 W. Va. 229. See *ante*, this note, "Principles Governing Court in Deciding Motion."

5. JUDGMENT OF APPELLATE COURT.—Where there have been two trials of a case in the court below the appellate court will only look to the proceedings on the first trial, and, if it discovers that the trial court erred in setting aside the verdict on that trial, it will set aside all proceedings subsequent to the verdict, and enter judgment thereon. Muse v. Stern, 82 Va. 33, 3 Am. St. Rep. 77; Brown v. Rice, 76 Va. 629; Pleasants v. Clements, 2 Leigh 474; Johnson v. McClung, 26 W. Va. 659; Hudgins v. Simon, 94 Va. 659, 27 S. E. Rep. 606; Patteson v. Chesapeake, etc., R. Co., 94 Va. 16, 26 S. E. Rep. 393.

IX. THE NEW TRIAL.

Jury Cannot Consider Opinion Expressed at Former Trial.—When a trial of a cause is had before a jury, and they cannot agree upon the verdict, or do agree upon a verdict which is set aside by the court and a new trial awarded, upon the new trial any opinion expressed by the former jury, or by the court upon the former trial, is improper for the consideration of the jury. Crawford v. Morris, 5 Gratt. 90.

If an opinion or instruction of the court given on a former trial is relied on before the jury on the second trial by the party in whose favor it was given, without asking for such opinion or instruction from the court, and a verdict and judgment are entered for him, the appellate court will consider the opinion or instruction so relied on, and if it is erroneous, will reverse the judgment and award a new trial. Crawford v. Morris, 5 Gratt. 90.

Limiting the New Trial to Particular Issues.—The trial court has the power, in the exercise of a sound discretion, to restrict the new trial to a particular issue, and consequently to the issue which has been made at the first trial. Other terms than the payment of costs may be imposed upon the party applying for a new trial. The new trial may be limited to a single point. Prunty v. Mitchell, 30 Gratt. 247.

Where a new trial is granted on condition that the cause shall be tried upon the plea and issue then in the case, it is not competent for the court to allow another plea. Prunty v. Mitchell, 30 Gratt. 247.

Remanded Case Is Heard on Issue Already Made.—Where the appellate court reverses the judgment and sends the case back for a new trial, it will be tried upon the issue already made in the first trial or upon such matters which have occurred since the new trial was granted which are proper and sufficient to be pleaded *puis darrein continuance.* Prunty v. Mitchell, 30 Gratt. 247.

Introduction of New Evidence.—On retrial *de novo*, a party may introduce new evidence and establish an entirely different state of facts from that shown on the former trial, and to conform its judgment to the changed state of facts is no violation of principle in a court, even if thereby it sets aside its former decision as inapplicable, and adopts a new one suited to the new phase of the controversy. But where the evidence is substantially identical on the two trials, and the relations of the parties there to the same, the judgment on the first trial is conclusive. Haffner v. Chesapeake, etc., R. Co., 96 Va. 528, 31 S. E. Rep. 899.

X. COSTS OF TRIAL.

Condition Precedent.—Where the judgment awarding a new trial directs the payment of costs of the first trial, without saying that the costs shall be paid before the new trial is had, still the payment of these costs is considered a condition precedent to the new trial. Rixey v. Ward, 3 Rand. 52.

Where the court grants a new trial upon the condition that the party asking for it shall pay the costs of the first trial, and no objection is entered against the condition at the time it is imposed, the condition is binding. Prunty v. Mitchell, 30 Gratt. 247.

It is error to grant a new trial except upon the terms of paying the costs. Boswell v. Jones, 1 Wash. 322.

Same—Virginia Statute.—Where a new trial is granted for causes other than the misconduct of the opposite party, section 3542 of the Code of Virginia provides that the party to whom the new trial is granted, shall, previous to such new trial, pay the costs of the former trial. It also provides that "if the party who is to pay the costs of the former trial, fail to pay the same at or before the next term after the new trial is granted, the court may, upon motion of the opposite party, set aside the order granting it, and proceed to judgment on the verdict, or award execution for said costs, as may seem to it best." The object of the former provision is to make the prepayment of such costs a condition precedent to a new trial, unless waived by the opposite party. Central Land Co. v. Obenchain, 92 Va. 120, 22 S. E. Rep. 876; Haupt v. Tebault, 94 Va. 184, 26 S. E. Rep. 406. The object of the latter provision is to secure their prompt payment. If the party whose duty it is to pay the costs fail to do so at or before the next term of the court after the new trial is granted, he runs the risk of having the order granting it rescinded, or of having an execution awarded against him for such costs. If, however, the costs are paid or tendered before the order granting the new trial has been set aside, or an execution awarded for them, the object of the latter provision of the section has been accomplished, and the condition upon which the court was authorized to award an execution, or to set aside the order granting a new trial, has ceased to exist. Haupt v. Tebault, 94 Va. 184, 26 S. E. Rep. 406.

Objection That Costs Were Not Required—Time of Making.—After a second trial, a plaintiff cannot for the first time object that the order granting the new trial did not require, as a condition precedent, the payment of the costs of the former trial, especially when no motion was made to set aside the order granting the new trial, nor for an execution for the costs of the former trial. Hudgins v. Simon, 94 Va. 659, 27 S. E. Rep. 606.

XI. NUMBER OF NEW TRIALS.

Not more than two new trials can be granted to the same party in the same case. Poling v. Ohio River R. Co., 38 W. Va. 645, 18 S. E. Rep. 782; Va. Code, § 3392; Code of W. Va., sec. 15, ch. 131.

Under the provision of sec. 15, ch. 131, of the Code of West Virginia, no more than two new trials can be granted to the same party by the court in any civil case of any character tried before it by a jury, although one or all of the verdicts necessitating the new trials was caused by the misdirection or mistake of the court. Watterson v. Moore, 23 W. Va. 404.

Limitation of Rule.—While there are no exceptions to the law that not more than two new trials shall be granted to the same party in the same case, yet if, on the face of the record, it appears that a verdict is void, and that no judgment at common law could be properly entered upon it, as, for instance, because it was too uncertain, ambiguous, or defective, the court may declare such verdict void and direct a new trial without regard to the number of new trials which may have been granted to the same party in the same case. Williams v. Ewart, 29 W. Va. 659, 2 S. E. Rep. 881. See *ante*, this note, "Grounds for New Trial—Nonjoinder."

Armistead v. Marks & Saunders.

October Term, 1794.

Deputy Sheriff—Failure to Take Appearance Bail on Mesne Process—Liability—Supersedeas.—The law does not warrant the rendering of a judgment against a Deputy Sheriff for failing to take appearance bail upon mesne process; and if judgment be so rendered against him, he alone may obtain a supersedeas.

The defendants in error brought an action of debt upon a bond with a collateral condition against Herbert Claiborne, William Claiborne and others, in the District Court. The appellant, a deputy sheriff, arrested the defendant Herbert Claiborne and made return thereof, signing his name as deputy sheriff, but failed to return a bond for appearance. A common
326 *order was confirmed, and a writ of enquiry executed against the plaintiff in error, and the two Claibornes, and judgment was entered thereupon. The other defendants having pleaded non est factum, a verdict was found in their favor. The deputy sheriff alone applied for, and obtained a supersedeas.

The questions made were, 1st, whether the common order ought to have been confirmed against the deputy sheriff, and 2dly, whether Armistead alone could obtain a supersedeas.

Wickham for the plaintiff in error as to the first point, relied upon the case of White and Johnson (see ante p. 159) as being expressly in point.

The PRESIDENT. On the first point

the court have no difficulty in reversing the judgment, being of opinion that the law does not warrant a judgment against an under sheriff for failing to take appearance bail upon mesne process.

As to the other point (which was suggested by the court) we are of opinion, that as the deputy sheriff was in no respect concerned in the merits of the cause, he alone, might obtain a supersedeas.

The enquiry of damages must therefore, be set aside, as to all the defendants, as must the proceedings subsequent to the declaration, and the cause is to be proceeded in anew upon the sheriff's return, made upon the writs issued against the two Claibornes.

Dandridge v. Harris.

October Term. 1794.

Chancery Practice—Agreement to Pay Money or Deliver Property at a Valuation.—The parties agreed to indorse upon the written contract a memorandum permitting the debtor to pay in money, or in property, at a valuation to be made by two honest men to be chosen by the parties. If the creditor refuse to make the endorsement, Chancery will relieve, and will consider the endorsement as made.

Same—Same—Effect Where Debtor Fails to Name Valuers.—If, in this case, the creditor refuse to join in nominating a valuer, the debtor might plead the special matter at Law, or the Court of Chancery might name valuers, if the parties should fail to do so by a certain day.

Payment—Where Made.—Where a man is to pay money, or to deliver property, at a valuation, he is not bound to carry the property to the creditor, but the latter should receive it at the debtor's house.

This was an appeal from a decree of the High Court of Chancery, dismissing the plaintiff's bill, which was, to be let into a specific performance of a contract between the parties, by which the defendant Harris was to repair a mill for the plaintiff, and to receive payment for it, either in money, or in property at a valuation to be made by two honest men, to be chosen, one by each party; and also to be relieved against a judgment at law obtained by the defendant, in consequence of his fraud in not inserting the alternative of payment in the written agreement, nor endorsing it on the back, as he agreed to do at the time of executing that agreement. The answer is a flat denial of every material allegation in the bill. The Chancellor conceiving the answer not to be disproved, dismissed the bill with costs.

327 *The PRESIDENT delivered the opinion of the court.

However it might appear to the Chancellor, this court have no doubt, but that the answer is fully disproved by more than two witnesses, who make it evident, that by the original agreement, before the work was begun, Mr. Dandridge was to have the alternative, and that at the time of signing the agreement, he refused his signature until Harris promised to make the endorsement allowing him that privilege. The alternative is an important part of the contract, since it might make a considerable difference to the appellant, whether he should give up his property at a fair valuation, or be obliged to part from it under an execution at three fourths of its value, or, if he replevied, to have it finally sold, perhaps at a much greater loss.

It appears, that in the action at common law, brought by Harris upon the agreement, the jury found a special verdict, stating the above facts, as set forth in the bill. The appellant excepted to the opinion of the court, permitting the appellee to give parol evidence of those facts, and the judgment which was in favor of the appellee was reversed in the district court on account of the parol evidence having been admitted. Whatever might be the decision of a court of law upon the propriety of admitting such proof to contradict a written agreement, there can be no doubt in equity, but that the appellee refusing to make that endorsement, upon his promise to do which the agreement was signed, and availing himself of that agreement as an absolute one, which in fact was only conditionally executed, he was guilty of a fraud, against which the court will relieve, by considering the endorsement as made, and incorporated into the agreement. The case of Walker v. Walker in 2d Atk. 98, which was read at the bar, does not apply; there was no written agreement in that case, and the question was, whether the parol evidence of it could be admitted, under he statute of frauds and perjuries. But there is a case there put by the Chancellor, which does apply. He supposes a person, advancing money, and taking an absolute conveyance, to which, by agreement, there was to be a defeasance, should refuse to execute the defeasance. He puts the question; will not this court relieve against such a fraud? A strong manner of declaring his opinion that it would, and it is very much like the case before the court. Considering the endorsements then as made, the court proceed to consider what would have been the effect of it, at law. The defendant at law might have pleaded the special matter, that he was always ready to deliver property;
328 *that the plaintiff had neglected to name a person to value it, tho' he had promised to do so, and had refused to receive the property; which plea would have been supported by the proofs in the cause. But for want of this endorsement, the defendant was probably advised that he could not plead this matter, it being dehors the agreement, and therefore he pleaded conditions performed. It is true, the court permitted him at the trial, to give evidence of those facts; and if the jury had upon that evidence decided against him, it would be reasonable that he should be bound thereby, since he would have had a fair trial upon the merits, as much so, as if the endorsement had been made. But that is not the case. The jury found matter suffi-

cient to excuse him, and the County Court gave judgment in his favor, which the District Court reversed, the ground of which reversal appears in the exceptions to have been, the admission of the parol evidence; so that the appellee has committed a fraud in withholding the endorsement, and has then availed himself of it, by a legal objection, founded upon the want of that endorsement. If this be not a proper case for relief in equity, we are at a loss to know how one can exist.

It was then objected, that suppose the endorsement made, it was the duty of Mr. Dandridge to tender property immediately, or else he lost the benefit of the alternative. This case from its nature is very different from the common one of a debtor, owing money, who is obliged to seek his creditor in order to pay the debt. Here property was to be delivered, which could not so easily be conveyed from place to place as money, and it would be natural to suppose, that it was to be valid and received at the defendant's house; and the rather so, as being more convenient to him, in the selection of property which might have taken place. That an actual tender of property was made prior to that made at Johnson's in November 1787, after the suit was brought, does not appear. And if it had stood upon that alone, the court would have considered Mr. Dandridge as having failed in performing his part of the agreement and consequently that he had forfeited the alternative. But the fact appears to be, that on the 16th of December 1786 (the very day the work was finished,) they settled their accounts, and fixed the balance at £48. Mr. Harris called upon Mr. Dandridge to sign the account, which he refused to do, unless Harris would state that property was to be paid; a circumstance which he constantly adhered to as a part of the original agreement. He then desired Harris to come to him with the writing, and to join in naming per-
329 sons to value the *property, and to receive it, which Harris promised to do the next day, or the day after, but did not. Mr. Dandridge then wrote a letter to the father and son, requesting them to come and have the property valued. They did not object, that the property should be carried to them, but declared they would not receive property, and in February 1787, only 41 days from the time the work was finished, and before Mr. Dandridge could probably have time to make a legal tender, Harris brought his suit.

Upon this view of the case, although Mr. Harris appears to have done his work honestly, and is entitled to his stipulated reward, yet since he has been delayed by what this court calls a fraud in him, and by his endeavours to use that fraud to the disadvantage of the other party, he stands in a very different point of view in equity, from Mr. Dandridge, whose conduct through the whole transaction appears to have been fair and upright, at all times willing to perform his real agreement.

The court have to lament the expenses which have been incurred on the occasion, but are of opinion, that they ought to fall upon Mr. Harris, the party in fault, who is adjudged to pay the whole costs at law and in equity.

It is objected that the court cannot decree a specific execution in this case, because the valuers were to be named by the parties, and as they did not name them, it is contended that the court cannot do it for them. In the cases of Pleasants Shore & company, and Anderson v. Ross, (ante p. 156,) and Smallwood v. Hansborough, (ante p. 290,) the parties named the valuers in their agreement, and it was decided that others could not be substituted in their stead, upon their refusing in the one case to act, and in the other not having perfected what they were to do. In this case, no persons were named, so as to shew a personal confidence, but a description of their character only; they were to be honest men; and it is supposed, that if the parties should refuse to name, the Chancellor might easily find two men in the state to answer the description. The court are also of opinion, that the Chancellor might appoint a day, before which the parties should name the valuers, or in case either refused, might direct it to be done by two honest men appointed by himself, to value the property, (negroes excepted) and upon delivering, or tendering the property so valued, to the amount of £48, the injunction to be perpetual.

But as there is difficulty in such a decree, which may be delayed, if not defeated, by the valuers, whether chosen, or appointed, refusing to act; and since the appel-
330 lant coming *into equity, must do equity, and it appearing, that he has parted with the property in the mare, which in his bill he suggests to have been accepted by Harris, at £45, and to have been kept for him by the appellant; and the appellant having declared before bringing this suit, that he intended to pay the money, and only contended for the costs, the court is of opinion that the judgment at law ought to remain in force as to the £48, and be injoined as to the costs.

We therefore reverse the Chancellor's decree with costs. The injunction to be made perpetual as to all the costs at law: and to be dissolved as to the balance of the £48, if any shall remain after deducting therefrom the appellant's costs at law and in equity, as well as in this court: and if upon the adjustment of the account of the said £48 against the said costs, any balance shall remain due to the appellant, in that case the injunction to be perpetual as to the £48, and the appellee decreed to pay such balance.

Duval and Marshall for the plaintiff in error.

Campbell for the defendant.

N. B. The arguments at the bar are omitted being noticed much at large by the court.

Nicolas v. Fletcher.

October Term, 1794.

Forthcoming Bonds—Motion on—Defendant Must Prove Performance.*—Upon a motion for judgment on a forth-coming bond, the plaintiff is not bound to show a breach of the condition; but the defendant is to prove performance.

This was an appeal from a judgment of the District Court of Petersburg, affirming a judgment of the County Court of Amelia, rendered in favor of the appellee, upon a forthcoming bond, endorsed by the sheriff, "that the property therein mentioned, had not been delivered on the day appointed for the sale, to be dealt with according to law."

An exception was taken by the defendant below, that the plaintiff did not prove a non-performance of the condition, by good and sufficient testimony.

Marshall for the appellee. It was not necessary for the plaintiff below to prove a forfeiture, or breach of the condition, but it was incumbent on the defendant to prove performance. On the contrary, the sheriff has returned upon the bond, that the property was not delivered.

The court affirmed the judgment.

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331 *Stott & Donaldson v. Alexander & Co.

October Term, 1794.

Foreign Bill of Exchange—Notice of Protest—Within What Time Should Be Given—Statute.†—If notice of the protest of a foreign bill of exchange be given within eighteen months from the date of the bill, it will be sufficient under the Act of Assembly, unless there be particular circumstances to warrant a departure from the general rule.

This was an action of debt, brought by the appellants against the appellees, as endorsers of a protested bill of exchange drawn by Robert Morris of Philadelphia, in the state of Pennsylvania, which was endorsed to the appellants in this state. The declaration is upon the act of Assembly. On the plea of nil debet, the jury found a special verdict, "that the bill, with three endorsements thereon, two of which are erased, was duly protested in London on the 10th of September 1787, and that notice thereof was given to the defendants, on, or about the latter end of June 1788. If this be a reasonable notice, then they find for the plaintiffs, otherwise for the defendants."

The judgment of the County Court, which was in favor of the appellants, was reversed in the District Court, because the verdict was defective, in not finding facts sufficient to enable the court to judge of the reasonableness of the notice of the protest therein mentioned. The verdict was set aside, and the cause by consent of parties retained for a new trial; from which judgment, Scott and Donaldson appealed.

Ronold for the appellants. There is but a single question in this cause, which arises upon the construction of the act of Assembly, of the 22d Geo. II, C. 27.* The first branch of the law would give the holder of a protested bill of exchange a right to recover interest at the rate of 10 per cent per annum for any unlimited time, if it were not restrained, by the second branch of the section, to 18 months; and from this it 332 is evident, *that the object of the legislature was merely to regulate the interest to be paid upon protested bills, and to fix it at 10 per cent per annum for 18 months, tho' notice be not given of the protest within that time; and yet it is contended, that for the want of notice, during a period far short of that time, the holder is to forfeit both principal and interest. This construction seems to be repugnant to the plain meaning of the law, and involves a contradiction not fairly to be attributed to the legislature. If the exposition, for which I contend, be right, then it follows, that the jury having expressly found, that notice was given within 18 months, the appellants ought to recover under this act. But if notice short of that time be necessary, still the judgment of the District Court is erroneous, because, what is reasonable notice, is a point of law, and is properly to be decided by the court. This is clearly settled by the modern decisions in England, and from hence, I draw an additional argument to prove, that the act of Assembly was intended to change the law of merchants upon the subject of giving notice. For would it not be absurd, that in this country, it should be necessary to give notice of a protest by the following post, as the practice is in England. Such

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***Forthcoming Bonds—Motion on—Defendant Must Prove Performance.**—In Wheeling v. Black, 25 W. Va. 285, the principal case is cited to the point that in an action on a bond the defendant must allege and prove performance.

***Same—Return of Sheriff—Conclusiveness.**—In Adler v. Green, 18 W. Va. 206, the principal case is cited to the point that the uniform practice in Virginia has been to contradict the sheriff's return of "forfeited" upon forthcoming bonds. See collection of cases in *foot-note* to Cole v. Fenwick, Gilm. 134, among others, the principal case. See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

†The principal case is cited in Thompson v. Cumming, 2 Leigh 324, 327. See monographic *note* on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 622.

*The words of the law are, "That where any bill of exchange is or shall be drawn for the payment of any sum of money, in which the value is, or shall be expressed to be received, and such bill is or shall be protested for non-acceptance or non-payment, the same shall carry interest from the date thereof after the rate of 10 per centum per annum until the money, therein drawn for, shall be fully satisfied and paid; but lest any person, having such bill, should for the sake of the said interest, delay negociating the same, or if after it shall be protested, shall not demand payment of the drawer or endorser thereof it is hereby declared that no person whatsoever shall pay more than 18 months interest from the date of any bill to the time it shall be presented protested to the drawer or endorsers thereof."—Note in Original Edition.

a regulation might be proper and convenient in that country, the communication from place to place being uniform and constant. But our situation, at the time when this law passed, and long after, and when too our commerce was confined to England, was very different. Our intercourse with that country, was not only confined in a great measure to particular times of the year, but various accidents might happen, to prevent so prompt a notice from being given, and the adoption of such a rule here, would have proved so mischievous, that it would have put an entire stop to the negotiation of bills of exchange, which the legislature (in the preamble to the law) declare it was their intention to "render equal to cash in the payment of debts."

Wickham for the appellees. We all agree as to the rule established by the law of merchants, but it is contended that the act of assembly was made to change that rule, and the necessity of that change is stated and relied upon to prove such an intention. On the contrary I should conceive, that the inconvenience which would result from such an innovation in the custom of merchants would be sufficient to induce the court to explode such a construction, unless the law be too clear and express to be got over. The drawer of a bill tacitly agrees to pay the bill, if dishonoured, provided he has timely notice of the protest and the holder tacitly agrees to give him that notice.

333 *The custom of merchants having established this principle, such an implied contract is always understood between the parties, as certainly, as if it were expressed. The inconvenience resulting from a contrary principle, is as strongly exemplified in this case, as in any which could be thought of. The drawer lives in a state, where this rule prevails. If the plaintiffs in this cause can, without regarding that rule, recover against the indorser, —the indorser, in an action against the drawer, will be told, that for want of due notice the drawer is discharged. Who would be mad enough to draw bills, if at any distance of time, they might be returned upon him protested, after all accounts were settled between him and the drawee, and after he had otherwise applied those funds, which as a prudent man, he would retain so long as the fate of his bill was in suspence.

There is a great difference between giving notice of the protest of a bill, and demanding payment. The first is necessary by the custom of merchants, to entitle the holder to the principal sum; the latter, to entitle him to the extraordinary interest given by the act of Assembly, which last (beyond 18 months,) he loses unless by presenting the bill protested to the drawer or indorser within that time, he affords them an opportunity of taking it up. It may so happen, that the drawer may have notice of a protested bill circulating in some part of the world, and yet, if it be not shewn to him, so that he may pay it off, he will be excused the 10 per cent for a longer period than 18 months. The object of the law was to fix the interest which the holder should receive, and to lay him under a certain condition to entitle him to that interest. That condition is, that within a certain time he present the bill protested to the drawer. But as to notice of protest required by the custom of merchants, it is left unaffected by the act of Assembly, which never could have intended to alter a general law prevailing in a country with which we principally traded.

The rule in England, as to the time of giving notice, is not as Mr. Ronold has stated it; it is regulated by the circumstances of each particular case, and is a subject which the jury must decide. I admit, that a different rule prevails in cases of inland bills of exchange.

Campbell on the same side. I admit that in England, what is due notice in the case of inland bills of exchange is a point of law, because the certainty of communication from one place to another, and the uniform decisions of juries upon that point, have so fully ascertained and settled it, that the judges are as competent

334 *as the jury to decide upon it. The adoption of a similar practice in this country would be unjust and preposterous even in the cases of inland bills.

As to the main question, there is one reason to be given for the custom of merchants, which has not been much relied upon, and which has always had considerable weight with me, independently of those stated in the books. It is this: a merchant who draws a bill, must, if he mean to be punctual, and to preserve his credit, keep unemployed such a portion of his capital, as will enable him to take it up, should it return protested. If he may be kept in suspence as to its fate, for any length of time, (even 18 months) he must either retain that capital unemployed, during all that time, which would be very injurious to commerce, or he must part with it, and run the risk of being called upon unexpectedly to pay a protested bill, at a time when he may be unprepared to do so. It can hardly be believed, that the legislature could have intended to fetter commerce by the establishment of a principle unknown in any trading country, and particularly in that, with which we were solely connected. The law requires a presentation of the bill to the drawer or endorser, not as being necessary to authorise the holder to recover the amount of the bill, but to entitle him to 10 per cent per annum beyond 18 months. As to notice of the protest, the act is entirely silent, leaving that subject as it stood under the general law of merchants.

Ronold in reply. The legislature certainly intended to alter the custom of merchants upon his subject, and to adapt it to the situation of his country, by declaring that 18 months should be considered as the time within which notice of protest should be given. Those persons whose recollec-

tion will carry them back to the period when this law was made, will remember, that protested bills passed from hand to hand as cash and formed a circulating medium of commerce. The endorsements were never dated, and the bills sometimes remained in circulation here, for many months before they were remitted. This practice the legislature meant to regulate, having a view to the interest of all parties, and to limit the damages to a certain amount.

Mr. Wickham submitted another question to the court, which was; whether an action of debt upon this bill, (which was drawn out of this state) could be supported under the act of Assembly?

335 *Mr. Ronold answered, that it might lie against the present appellees, who made the indorsement in this state, upon the principle, that every indorser is considered as a new drawer.

The PRESIDENT delivered the opinion of the Court.

Some general questions have been discussed at the bar, upon the law respecting protested bills of exchange, such as; whether the act of Assembly has not done away the whole custom of merchants on the subject of notice, and whether the holder may not, upon notice at any time however remote, recover his principal money, although he may lose his damages. With these points, the court think it unnecessary to meddle, except so far as they may concern the present case.

The act of Assembly does not seem to interfere with the negociation of bills, but taking them up as negociated, and protested, proceeds to give the remedy for recovering their amount, leaving the point of their negociation to be decided upon the particular circumstances of each case. As to the diligence necessary to be used by the holder in giving notice of the protest, since that depended upon the situation of the parties, and of the countries between which the exchange was made, the legislature, contemplating those circumstances, seem to have thought 18 months a reasonable time for the whole negotiation, and for the giving of notice, by allowing full damages in case the notice be given within that time.

There may be particular circumstances, which would render a departure from this general rule reasonable and proper; and when they occur, the general rule may not be adhered to; but no such circumstances are stated in the present case. The bill is dated in Philadelphia on the 15th of March 1787,—endorsed in Virginia, but at what time does not appear. It was presented for acceptance about the 10th of June, and protested in September in the same year. Notice was given to the defendant in the latter end of June 1788, all within 15 months from the date of the bill, and the question submitted by the jury is, whether this be reasonable notice. No facts being stated take this case out of the general rule ore mentioned, and established by the act of Assembly, we are of opinion that the notice is reasonable.

As to the opinion of the District Court, respecting the insufficiency of the finding, it is no objection to a verdict, that enough is not found to answer the purpose of

336 one of the parties, *provided what is found, be clearly stated, which is the case in the present verdict.

Judgment of the District Court reversed, And that of the County Court affirmed.

Southall v. M'Keand, Mayo, &c.

October Term, 1794.

Issue Out of Chancery—Effect Where Trial Judge Certifies Verdict against Evidence.*—If the Judge, before whom an issue directed by the Chancellor is tried, certifies the verdict to be against evidence, the Chancellor ought not to be satisfied with it, but should direct a new trial of the issue.

Purchase of Land with Notice of Equitable Title—When Purchaser Entitled to Improvements—Rights of Lawful Owner†—Case at Bar.—If a man purchase land with notice of another's equitable title, but that other neglects to assert his right for a long time, during which valuable improvements are made on the land, he ought not, in Equity, to lose the value of his improvements; aliter, if,

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The principal case is reported in Wythe 95. It is cited in Turpin v. Thomas, 2 Hen. & M. 142; Lyons v. Brown, Gilm 120.

***Issue Out of Chancery—Effect Where Trial Judge Certifies the Verdict to Be against Evidence.**—On this question the principal case is cited in *foot-note* to Pleasants v. Ross, 1 Wash. 156; *foot-note* to Ross v. Pynes, 3 Call 568; Pryor v. Adams, 1 Call 392; Grigsby v. Weaver, 5 Leigh 205, 210; Lavell v. Gold, 25 Gratt. 476; Henry v. Davis, 7 W. Va. 716.

Same—Discretion—Review by Appellate Court.—In Miller v. Wills, 95 Va. 351, 28 S. E. Rep. 337, it is said, while directing an issue to be tried by the jury is a matter of discretion in a court of equity, it is not a mere arbitrary discretion but must be exercised upon sound principles of reason and justice; and a mistake in this exercise is ground for an appeal, and the appellate court will judge whether such discretion has been properly exercised in the given case. Stannard v. Graves, 2 Call 369 (see *note*); Reed v. Cline, 9 Gratt. 136 (see *note*); Wise v. Lamb, 9 Gratt. 294 (see *note*); Beverley v. Walden, 20 Gratt. 147 (see *note*). And likewise is the action of a court of equity, in approving the verdict of a jury upon an issue and decreeing in accordance therewith, or in disregarding it and decreeing against it, equally the subject of review by the appellate court. *Southall v. M'Keand*, 1 *Wash.* 336.

In Love v. Braxton, 5 Call 542, it is said, there was no action for directing the issue as the evidence all stood in the record, and there was neither conflict among the witnesses, nor imputation upon their credit. Therefore, as the chancellor was justly dissatisfied with the verdict, he was at liberty to set it aside, and decide the cause himself. Citing *Southall v. M'Keand*, 1 *Wash.* 336. See monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

†**When Occupant of Land Is Entitled to Improvements.**—In Effinger v. Hall, 81 Va. 103, it is said,

after the right is asserted, the improvements are made. The lawful proprietor is entitled, as against the purchaser, or one claiming under him with notice, to the value of the land at the time it was purchased, clear of the improvements, for which he has a lien on the land. But he would have no lien as against a purchaser without notice, or against one claiming under such a purchaser.

This was an appeal from a decree of the High Court of Chancery, affirming a decree of the County Court, which dismissed the bill of the appellant Southall.

The PRESIDENT stated the case and the opinion of the court as follows. The ground of the appellant's equity is, that colonel Byrd, in the year 1767, published a scheme for disposing of his lots in the city of Richmond, and of his lands in the neighbourhood, by way of lottery, in which scheme, he described the improved lots as tenements in the occupation of the several tenants. The unimproved lots were to be laid off and to contain half an acre each. Under this scheme, the appellant and others became purchasers of tickets in the lottery. Some time after, and before drawing the lottery, colonel Byrd proceeded to survey and lay out the lots, and was about to reduce the improved tenements (which had been occupied by the tenants to various extents more or less,) to half an acre each, which being objected to, he desisted, and consented that they should stand agreeably to the occupation of the tenants, and most of them were laid out accordingly. But the tenement, called M'Keand's was laid, off, as for half an acre, narrowing (as the appellant suggests) that tenement from its usual occupation; to this circumstance however the appellant was a stranger, and having become the fortunate adventurer as to that tenement, he insists he was entitled to it, to the extent of its occupation, which included the land in dispute; but that colonel Byrd, confining him to the bounds of the lot, including only the houses on the tenement, had sold and conveyed the residue of the occupied ground of M'Keand, whom the appellant charges to have had full notice of his title thereto: that M'Keand had sold to Powell, and he to Mayo, who are also made defendants to the bill.

337 *M'Keand admits the scheme of the lottery, colonel Byrd's survey, and his desisting from reducing the improved tenements to half an acre, and agreeing to let them stand upon their occupation. But he denies that there was any additional ground possessed by him, or inclosed on either side of the said tenement, although he understood that colonel Byrd had given up an old kitchen, and nearly half an acre of ground on the east side of the said tenement, and annexed the same thereto, as part of the prize lot. He denies that the appellant ever forwarned him from purchasing; and does not recollect that he offered to purchase the ground in dispute from the appellant. That he erected buildings on the ground in dispute to the value of £1000, & then sold it to Powell.

The appellee, Mayo, in his answer, alledges that he holds the land under a deed from his father without notice of the appellant's title, and believes that his father had no notice at the time of his purchase from Powell.

The father in his answer had expressly denied such notice, and there being no proof to the contrary as it respects either Powell or Mayo, they must be considered as purchasers without notice.

Several depositions being taken, the Chancellor directed an issue to be made up, and tried by a jury, to ascertain the boundaries of M'Keand's tenement; also a survey to be made of the ground in dispute and returned, with the examination of witnesses, to the District Court, where the issue was to be tried, and also directed the scheme of the lottery, and the plan of the city of Richmond to be given in evidence to avail so much only as the jury should think they ought; the former was objected to by the appellees, and the latter by the appellant.

On the trial of the issue, the first jury could not agree. A second, determined the bounds in favor of the appellees, and the District Court certified that the weight of evidence was in favor of the appellant. The Chancellor declared the verdict satisfactory, and affirmed the decree of the County Court, dismissing the bill with costs, from which decree, the appeal comes to this court.

It is agreed by the parties, and the court think rightly, that the verdict in the District Court ought not to stand, upon the certificate of the judges, that the weight of evidence was against it: Since it is unusual for the Chancellor to be satisfied with such a verdict; and tho' the Chancellor

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where the owner of land by fraud, acquiescence and laches has precluded himself from questioning the occupant's claim for improvements, compensation is allowed the latter, as in partition between tenants in common where the owner has made improvements, for which he ought, in equity and good conscience, to be compensated. Wood v. Krebbs, 33 Gratt. 685. This principle was recognized in Walker v. Beauchler, 27 Gratt. 511, where the defendant's claim for improvements was allowed on the ground that by his acquiescence and laches the plaintiff was estopped from contesting it. And to the same effect is *Southall v. M'Keand*, 1 *Wash.* 336.

And in Threlkeld v. Fitzhugh, 2 Leigh 471, it is said, this court has gone so far as to restrict the claim of even the rightful owner of the land, to the value of the land in its unimproved state; permitting both the land and the improvements to remain with the person who made the improvements, or in the hands of his assignee. Citing *Southall v. M'Keand*, 1 *Wash.* 336. See also, citing the principal case, Hughes v. Caldwell, 11 Leigh 350.

In Jones v. Roberts, 6 Call 197, the principal case is cited to the point that, the rule *caveat emptor* applies to legal, not to latent, and much less, to wilfully, concealed equitable rights. To the same point the principal case is cited in Jones v. Roberts, 3 Hen. & M. 441.

was to judge whether his conscience was satisfied, this court, exercising their legal discretion on the same subject, see no reason to depart from the general rule, and therefore they take up the case upon its original merits.

338 *The question, how far the plot in the record is to be considered as evidence, may become all-important to persons interested in the town property; and therefore it is left undecided till cases shall arise, and that question shall be necessary to be decided, when probably it may be brought forth with fuller proof than appears in this record. In this case, it seems of no consequence, since neither Mr. Southall, nor Mr. M'Keand (the tenant at the time,) appear to have been present when Mr. Watkins made the original survey, so as to imply their consent that the occupied bounds of the tenement in question should be changed into the figure then laid down. Nor does it appear to the court, that such consent ought to be inferred from the exposure of the plan in the room where the lottery was drawn, even if the plaintiff had read it, which does not appear, since he could not from thence discover whether the lot was described according to the occupied bounds or not.

The appellant had a right to consider himself as entitled to the occupied bounds of Mr. M'Keand's tenement, (whatever those were) under the scheme, and under colonel Byrd's agreement that the tenements should go according to the occupation, and not be governed by the quantity, of which the unimproved lots were to consist.

The proofs upon the whole, amount to this: that during the occupation of the tenants, some part of the ground in dispute was used as parcel of the tenement, for a garden, which was somewhat extended by one of the tenants, beyond what it had been before, and the vacant ground, between that and the street, was used as a cockpit, and sometimes by the planters, for picking their tobacco on. When M'Keand came to be the tenant, the garden was generally supposed to be part of the tenement, but as he did not want it, no use was made of it by him.

But since that circumstance might be known to adventurers at a distance, who might have received an impression of M'Keand's tenement from observations on the actual occupation of former tenants, and since it appears that the neighbors acquainted with that circumstance, did not consider it as altering the extent of the tenement, but a number of them swear, that if they had been fortunate, they should have considered themselves as intitled to the land in dispute, as part of the tenement, a majority of the court are of opinion, that the appellant was entitled to all the ground occupied as part of the tenement.

M'Keand purchased with full notice, and if the tenement had remained in his hands, and the appellant had commenced his 339 *suit immediately, and M'Keand had, notwithstanding, proceeded in his improvements, he would probably have lost them with the ground itself. But since Mr. Southall tho' he made his claim known, did not commence any suit to enforce it, till M'Keand had placed improvements on it to the amount of £1000, (more than ten times the value of the lot,) it would be unreasonable, that he should in equity avail himself of the increased value produced by his own delay, since M'Keand had a right to suppose from that circumstance, that he had deserted his claim. All he can therefore expect in equity, is to be restored to the value of the ground at the time M'Keand purchased it, and which the court now think him entitled to.

The next question is, against whom, this relief is to be granted? If the ground had remained in M'Keand's possession, or were now in the possession of a purchaser with notice, the court would have no difficulty in determining, that it would have been charged with the payment of such value. But since it was a latent equitable charge only, and the appellee, Mayo, holds under his father who was a purchaser without notice of the appellant's title, the court are of opinion, that the ground in his hand is not charged or liable to make satisfaction for such value, and that the decree is therefore right in dismissing the bill as to Mr. Mayo with costs.

But the appellant has a right to resort for satisfaction to the estate of M'Keand, and therefore, the decree is wrong so far as it dismisses the bill as to him, who ought to have been decreed to pay the value as before stated. That part of the decree must therefore be reversed with costs.

The period at which the value should be fixed, ought to be the time when M'Keand parted with the property to a purchaser without notice, and an issue ought to be made up by direction of the Court of Chancery, and tried to ascertain what was the value of the ground in dispute on the 26th of July 1779, independent of any improvement made thereon subsequent to the 8th of October 1769, which being ascertained, the amount is to be paid to the appellant with interest from July 1779, and his costs in the High Court of Chancery and the County Court, out of Mr. M'Keand's estate. But as M'Keand had died since the pendency of this appeal, tho' it has been revived, by consent of parties, as to his heirs and representatives in their general character without naming them, we think it proper that they should respectively be made specific parties, that they may discover a state of M'Keand's assets, real and personal, in case there should 340 *not be sufficient of the latter to satisfy this demand. For this purpose, the cause is to be remanded to the High Court of Chancery, that the suit may be revived against the executors or administrators, as well as the heirs or devisees of the real estate, and for further proceedings therein.

Watson & Hartshorne v. Alexander.

October Term, 1794.

Statute for Scaling Debts—For Whose Benefit.—The two first branches of the fifth section of Act of Scaling Debts, was intended for the benefit of debtors; the third is intended equally to benefit creditors and debtors.

Same—How the Equity of This Act Brought before Court—Verdict.*—The proper mode of bringing before the Court, the Equity claimed under the fifth section of this Law, is by a special verdict finding the facts on which the Equity is to arise; or for the Court to instruct the jury, on the evidence given to them, upon the equitable circumstances of the case; or to hear the evidence upon the Equity of the case at the trial, and then to correct the verdict accordingly. But it is improper in the Court, after the verdict is rendered, to receive evidence, and on that to vary the verdict.

Landlord and Tenant—Rent—Scale of Depreciation.†—A conveyance of land in fee simple in 1779, upon a ground rent, charged thereon, payable in current money;—the rent is subject to the scale of depreciation.

Same—Rent—Tenant Cannot Repel Claim.—If the tenant has enjoyed the land, he cannot repel the landlords claim of rent, by saying "he has nothing in the land;" or, that the conveyance was void.

Deeds—Failure to Crave Oyer—Variance—Effect.—Action of covenant upon a deed executed by four persons. The defendant pleads covenants performed, without asking oyer of the deed. Although the deed set forth in the record, appear to have been executed by only three of the persons, the Court will not notice the variance.

This was an action of covenant brought by the appellee against the appellants in the District Court of Dumfries. The case was as follows: John Alexander, by his will devised to the appellee, his son, in fee simple, a tract of land lying in and adjoining to the town of Alexandria part whereof was laid off into lots. He further devised, that if his executors therein after named, should think it conducive to the interest of his said son, to lease out the whole, or any part of the said land, reserving ground rents for ever; that they, or the survivors might lay the same off into lots, and give leases therefor in fee simple, reserving an annual ground rent to his son, and his heirs: and he appointed four persons his executors.—In August 1779 a deed was executed purporting to be made by the four executors of the first part, the appellants of the second part, and the appellee of the third part, (who was then an infant) conveying the lots in question to the appellants in fee, reserving an annual rent of £78: 10, current money of Virginia, payable to the appellee and his heirs, with a covenant on the part of the appellants to pay the said rent annually to the appellee and his heirs. The deed of which a profert was made, and upon which this action is founded, is made part of the record, and appears to be signed by three of the executors, and the appellants, and by no one else. The action was brought for 9 years rent in arrear and unpaid, and the declaration states the lease to be made by the four executors, of the first part, the appellants of the second part, and the appellee of the third part. The appellants after taking an imparlance, pleaded covenants performed. The jury found a verdict for the plaintiff, and assessed his damages at £626, 341 *subject to the opinion of the court, whether the rents in the declaration mentioned, and granted by the deed therein set forth, be within the operation of the act of Assembly, entitled an act, directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes." "And if they be, by what rule the same ought to be reduced into specie value, if they ought to be reduced at all, and that the said damages may be reduced according to the same rule that shall be applicable to the said rents."

The District Court examined witnesses, and being satisfied, (as the record states,) that the rents for which the action was brought, were expected to be paid in the money current at the time they should become due, gave judgment for the damages found due by the jury in specie. To the examination of the witnesses the appellant filed a bill of exceptions, and appealed to this court.

Lee for the appellants. The first question which arises in this cause is, whether the deed upon which the action is founded, be within the operation of the act of November 1781, c. 22;* and I contend that it

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***Forthcoming Bonds—Motion on—Non Est Factum—Discretion of Court.**—Where *non est factum* is pleaded to a motion on a forthcoming bond, a court may render judgment without the intervention of a jury; or they may impanel a jury to try the issue, at their discretion. Burke v. Levy, 1 Rand. 1, citing the principal case at page 2. See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

†**Rents—Scale of Depreciation.**—On this question, the principal case is cited in Dearing v. Rucker, 18 Gratt. 448; Meredith v. Salmon, 21 Gratt. 774. See also, Bogle v. Vowles, 1 Call 244; Skipwith v. Clinch, 2 Call 253; Com. v. Beaumarchais, 3 Call 136.

Same—Damages—Interest.—In Cooke v. Wise, 3 Hen. & M. 487, the principal case is cited as authority for the proposition that interest is not recoverable, by way of damages in an action of debt for rent arrears.

*The second section of the law is as follows: "And whereas the good people of this state will labour under many inconveniences for want of some rule, whereby to settle and adjust the payment of debts and contracts entered into and made between the first day of January, one thousand seven hundred and seventy-seven, and the first day of January, one thousand seven hundred and eighty-two, unless some rule shall be by law established for liquidating and adjusting the same so as to do justice as well to the debtors as to the creditors. Be it, therefore, enacted by the General Assembly, that from and after the passing of this Act, all debts and contracts entered into or made in the current money of this State, or of the United States, excepting, at all times, contracts entered into for gold and silver coin, tobacco, or any other specific property, within the period aforesaid, now remaining due and unfulfilled, or which may become due at any future day or days, for the payment of any sum or sums of money, shall be liquidated, settled, and adjusted, agreeably to a scale of depreciation herein after mentioned and contained, that is to say, by reducing the amount of all such debts and contracts to the true value in

is. The legislature, when they passed this law, had put a period to the existence of paper money, by calling the whole of it out of circulation. During its circulation, it had, from its constant depreciation, 342 united with the exertions *of the legislature to support its credit, and to re-assure the confidence of the public mind, given birth to a multitude of contracts, which depended for their performance upon its continuing to exist. It had also given rise to innumerable speculations, founded in a difference of opinion between those, whose confidence in the public assurances led them to expect specie in lieu of it, at par, and those who calculated upon its progessive depreciation, and its ultimate destruction. In this situation of things, when the legislature, at one stroke, dispelled the delusion, it became an indispensable duty with them to establish some general and fixed rule for the discharge of those contracts, to prevent the injustice which might otherwise have ensued, if debtors should have been compelled to pay specie, where they only calculated upon paying depreciated paper money. This rule then became necessary in all cases, where money was contracted to be paid, and the words of the law are sufficiently general to comprehend every possible contract. The cases which are within the letter of the law are, all debts and contracts entered into in current money, between the 1st of January, 1777, and the 1st of January, 1782. This case, then, is strictly within it, and is equally within the mischief meant 343 to be *provided against. It cannot be otherwise considered, because it is a contract always continuing, unless the law be rendered a dead letter. For where will the court draw the line? Would debts payable by installments in one, two, fifty or a thousand years, come within the law? Would rents reserved upon a lease of an hundred years? If all of them would, this would. If some of them would not, I ask which they are, and upon what principle the discrimination can be made? I think then there is no doubt, but that this case comes within the general rule established by this law, and that the rents ought to be reduced according to the scale, unless the next question to be considered be against me, and that is,

2dly, Whether this case be within the benefit of the 5th section of that law? That section was intended to reach the case of debtors only, and not that of creditors. The two instances specified in the first part of the clause, are clearly intended for the benefit of the former, namely, 1st, where the debt has been tendered and refused; and 2dly, "where the non-payment is owing to the creditor." The third branch of the section, which provides for cases in "which other circumstances arise, which in the opinion of the court, before whom the cause is brought to issue, would render a determination, agreeable to the above table, unjust"—was intended to comprehend cases not within those specified, which could not then be foreseen, and where from other causes the debtor might be injured, if the scale were strictly to be applied. On the other hand, if the court consider both the creditor and debtor as coming within the operation of this clause, the consequence will be, that the law will furnish no rule at all, and the legislature might as well have left all cases to be decided by the court under the 5th section of the law; because the construction which will be contended for by the counsel on the other side, will produce the very same effect, and will render the rule a mere nullity. But admit that this case is within the operation of the 5th section, I insist,

3dly, That it does not warrant the court in a departure from the general rules of evidence, or of judicial proceeding. One of those general rules is, that parol evidence is inadmissible to contradict a written agreement; another is, that the jury are to decide upon facts; and the court upon the law arising out of those facts. There is nothing in this act, which authorises the adoption of a different rule. The evidence, if it could properly have been admitted, should have been heard and decided upon, pending the trial, or should have been 344 brought before the court by *regular pleading. The case of Pleasants and Bibb in this court and that of Loudon and Stotsdale in the General Court were decisions favorable to the appellant.

But if all these points be against me, I ask what can this court do, or how are they to decide; They should have the same means of judging upon the evidence, that the Dis-

specie at the days or times the same were incurred or entered into, and upon payment of said value so found in specie, or other money equivalent thereto, the debtors or contractors shall be for ever discharged of and from the said debts or contracts, any law, custom, or usage to the contrary in any wise notwithstanding. Provided always, nevertheless, That in all cases where actual payments have been made by any person or persons, of any sum or sums of the aforesaid paper currency, at any time or times, either to the full amount, or in part payment of any debt, contract, or obligation whatsoever, the party paying the same, or upon whose account such sum or sums have been actually paid, shall have full credit for the nominal amount of such payments, and such payments shall not be reduced, any thing in this act, or any other act or acts, to the contrary in any manner notwithstanding."

"V. And be it enacted, That where a suit shall be brought for the recovery of a debt, and it shall appear that the value thereof hath been tendered and refused, or where it shall appear that the non-payment thereof is owing to the creditor, or where other circumstances arise which, in the opinion of the Court before whom the cause is brought to issue, would render a determination according to the above table unjust: in either case, it shall and may be lawful for the Court to award such judgment as to them shall appear just and equitable. And where any verdict hath been given for damages, between the first day of January, one thousand seven hundred and seventy-seven, and the first day of January, one thousand seven hundred and eighty-two, and the judgment remains unsatisfied, it shall be lawful for the several Courts within this Commonwealth, in a summary way, by motion to them made, either before any execution issues, or at the return day of such execution, to fix, settle, and direct at what depreciation the said damages shall be discharged, having regard to the original injury or contract on which the damages are founded, and any other proof or circumstances that the nature of the case will admit.—Note in Orginal Edition.

trict Court had, else they cannot say whether the opinion of that court be right or wrong. It is the business of the appellee to produce the testimony relied upon to support that judgment; and if it be not offered to this court, the judgment must be reversed.

There is another objection which arises out of the pleadings, and which I conceive will be fatal to the judgment below. The deed set forth in the declaration, is substantially variant from that offered in evidence. It is stated in the declaration, to be made by the four executors on the first part, and by the appellee on the third, whereas it appears to be executed by only three of the executors, and not at all by the appellee. This error is not cured by a special verdict, such as this is, however it might have been considered after a general verdict.

Washington for the appellee. As to the first point, Mr. Lee's concessions respecting the motives which induced the legislature to pass the law in question, will warrant me in saying, that either the case before the court was not intended to be affected by the scale, or if it were, that it is also within the operation of the 5th clause. For surely, if the inconvenience and injustice, which were intended to be prevented, be as general as Mr. Lee admits, the legislature could never be so unjust as to provide a partial remedy, to fit the case of a particular class of men only. Whether this case be within the spirit, or within the letter of the law, I submit to the court upon the following considerations: 1st, the spirit of the law. During the existence of paper money, it was well understood by all men, that the nominal rise of property was produced by the fall in the value of the circulating currency. The confidence of one class of men in the public assurances, and the want of it in another, begot innumerable speculations founded upon this diversity in the sentiments of men; and therefore, in all temporary contracts, the duration of which was limited, and which might be complied with whilst paper money circulated, the debtor calculated upon further depreciation, and the creditor upon the appreciation of the money before the time of performance should arrive. Consequently, paper money was with both, the standard by which they estimated their expected gain. But
345 when the legislature put an end *to this standard, justice compelled them to provide some other, by which to adjust such contracts. But in continuing contracts like the present, which from their nature were to extend far beyond the possible existence of depreciated paper currency and which could never be fulfilled, the parties would naturally look beyond this period, and of course make some thing more permanent in its value, than depreciated money, the standard by which to estimate the property contracted for. They could never conjecture, that the legislature would at a future period pass a law for scaling such debts, nor indeed any other, and of course would provide for themselves a rule which would be just, whatever might be the fate of paper money. This being the difference between temporary and petpetual contracts, that is, one, which might, the other which could not be fulfilled whilst paper money circulated, it follows, that since the latter never could require legislative interposition, so that interposition never would be exerted. The case put by Mr. Lee, of a debt payable by installments, is that of a temporary contract, and tho' possibly it might extend beyond the period, and therefore it is possible, that in such a case the parties may have had paper money in view, yet it might terminate before. In this case, the fulfillment of the contract could not possibly happen before, and therefore paper money could not have been contemplated by the parties.—Again, the act declares, that where payments are made, in satisfaction of such debts or contracts, according to the reduced value, the payer shall be for ever discharged of and from such debts or contracts; which can never be construed to extend to contracts, incapable of being discharged so long as time shall last. If then this case be not within the spirit, I submit it 2dly, whether it be within the strict letter of the law. The act speaks of "debts and contracts now remaining due and unfulfilled, or which may hereafter become due." Now this may well apply to common debts, payable either at one, or at different periods, for they are literally debts, immediately that the contracts are made, tho' to be discharged at a future day. But a rent, is not a debt until the time of payment arrives, insomuch, that if the lease by any means expire before the rent become due, the rent for the last year could not at common law be demanded, because it being a retribution made by the tenant out of the profits of the thing leased, unless he have the full enjoyment thereof, he is not bound to make the retribution. The act therefore seems literally to apply to debts due, or to become due.

346 *2dly, If this case be within the law, then I contend with confidence that it is within the letter, as well as the spirit, of the 5th clause. The words are general enough to comprehend it, and surely neither reason nor common justice can warrant an idea, that the legislature would apply a partial remedy to a general mischief, and permit one class of men to suffer, who struggled equally in the general clause, and who were equally injured, with the other, by the delusion created by paper money.

It is insisted 3dly, That the mode of decision in this case was improper. The words of the law expressly give to the court, the power to render such a judgment as the principles of equity require, if they be satisfied, that the circumstances of the case would render the general rule unjust. If the court are to decide this question, upon the circumstances of each case, the court, must necessarily examine the witnesses,

and any other testimony produced to establish the facts upon which this decision is to be given. It is perhaps immaterial, whether this be done, pending the trial, or after verdict; tho' I rather think it most proper after verdict, because until the jury have found whether any thing, and what is due, it would be unnecessary, if not improper, for the court to decide the other point. But it is contended, that the admission of parol testimony in this case was improper. I cannot admit the position either upon common law principles, or upon the construction of this law. As to the first, the rule is, that parol evidence may be admitted to explain doubtful expressions in a written agreement, though not to contradict plain expressions. Now the rent in this case is made payable in current money. But the question is, what sort of money was meant? For specie was current, tho' not as plentiful in 1779, as paper money. Evidence was resorted to, and it appeared to the satisfaction of the District Court, that specie was the sort of current money intended. Proof of the value of property in 1779, and at this day, was probably the evidence upon which this conclusion was formed. But however this may be upon the common rules of evidence, the act warrants such proof, since the court, in all cases where there are circumstances to authorize a departure from the scale, are to decide upon equitable principles, which they could not do, if prevented from hearing testimony to prove those circumstances.

It is then objected, that this court should possess the same means of judging, which the District Court had. I admit it; and since the judgment of that court is in our favor, and every thing transacted in a court of justice is presumed to be rightly 347 *done, till the contrary appears, this court must affirm the judgment. The appellant's counsel thought it necessary to state in his bill of exceptions, the general weight of the testimony: why was it not as necessary to spread the whole evidence upon the record? For if he meant to impeach the judgment, he would have done do, or summoned the witnesses to attend this court.

As to the objection respecting the variance, it is easily answered. The deed is no part of the record, oyer of it not having been taken; so that this court cannot say there is a variance between the declaration and the proof. If the deed actually produced in evidence, was different from that declared upon, the appellant should have excepted to the deed going in evidence to the jury, and spread it upon the record, so as to enable this court judicially to notice the variance.

The court will presume, after this verdict, that sufficient, and proper evidence was produced to the jury, or else that they would not have found that the defendant had not performed his covenants, and was indebted in a particular sum for rent arrear. As to this point the verdict is general, and carries with it all the presumption in its favor, which arises out of general verdicts. The jury doubting upon a single point of law, the court are only to settle that doubt.

Marshall on the same side. In the exposition of a statute, we should attend to the mischief meant to be prevented; and the remedy should be made commensurate with it: it should never be extended beyond the mischief, unless the expressions made use of, are so strong, as to render such a construction absolutely necessary. The difference which has been stated between temporary and perpetual contracts is a striking one. In the former, the parties calculated the value of paper money at the day of making the contract, as well as the probable value of it, on the day of payment. If it continued to depreciate more rapidly than was expected, the debtor gained; otherwise he lost. The legislature put an end to the delusion; and rendered a performance of the contract impossible, by taking out of circulation that medium, upon which both parties calculated; and of course, it became necessary to provide a remedy to the evil, which the situation of this country had rendered inevitable. But in contracts, which, from their nature were calculated to continue long beyond the time when depreciated paper money could exist, or could furnish a standard by which to estimate the value of property, the parties would naturally look beyond that time for a standard, by which to estimate the present value of 348 property, *and would therefore make specie that standard. In the first case then, there existed a mischief, and the law is satisfied, by applying the remedy to that case, in the latter, no such mischief could happen, and therefore there was no necessity to provide a remedy. It is a strained, rather than a necessary construction to extend the law to such a case.

Second point. It is contended, that the benefit of the 5th clause must be confined to debtors. The words of a law must be express and clear beyond doubt, which can warrant a construction so manifestly at variance with the fundamental principles of justice. On the contrary, the words are so general, that nothing could justify an exception, but to prevent the gross partiality, which the construction on the other side tends to produce. It is said, that the two cases, which are specially provided for, point to the benefit of the debtors only. I do not think that the first case is intended to benefit the debtors, since the creditor who would, without this provision, have been obliged to accept of the identical money tendered and refused, is to receive in lieu thereof, an equitable payment. Tender and refusal are technical words, and will be construed to mean a legal tender, and not a mere offer to pay. But I rely upon the latter part of the 5th clause, to prove, that creditors were as much the objects of justice with the legislature as the debtors. Suppose the clause in question had been left out of the law, then I think it clear,

that a judgment rendered within the period during which the scale operates, (being undeniably a debt) would also have been scaled. But the court, by this clause, are to fix at what depreciation the damages are to be paid, having regard to the original injury or contract, which by referring to a period antecedent to the judgment, must operate against the debtor. If then, in the latter branch of the clause, creditors were intended to be benefited, upon what principle can it be said, that they were intended to be excluded in the former part of it. Again; in the former part of the clause, (let it be, that the two specified cases are in favor of debtors only,) what can the words which follow mean? Namely, "in either case it shall be lawful for the court to award such judgment as to them shall appear just and equitable." I might with more propriety contend, that the general part of the section, viz: other circumstances &c. relate exclusively to creditors, if the former part related to debtors.

As to the propriety of admitting parol testimony, it is to be remarked, that in the latter branch of the 5th clause, this 349 sort *of testimony is clearly to be heard and decided upon by the court, without bringing it before them by special pleading, and why is it to be excluded in the former part of the clause? But it is contended, that by our construction, there would be no general rule at all. In ordinary cases, men may settle their differences by referring to the scale, without the necessity of a suit, and this extraordinary remedy is provided only for extraordinary cases.

As to the objection, that all the evidence which was laid before the District Court, should appear before this, it is be observed that the bill of exceptions renders it unnecessary; for it admits as does also the judgment of the court, that there were circumstances proved to the court sufficient to except this case from the general rule, and the only objection relied upon, is the impropriety of the court's hearing and deciding upon such testimony; so that, if we be right in contending that the court below were authorised to hear parol evidence, there is an end of this question. But if it should be determined, that the evidence ought to have been spread upon the record by the plaintiff, the court will then send back the cause for that purpose; since in cases like this, (as in appeals from decisions respecting mills, wills and roads,) the practice as to this subject remains yet unsettled.

Lee in reply. If the act of Assembly does not apply to cases of rents which have become due since 1781, it does not apply to antecedent rents; and if this action had been brought for the rent due in 1780, could it have been contended that it should not be scaled? For it seems to be admitted, that this would have been a debt due when the law passed, and of course, literally within it. And if such a rent would have been subject to the scale, the rents which afterwards became due were, because the law is general, and I know no rule by which to limit its operation. It is said, that the 5th clause forms an exception, only in extraordinary cases. But I ask, how are these to be distinguished from ordinary cases, until they are all brought before the court and examined? So that the consequence would be, what I before stated; that the law forms no general rule at all, but is a mere nullity, if we apply it to creditors as well as debtors.

As to the argument, that this is no debt till it become due, it is surely as much a debt before the time of payment, as where money is payable on a precedent condition, which, it is not contended, would not be within this law.

I differ very widely from Mr. Marshall in the construction of the last branch of the 5th section. It seems intended exclu- 350 sively *for debtors; for if a judgment had been rendered for damages before 1781, execution might have issued for the nominal amount against the debtor, who would have been without remedy (unless perhaps in equity,) but for this provision in his favor, authorising the court, on motion of the debtor, to adjust the damages, which ought to be paid in specie.

The Court took time to consider, and afterwards mentioned to the bar a doubt, which had occurred as to the plaintiff's title, which they desired might be argued. It was, that only three of the executors appear to have executed the lease.

Lee. The testator devises the land in question to the appellee, and the executors have a mere power uncoupled with an interest: and the law is well settled, that in such a case all the executors must join in executing the power. The power is given to the executors not in their capacity as executors, in which case perhaps those only who qualified might execute it, but it is a confidential trust reposed in them by name, because he speaks of them as his executors thereafter named, and it is therefore the same, as if he had given the power to those four persons, (naming them,) without stiling them his executors.

The deed therefore is void, and of course it cannot be the foundation of an action. The court cannot presume the other executor to be dead. He cited Pow. on Dev. 292—294. Co. Littl. 446.

Washington. I shall contend 1st, That it was not necessary for all the executors to join in the deed. 2dly, If it were necessary, that it appears judicially to the court, that all of them did join. 3dly, If both points be against me, yet that we are entitled to recover.

1st, There is an obvious distinction, between a power given to executors in their official capacities, and one which is confined to them as individuals. In the former, if all the executors do not qualify, still those who do, answer the description, and being executors, may as such, execute the power. But if the power be given to A, B and C, who are also named executors, A and B cannot act, because the confidence was not

placed in them unless united with the other executor. Now the devise in this case is of the former sort, that is, to his executors, whose names are afterwards mentioned, and the court will not presume that more qualified than have executed the deed, unless the contrary appear.

But 2dly, the court must take notice, that all the four joined in the deed. The declaration states it expressly. The defendants without demanding oyer, so as to en-
351 able the court to take advantage *of the variance, if it existed, plead, that they have performed the covenants contained in the deed declared upon. On the trial, no variance is discovered, or excepted to, and the jury find, that the defendants have not performed the covenants, but that the plaintiff has sustained damages by the breach of them, submitting to the court a single point of law, which is not that now under debate. As to every material fact in the cause, this is a general verdict, and every thing necessary to induce such a finding, without the proving of which it ought not to have been found, will be presumed. This court therefore must take it, that such a deed as is declared upon was produced in evidence to the jury, and tho' a different one appears in the record, yet it cannot be noticed as being that deed, since it is neither made a part of the record by oyer, nor by a bill of exceptions.

3dly, This deed which appears in the record, and which for the sake of argument may be considered as that declared upon, is executed by the appellants, who grant a rent—charge to the appellee. The declaration states, that the appellants entered by virtue thereof, and were and still are seised and possessed. The jury have found in favor of the plaintiff. This fact then must be considered as established, that the appellants have enjoyed the land ever since the conveyance to them. They are therefore estopped by their deed, to say, that the grantors had no right to convey, but, are bound to make the stipulated retribution during the period that they have enjoyed the possession, whatever latent right the appellee may have to recover the possession on account of a defect in the conveyance. When the appellee does this, then and not before his right to rent will cease.

The PRESIDENT. The first point which merits our attention, is the objection to the plaintiff's title, to which two sufficient answers are given, 1st, The non-execution of the deed by the fourth executor, does not appear judicially to the court. The declaration states, that all the executors made the deed. The plea (if it do not admit the fact,) does not deny it, and the verdict which as to this point is to be considered as a general one, confirms it; nor can we consider this fact as being contradicted by the deed which appears in the record. 2dly, The declaration charges enjoyment of the property by the appellants, during the term for which the rent is claimed, which is sufficient to maintain the action, without deciding how far the doctrine of estopplés applies to the case.

We come next to the merits. The 1st question is, if this contract for rent be subject to be scaled at all, under the 2d
352 *section of the act of 1781: and if it be, then, 2dly, whether it be within the 5th section of that law, so as to warrant the court in adjusting it upon equitable principles. 3dly, Whether the mode of adjustment be a proper and legal one.

1st, It may be premised, that the law in question, tho' rendered necessary by the peculiar situation of this country, at that time, was certainly retrospective in its operation, and the subject was of an extremely delicate nature.

The objection is, that the act meant only to respect temporary contracts, which might probably be fulfilled during the existence of paper money, and which the parties could not contemplate to continue forever: that of course, the legislature did not mean to scale rents payable annually, and for an interminable course of time, when even the remembrance of paper money might be retained. There is certainly considerable weight in the argument. On the other side it is contended with much strength, that the legislature in fixing the scale at the time of the contract, and not at the time or times of future payments, seem to have supposed, that the price was fixed by the idea, which the parties then entertained of the relative value of paper to specie. To govern our enquiries upon this subject by a loose comparison of the rent, with the thing for which it is to be paid, would prove quite unsatisfactory—£78 for three quarters of an acre of naked ground, may appear as high in specie, as that sum in paper money, reduced by the scale to £3: 10, is unreasonably low. Our safest and only guide is to pursue the words of the law, which plainly include this case, being a contract for payment of current money at future days. The act is general, and not limited as to portions of time, nor can the court draw a line between a contract for payment at the end of two days or of twenty years or more. The act excepts the cases of contracts for gold or silver coin, tobacco, or other specific property, and if it be true, that an exception proves the rule, we must decide that all other contracts are within the law. The objection that one payment would discharge the whole contract, was well answered by the appellant's counsel, when he observed, that the discharge, was meant to be coextensive with the payment only, and not to effect demands becoming due at future days, by the same contracts.

2dly, Although the second clause has established a general rule for adjusting contracts, where no particular circumstances intervene, yet the 5th section has allowed the equitable interposition of courts, in cases of particular hardship as,
353 *1st, Where it shall appear that the value of the debt hath been tendered and refused.

2dly, Where it shall appear that the non-payment is owing to the creditor. Or 3dly, where other circumstances occur which, in the opinion of the court before whom the cause is brought to issue, would render a determination according to the scale unjust. In either case, the law authorises the court to award such judgment, as to them shall appear just and equitable.

It is objected 1st, that the application for this equitable interposition of the court, can come from the debtors only; that the clause under consideration was intended exclusively for their benefit, and not for that of the creditors, and that this was so decided in the General Court. I do not know the cases alluded to, but am persuaded they must have arisen from one of the two branches of the clause, which are clearly intended for the benefit of debtors only; for it would seem strange for any court to determine under the 3d branch of the clause, if circumstances appear which would render the application of the general rule unjust to the creditor, that the court were not at liberty to give a just and equitable judgment for him, as well as for the debtor, in a similar situation. Such partiality cannot fairly be imputed to the legislature, and it would require strong words to induce such a construction. In this law there is not the slightest ground for it.

Another objection contended for is, that this clause, if construed to apply to creditors, as well as to debtors, would render the second section a mere nullity, and would entirely destroy the effect of the general rule, by leaving the whole subject at large, and to depend upon the various opinions of the different courts. If this would be the case, are the court at liberty to reject a positive law, because its effects may be inconvenient? But how does this differ from the common case of exceptions from a general law? The latter is to prevail in all general contracts, unattended by any particular circumstances, and is to be departed from only when such circumstances occur. Again; does it not fall within the general system of jurisprudence, which although it fixes rules of decision governing courts of law, allows a departure from them in equity, upon circumstances of fraud or accident; yet different chancellors entertain different opinions as to the application of those circumstances, and courts of law differ daily in the construction of statutes, deeds and wills. So likewise, juries fre-
354 quently, in the *same cause, and on the same evidence, not to say on the same point, in different courts, give contrary verdicts. Yet this does not furnish a sufficient reason for restraining the different courts, and juries from proceeding to try all cases before them.

Upon the whole, we must decide, that the District Court had a power, under this clause, to enquire into the circumstances of this contract, and from a view of them, to determine whether an adherence to the scale in this case would be unjust, either as to the plaintiff, or as to the defendant, and to substitute such other rule, as to them might seem more just and equitable.

But 3dly, How are those circumstances to be brought before the court, and to be decided upon? This is a question of some difficulty.

The 1st method is by a special verdict, stating the facts and circumstances, and leaving it to the court to decide upon them, whether the scale should be applied, and if so, whether by the legal rule, or by any other? This seems to be the most proper method as complying strictly with the words of the law, and according with the ordinary modes of trial. Indeed in this case, which is not an action of debt for rent certain, but of covenant for damages to be ascertained by the jury, the jury might upon evidence of the intention of the parties, encrease, or diminish the damages, and these they might find in specie, and so determine the question by a general verdict.

Another method would be, for the court to hear the evidence of those circumstances, on the trial, and to instruct the jury as to the point of scaling, subject to the controul of the court as in other cases, in setting aside the verdict, if their opinion be disregarded; or perhaps, if the evidence be heard at the trial, and a general verdict given, the words of the law might justify the court in entering a judgment for a sum different from that found by the jury, assigning as a reason for this departure, that circumstances required a deviation from the legal scale, and the adoption of another for the purposes of justice. But in either case, it would be the business of the party who is dissatisfied with the opinion of the court, to state the evidence in a bill of exceptions, that so the question might properly be brought before a Superior Court. Whether this mode, or that by way of special verdict, be adopted, the influential circumstances may be proved by parol evidence, and the parties, as to those, are not confined by the written contract. If it were otherwise, the clause would be vain and nuga-
355 tory; since I cannot conceive, *what circumstances could appear in the contract itself, to induce a departure from the scale, unless the payment is stipulated to be made in specie, or in some specific property, which would at once take the case out of the law altogether.

The scale, it is to be observed, was former subsequent to the destruction of paper money, and on conjecture only; and that drawn from the ideas of mercantile men, not of the bulk of society. The contracts of men should be governed by the comparative value of paper to specie, as they understood it when those contracts were entered into; and if that be more, or less than the rate at which the scale afterwards settled it, the latter ought not to be a rule for them. Circumstances therefore tending to illucidate their ideas upon this subject, collected from their expressions in the treaty, the general opinion of the parties, and of others in the neighborhood at the time, and such like, seem to be what the law contemplates, and

can only be collected from parol testimony. It is loose indeed; but it rests with the judges as in other cases of evidence, to say whether it produces conviction on their minds or not.

The objection therefore is not to the court's having (in this case) admitted parol proof of the circumstances, but the doubt arises as to the time and manner of that admission. For neither of the modes, before stated as proper, have been pursued; but one wholly new, and in my mind irreconcileable with every idea of propriety. A jury are sworn, who find a verdict for the plaintiff, subject to the opinion of the court, whether the money ought to be scaled, and in what manner, under the act of Assembly, without stating a single fact, or circumstance, to enable the court to decide upon the question. If the court were right in proceeding to judgment on this verdict, they were bound to decide as the case appeared upon the contract itself. And if they judged it to be within the second section, which they appear to have done, they should have scaled it, since no circumstances were disclosed to shew the legal scale to be unjust. Instead of this, after deciding that the contract was within the law, they examine witnesses, and upon their testimony, enter judgment for the whole sum in specie, saying "that it appeared the rent was expected to be paid in specie."

This, it is contended, is warranted by the law, which gives to the court, the power of hearing, and of judging of the circumstances, exclusive of the jury, and that at the time of entering their judgment.

356 *But 1st, I doubt whether the act does any more than give the court jurisdiction over the enquiry, and whether the trial is not to proceed as in ordinary cases, in which the jury, if they please, may decide. For 1st, the words are, "the court before whom the cause is brought to issue" which are proper words to give jurisdiction. 2dly, A jury must be, and was sworn to try the issue, and surely, that was the time to bring forward the evidence as to this collateral point, for which both parties ought to be prepared. 3dly, The constitution declares, "that the trial by jury is preferable to all others, and ought to be held sacred." To go no farther, it may be affirmed, that this mode of trial is never to be taken away by implication, or without positive words in an act of Assembly. Laws for this purpose sometimes give the court an express power to proceed, without the solemnity of a jury; most usually to proceed upon motion in a summary way, by which, the same thing is understood. Of this, there is an instance in this clause, where a power is given to the courts to regulate judgments entered up during the existence of paper money. The different expressions in that, and the part under consideration, operate strongly against the exclusion of the jury from a part in this decision, and against the taking of it out of the ordinary mode of trial.

But 2dly, Suppose the court have the exclusive power of decision, surely it must come before them in a regular manner, and at a proper time; that is to say, by way of direction to the jury in case a general verdict be found, or by a judgment given upon a special verdict: or the point might be reserved on a proper state of facts, entered upon the record: none of which have been observed in this case.

I said, that if the court could give judgment on this verdict, it should have been for the money legally reduced, since the contract was within the law, and no circumstances are disclosed to take the case out of the general rule. And strictly speaking, such judgment might perhaps be proper, since enough is found to enable the court to decide upon the face of the contract; and it would seem to be no good reason for awarding a venire facias de novo, that such circumstances are not stated, since it may from thence be presumed that none such were proved to the jury.

However, since the record discovers, that there are circumstances which induced the district judges, to depart from the scale, though now determined to have been improperly brought forth; the party ought not to be precluded from the benefit of

357 those circumstances *if disclosed in a regular way, and the justice of the case will be best attained, by awarding a venire facias de novo.

Judgment reversed, and a new trial directed.

Wroe v. Washington, Butler and Nevison.

October Term, 1794.

Bills of Exception—Effect as a Demurrer to Evidence.*—A bill of exceptions cannot be considered as a demurrer to evidence. In the latter, the Court may, if the case be clear, refuse to compel the other party to join, and may instruct the jury, or leave the question with them.

Non-Suit—Right of Court to Compel.—The Court cannot compel the plaintiff to suffer a non-suit.

***Bills of Exception—Effect as a Demurrer to Evidence.**—On this question the principal case is cited and approved in *foot-note* to Keel v. Herbert, 1 Wash. 208; Smith v. Segar, 3 Hen. & M. 397; Lovell v. Arnold, 2 Munf. 176; Hollingsworths v. Dunbar, 5 Munf. 199; Brooke v. Young, 3 Rand. 116; C. & O. R. Co. v. Sparrow, 98 Va. 632, 37 S. E. Rep. 302.

Demurrer to Evidence—Joinder.—In Green v. Buckner, 6 Leigh 83, it is said: "There was no reason why the defendants should not have been compelled to join in the demurrer to evidence. The evidence demurred to, was not plainly against the demurrant, and therefore does not come within the influence of the decisions of Thweat v. Finch, 1 Wash. 217, *Wroe v. Washington*, 1 *Wash.* 357, and Dunbar v. Beale, 5 Munf. 24. The evidence, though parol, was not loose and indeterminate, but *explicit*, and admitted of no variance. It was therefore, within the rule laid down by JUDGE ROANE, in Hyers v. Wood, 2 Call 574." The principal case is cited on this question in *foot-note* to Trout v. Va. & Tenn. R. Co., 23 Gratt. 619. See monographic *notes* on "Bills of Exception" appended

Pleading and Practice—Declaration—Variance†—Case at Bar.—Declaration stating an agreement that the plaintiff would rent and furnish a house at L., and board the defendant and his Clerks for so much each. The agreement proved was, that he would board the defendant and his Clerks at L. for the sums stated in the declaration. The variance is not material.

This was a special action on the case, brought by the appellant against the appellees in the County Court of Westmoreland. The declaration stated an agreement between the appellant and the appellees, that the former should rent and furnish a house in Leeds Town, and entertain one of the appellees, two of their store keepers, and a servant, with meat and drink for one year, for which, the appellees agreed to pay him, for the three first, £25 each, for the last £8; and that, in consideration of the appellant's having undertaken to rent and furnish a house, and to entertain the said four persons as aforesaid, the appellees promised to pay &c. and avers performance on his part &c. The breach assigned is in the non-payment of the stipulated sums. Plea, non assumpsit. The appellees at the trial, moved for a nonsuit, because the evidence did not correspond with the declaration, which being over-ruled, they filed a bill of exceptions, stating, "that the plaintiff did not prove that any contract had been made between the plaintiff and defendants respecting the renting of a house in Leeds Town as mentioned in the declaration, on the contrary it appeared by a witness, that the plaintiff had applied to the defendants upon this subject, informing them, that he had rented a house in Leeds Town for the purpose of taking boarders, and requested the defendants to board their assistants with him: that there was no proof of any application having been made by the defendants to the plaintiff touching the board of the said assistants in the town of Leeds, before the offer was made as aforesaid by the plaintiff to the defendants, nor did it appear in evidence, that any other contract had been made between the parties except such as is above stated. Whereupon the defendants did object, that no such contract as that laid in the declaration had been proved, and 358 *moved for a nonsuit." The court refused to nonsuit the plaintiff, because it appeared that the price at which the assistants were to be boarded by the plaintiff was £83 per annum. The jury, found a verdict for the appellant, and upon an appeal to the District Court, the judgment was reversed, and a nonsuit awarded, from which the plaintiff below appealed to this court.

Marshall for the appellant. The 1st question is, if the variance between the declaration and the evidence be material. 2dly, If material, whether the Inferior Court erred in the judgment which they gave.

1st, The variance is certainly not a substantial one, since, whether the agreement was to board, or to rent and furnish a house and board, the appellant in either case, was entitled to the stipulated sum, and no more is claimed. The renting and furnishing of a house were circumstances entirely unconnected with the services to be performed by the appellant, and for which alone, he was to be paid.

2dly, The motion made was for a nonsuit. It has been so repeatedly decided in this place, that a plaintiff cannot be compelled to suffer a nonsuit, that the judgment below will surely not be reversed, because that was refused which this court has declared ought not to have been directed. If the court had given an improper direction, or opinion to the jury, it would be subject to the correction of this court? But that was not done. The Inferior Court decided properly upon the point submitted to them, and their judgment was therefore improperly reversed.

Washington for the appellee. If the contract laid, be proved to be made upon a different consideration, from that stated in the declaration, or on that and some other, the variance is fatal. Bull. Ni. Pri. 147. In Gilb. Law of Evid. 183, it is laid down "that in all special actions on the case, the allegata and probata must correspond; for since in verbal contracts where the identity is not clearly ascertained in the declaration, and where it cannot be otherwise known till the trial, if a latitude were allowed that contracts might be considered as the same, which did not substantially differ, no man by the allegation could prepare for his defence."

These rules of law are in strict conformity with the real and substantial purposes of a declaration; which are, 1st, to apprize the defendant of the nature of the charge, and 2dly, to enable him by a reference to the record itself, to plead the 359 judgment in *bar to a second action, for the same cause. To discover whether the variance in this case be material or not, let me suppose that there had been at one time such a contract as is stated, and at another, such a contract as is proved, and this is at least a possible case. Suppose a judgment obtained upon the contract as stated, and another action brought some years after upon the contract as proved; could the former judgment be pleaded in bar? surely not. Again; suppose the defendants had had a witness material for them as to the first contract, and another as to the second: when the plaintiff found the defendants prepared to meet him upon the contract as laid, he had only to shift his ground at the trial, and prove the second contract, upon which he discovered the defendants were unprepared. By strictly requiring a close correspondence between

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to Stoneman v. Com., 25 Gratt. 887, and "Demurrer to the Evidence" appended to Tutt v. Slaughter, 5 Gratt. 364.

†**Pleading and Practice—Declaration—Variance.**—The principal case is cited in Brooks v. Scott, 2 Munf. 347.

the allegation and the proof, the plaintiff can never be injured, because knowing his own case, it must be his own fault if he mistate it. But infinite mischief will ensue from breaking in upon the rule, since we are then at sea, at the mercy of nice and capricious distinctions, without any certain guide to direct us.

The variance is said not to be material, because in either case, the appellant was entitled to £83, and for this he has brought his action. But if the plaintiff state what he might with propriety have omitted, yet having stated it, he must prove it, for otherwise the cases are not the same. The case of Bristow against Wright and Pugh. Dougl. 665, is a complete answer to this argument, and the doctrine is fully and ably stated by lord Mansfield. That was an action by a landlord against a sheriff under the statute, for levying an execution on his tenant, without paying him a year's rent, which in the declaration was stated to be payable annually. On evidence it turned out, to be payable quarterly, and the variance was considered as fatal. Now this variance was quite unimportant to the sheriff, since the action was brought for the year's rent, and more could not have been recovered, whether it were payable in one way, or in the other. It was agreed, that the mode of payment was unnecessarily set forth, but being stated, it should have been proved.

Should it be argued, that in the case at bar, the declaration is broader than the proof, and therefore the variance favourable to the appellees, I answer, so it was in the case reported in 1 Ld. Ray. 735 where the promise laid, was to deliver good merchantable wheat, and that proved, was to deliver good second sort of wheat which was decided to be a fatal variance.

Another variance equally material is, that the agreement laid, is to pay £25 for 3 persons each, and £8 for a servant. and that proved, is to pay a gross sum of £83.

360 *I consider the second point as being more difficult and more important. —The decision of this court are relied upon, and it is contended, that however the case might have been, if the motion had been more regular, yet in the shape in which it was made, the judgment must be affirmed. But if the court perceive from this record, that the appellant ought not to recover upon the principal point, it is strange to say, that he shall have the benefit of the judgment, because the appellees happened to make a collateral motion which was irregular.

Suppose for a moment, that this motion had not been made; how would the case have stood, if the appellees instead of proceeding as they did, had demurred to the evidence? If the variance be material they must have prevailed. I then submit it whether in substance this be not a demurrer to evidence, whatever it may be in form? An attention to the distinction between a bill of exceptions, and a demurrer to evidence will be important. The first is founded upon an objection to the admission of improper testimony; The judgment of the court is, that the evidence is, or is not, proper, and if it be improper a new trial is awarded. The latter admits the competency of the evidence, as well as the verity of it, but objects, that it is insufficient to maintain the issue; and in this case, the whole evidence must be stated, in order that the court may decide whether it be sufficient or not. The judgment is final, either for the plaintiff or defendant, and the verdict, which is a conditional one, stands or falls with that judgment. Now apply this definition to the present case. All the evidence which was given is spread upon the record, and it is further stated, that certain other facts were not proved. But the fact not proved was the very thing essentially necessary to have been established in support of the issue. This court then have it in their power to give a final judgment and to say, either that the issue was, or was not supported by the evidence. In the case of Keel and Herbert v. Roberts in this court, where the plea was non-assumpsit within five years, a bill of exceptions was filed, stating three depositions verbatim, from which it appeared that those deponents did not prove an assumpsit within five years. It was contended at the bar that this, though a bill of exceptions in form, might be considered as a demurrer to evidence, since it stated the whole evidence. Your honor in delivering the opinion of the court, observed that the question was, whether this was to be considered as a demurrer to evidence; which could never have been a question if the form was material to give the name. The cause was sent back for a new trial, and I presume

361 for this reason, that the whole *case was not stated, for notwithstanding three witnesses might not have heard an assumpsit within 5 years, there might have been other witnesses examined who did. If then the motion for a nonsuit had not been made, and this court have found enough stated in the record to satisfy them, that judgment ought to be given for the appellees, what alteration will that motion make? The motion was merely collateral, and the appeal is not from that, but from the final judgment, which I have endeavored to shew was erroneous, and which is either to be affirmed, or corrected here. And if the final judgment be wrong, will this court affirm it, because the counsel propounded an improper question to the court? This would be sacrificing substantial justice to considerations of mere form. But what is this court now to do? They must either give judgment for the appellant, award a new trial, or give judgment for the appellees. The first cannot be done, because it appears upon the face of the record that the appellant ought not to recover. Will they do the second? If they do, it will be a vain thing, since it is evident that the appellant upon this declaration cannot ultimately succeed. But the court may reverse the judgment of the District Court because it

awarded a nonsuit; also the judgment of the County Court, and direct it to be entered for the appellees, upon the ground that the appellant ought not to have recovered upon the evidence.

Marshall in reply. The case from Ld. Ray, is not like the present. The variance there was material, since the price of the wheat not being fixed, it would depend upon the quality of it, and therefore it was essential in fixing the quantum of damages which the plaintiff was entitled to recover, whether it were of the first, or of the second quality. But in this case, whether the agreement was as it is stated in the declaration, or as it turned out in proof, still the appellant was entitled to £83, and to no more, nor less. If this action had been for damages, on account of the appellees refusal to board the four persons with the appellant, the variance might have been material, since those damages ought in that case to have been proportioned to the inconvenience and loss which the appellant sustained by providing himself with the means of accommodating the boarders.

Upon the second point, I would ask, whether it be possible to liken a bill of exceptions, to a demurrer to evidence? They are different in form, in their consequences, and in the conduct of the parties. In the former, the parties still proceed to a trial of the issue; in the latter, the jury are discharged immediately, or find a conditional verdict only. In the former, the 362 question is *brought before the court upon the motion of the objecting party only; in the latter, by the act of both parties, since the demurrer offered by the one, is joined by the other. In the former, either party has a right to the benefit of his exceptions before a Superior Court; in the latter, the court, if the case be clear, may refuse to compel the other party to join the demurrer, and leave the whole question to the jury. The judgment upon reversal in the one case is for a new trial, in the other, it is final and conclusive. But the order of nonsuit is not conclusive; the plaintiff is not obliged to submit to it, and if he do, he may re-institute his suit, and recover upon better evidence. But the final judgment is a perpetual bar. As to awarding a new trial, the court is not bound to do it against the justice of the case; for if in this cause, the appellant should fail, it must be, not because the justice of the case is against him, but because of a mere slip in his attorney in stating it.

The PRESIDENT delivered the opinion of the court.

This court having decided, that the plaintiff cannot be compelled to suffer a nonsuit, the counsel for the appellees acknowledged that the judgment of the District Court must be reversed, but he has insisted, that the bill of exceptions should be considered as a demurrer to evidence, and that the variance between the case stated and that proved, being material, the court ought to reverse the judgment of the County Court.

In the case of Keel and Herbert v. Roberts, this court decided against the doctrine of taking a bill of exceptions for a demurrer to evidence; but the counsel endeavored to distinguish that case from this, on account of the whole evidence being stated in this, whereas there was in that only a partial recital of the evidence, and says that the reason which governed the court in that case was founded upon this distinction. Whether this was the only reason assigned by the court, I cannot ascertain, not having my notes with me; but the Judges recollect that their discussion went farther, and that they considered the two modes of proceeding as being so totally dissimilar, that the one could not be considered as answering the purposes of the other. On a demurrer to evidence, the court may refuse to compel the other party to join, and may either direct the jury as to the sufficiency of the evidence, or in a clear case, may leave it to the jury to decide upon, as the court seem to have done in this case. We cannot therefore consider this as a demurrer to evidence. The counsel for the appellees then insists, that the variance between the declaration and the proof is so material, 363 *that this court cannot give judgment for the appellant, or affirm the judgment of the County Court; since in all special actions, the plaintiff must prove his case precisely as he has stated it; that if he fail to do so, he cannot recover, although he should prove another contract entitling him to the same relief, because such recovery would be no bar to a new suit founded upon such other contract. The cases cited for this purpose do not apply to the present. In those, the two contracts are entirely different from each other; such as good wheat, stated, and good wheat of a second quality proved—a lease reserving rent annually stated, and reserving it quarterly proved. These were different contracts, and the substance of the one, was not comprehended in the other. We are not inclined to meddle with these decisions, nor by any means to extend them beyond their principles. But in this case, the proof extends to all the substantial parts of the contract as laid, and what it does not reach was wholly immaterial, and might as well have been omitted as inserted. But if it could be material, yet the evidence being stated in the bill of exceptions, and a general verdict found for the appellant, he would be barred from a future action, and the appellees would have it completely in their power to avail themselves of this recovery, by referring to the record. The appellant was to find the store keepers meat and drink for £83; to do this, he must have a house, and whether he then had one, or was to procure one, or whether they solicited him, or he them for the contract, was wholly unimportant.

The judgment of the District Court must be reversed, and that of the County Court affirmed.

Brewer v. Tarpley.

October Term, 1794.

Verdict—Want of Similiter—Effect.*—The want of a similiter shall not, after a trial, vitiate the verdict.

This was an appeal from the District Court of Northumberland, and the only question was, whether an issue was properly joined. It was an action on the case upon an assumpsit. Plea non-assumpsit, concluding as usual to the country, but no similiter appears in the record.

Warden for the appellant contended, that the omission of the similiter was fatal, and could not be amended by an appellate court. He cited 1 Str. 641 in point.

There being other cases in the court of a similar nature, tne counsel who were interested in he general question, argued the point.

364 *Washington on the same side contended, that the case from Stra. cited by Mr. Warden, was expressly in point, and was unimpeached by any subsequent adjudication.—Those which come the nearest to it, are Sayer v. Pocock Cowp. Rep. 407. and Harvey v. Peak 3 Burr. 1793.—In the first, there was an et œtera which the court construed to mean a similiter, since nothing else could be inferred from it. That at farthest it could be considered only as an issue misjoined, and (being in the same court) amendable by the statute of Jeofails, which however does not cure the want of an issue. In the other case, the plaintiff replied "and the defendant likewise" instead of the plaintiff. In that case it was no more than the misjoining of the issue. But no case can be produced where the total want of an issue has been aided by verdict.

Warden; in the case of Sayer v. Pocock, the amendment was made in the same court, and to prevent a writ of error.

Campbell for the appellee.—It would be mischievous as well as a disgrace to justice, if such captious objections were permitted after a trial. The issue is completely formed by an affirmation on the one side, and a negation on the other, and the adding of the similiter, is either done by the clerk, or by the party who tenders the issue. It is always understood that the one or the other will do it, and it would be a palpable fraud to permit the party to avail himself of a mistake, which it is understood and expected he will prevent. The case of Cooper v. Spencer 1 Str. 641 is not in point, for the replication did not tender an issue.

Washington in reply. The replication in the case of Cooper and Spencer was de injuria sua propria, &c. which was a complete negation of the plea of son assault demesne, and concludes to the country as the plea now under consideration does.

The PRESIDENT delivered the opinion of the court.

The mere omission of a similiter in a plea importing the general issue, if it be a fault at all, is the misprision of the clerk, and therefore amendable. In this case, the parties considered it as joined; the jury were sworn to try the issue joined—the parties go to trial upon the merits, and the verdict is that the defendant did assume. After this, it is too late to object.

Judgment affirmed.

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365 *Cosby Executor of Loudon v. Hite.

October Term, 1794.

Amendment of Pleading by One Party—Right of Other.*—Where one party is permitted to amend, or amends without leave, the other has a right to plead de novo, whether the new plea be material or not to his defence.

This was an action on the case brought by the appellant against the appellee in the County Court. The declaration was upon an assumpsit, and the general issue was pleaded. Afterwards, the plaintiff moved the court for leave to amend, by filing a new declaration in trover, which was permitted, and to this the defendant pleaded not guilty. The latter declaration being in many parts of it blank, when the issue was joined, was afterwards filled up by the plaintiff in material parts. The defendant moved that the words thus inserted should be stricken out, which was refused by the court. He then moved, that he might have leave to plead de novo, in which he was also overruled, it appearing (as the record states) that he intended to plead the act of limitations. Verdict and judgment was given for the plaintiff, which was re-

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*Pleading and Practice—Want of Similiter—After Trial—Effect.—In B. & O. R. R. Co. v. Faulkner, 4 W. Va. 184, it is said: "In respect to the plea of the general issue, it was long ago decided that a failure to add a *similiter* was not error after trial. *Brewer v. Tarpley*, 1 *Wash.* 363. And it is expressly provided in the Code of Va. 1860, ch. 181, § 3, that the want of a *similiter* shall not be error after verdict. So that as to the plea of *nonassumpsit*, there was no error, in trying the case without a formal issue."

Also in Wellsburg Bank v. Kimberlands, 16 W. Va. 572, it is said: "In the present case the verdict of the jury was responsive to all the issues, being a general verdict for the defendants. I say responsive to all the issues, for though no formal issues were taken on the pleas of *nonassumpsit* and payment, yet, as both these pleas properly conclude to the contrary (see Douglass v. The Central Land Co., 12 W. Va. 512), the plaintiff had a right without the formal addition of a *similiter* to proceed to trial on them as though issues had been formally joined upon them. See Code W. Va., ch. 125, § 25, p. 603, and Douglass v. Central Land Co., 12 W. Va. 506; JUDGE MAXWELL'S opinion in B. & O. R. R. Co. v. Faulkner, 4 W. Va. 180, and *Brewer v. Tarpley*, 1 *Wash.* 363. But it is otherwise if the plea concludes with a verification." The principal case is also cited in Turberville v. Self, 4 Call 587; Digges v. Dunn, 1 Munf. 58. See Turberville v. Self, 2 Wash.

*See monographic *note* on "Amendments" appended to Sneed v. Coleman, 7 Gratt. 300.

versed in the District Court, from which the plaintiff below appealed.

Wickham for the appellant. The first objection to the judgment of the County Court will probably be, their refusing to permit the appellee to plead de novo to the new declaration. In answer to this I shall insist that wherever the defendant pleads to a blank declaration, he waves all objection to it on that account, and tacitly consents, that the plaintiff may fill up the blanks as he pleases.

I shall admit, that in general, where either party has leave to amend their pleadings, the opposite party should also be permitted to plead de novo. But it does not follow as a necessary consequence, that this must happen in all cases. There may be, and certainly are, exceptions from the general rule, as for instance, if the amendment be in form only, and not in substance; if the pleading de novo be unnecessary; if it should be (as it often is) the practice of the court to permit amendments of this sort at any time. In short, if a possible case can happen where an exception from the rule can be warranted, it will be presumed in support of the judgment, unless the facts stated in the record are sufficient to overrule the presumption, and to bring the case within the general rule. Now in this case, the appellee could not possibly be injured by the rejection of his motion, because upon not guilty he might have given 366 any thing in evidence, *which could afford him a defence. It is laid down generally, that the only pleas in trover are not guilty and a release; but it is also said by lord Holt, that a release may be given in evidence upon the general issue. Of course, the appellee's only view was to produce delay by the amendment asked for, since he might have defended himself upon the plea of not guilty, as completely after, as before the blanks were filled up; and surely, if the motion made by him, was merely for the purpose of delay, the court were not bound to grant it.

Marshall for the appellee. I shall not differ this case from what it would have been, if the motion had been originally made by the appellant to amend his declaration, but I hold it to be a rule without an exception, that where one party is permitted to amend, it is the unquestionable right of the other party to plead de novo. The amendments made in the declaration in this case were material, since they stated the appellant's title, and described the thing in dispute. The appellant stakes his right to recover upon the declaration, the defendant his defence upon the plea. It is unequal and unjust to permit one of them to shift his ground, and to hold the other bound by his first plea. The appellee might think the plea first put in a sufficient answer to a blank declaration, knowing that the plaintiff could not recover upon it; otherwise he might have pleaded a release, which I do not agree could be given in evidence on the general issue. I do not positively say that the appellee was injured by the court's refusing him the liberty of pleading de novo. It is sufficient for me, if it were barely possible that he might have been. Now it appears, that the appellee wished to plead the act of limitations, from which I conjecture that his attorney thought it necessary. I admit it might have been given in evidence, but if the attorney was impressed with a different opinion, it is probable that this ground of defence was entirely lost to the appellee, by the court's refusing the amendment asked for on his part. It is said, that the amendment was unimportant; if it were, then no good reason can be given for its being refused.

Wickham in reply. Mr. Marshall's argument might have been proper, before the Inferior Court, where the materiality of the amendment might have been discussed and considered. But since there are exceptions to the general rule, and this record does not state such facts as can enable the court to decide upon the materiality or immateriality of the proposed change in the plea, this court presuming the Infe- 367 rior Court to have done *right, until satisfied of the contrary, must conclude that the change was unimportant and intended merely for delay.

The PRESIDENT delivered the opinion of the court.

Whatever terms the court might have imposed on the appellee, had he moved to amend, or to plead de novo, the case is quite altered when the motion came from the other side. Equal justice required in that case, that the appellee should be allowed to change his plea, or even to demur if he thought proper, without being subjected to terms. The appellant having amended his declaration without leave, it can only be sustained upon the ground, that if he had moved the court, they would have permitted the amendment to be made. It is therefore to be considered in the same point of view as if the amendment had been made at his motion, and this brings it within the principle above stated.

Hewlett v. Chamberlayne.

October Term, 1794.

Forthcoming Bond*—Defective—Action of Debt.—An action of debt may be brought upon a defective forthcoming bond, even after an unsuccessful motion had been made on it.

This was an action of debt brought by the appellee in the District Court of Williamsburg, upon a forthcoming bond, the condition of which upon oyer appeared to

*Statutory Bonds—Failure to Comply with Statute—Effect.—On this question the principal case is cited in *foot-note* to Johnston v. Meriwether, 3 Call 523; Morgan v. Hale, 12 W. Va. 718. See *foot-note* to Stuart v. Lee, 3 Call 421. See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

be in common form, except that it did not recite the amount of the debt due by the execution—the pleas were, 1st, Conditions performed. 2dly, That the plaintiff had in pursuance of the act of Assembly moved the court at a former term for judgment upon the bond which was over-ruled, the court being of opinion that the bond was insufficient. 3dly, That the bond was taken by the sheriff under colour of his office and contrary to the statute &c. To the 1st plea, the appellee replied generally. To the 2d, that the motion was made under the act of Assembly of 1769 entitled "an act to amend an act entitled an act declaring the law concerning executions and for relief of insolvent debtors" which said act being construed strictly in motions, an award of execution upon the said forthcoming bond was refused for some inaccuracy in the condition of it. To the 3d plea, the appellee replied, that the bond was taken in pursuance of the act of 1769 upon an execution &c.

The parties agreed the following case; that the bond in the declaration mentioned was taken by the sheriff upon an execution issued at the suit of the appellee, conditioned for the forthcoming of property 368 seized by the said sheriff under *that execution. That the property was not delivered according to the condition of the bond, nor the money paid. That a motion was made for an award of execution upon the said bond, which was over-ruled and the motion dismissed with costs, on account of the insufficiency of the bond. That afterwards another motion was made by the appellee to quash the execution which was also rejected. Judgment was entered below for the appellee.

Wickham for the appellant. This bond was taken under the act of 1769, but not pursuing that act in reciting the execution, and the amount of it, it is utterly void. The law requires forthcoming bonds to be returned to the clerk's office and to have the force of judgments; but if the bond be not made in conformity with the law, it can have no greater force than a defective judgment or recognizance, upon which no recovery could be had. An irregular judgment may be set aside upon motion, and if this be considered as such, the appellee could not elect to take it as a thing in pais and bring an action upon it. But if he had such an election, he has made it, and a regular judgment has passed against him upon his motion.

Marshall for the appellee. This question has been fully settled by this court, in the case of Meriweather and Johnson. In that case the objection to the bond was: that it was taken payable to the sheriff, instead of the creditor, as the law required; but the principal decided in that case is strictly applicable to the present.

In that case, as in this, a motion for judgment upon the bond had also been made and overruled. In short, the very same objections were there stated and argued, which are now urged; and upon full consideration, the court determined, that an action of debt upon the bond might be sustained.

The PRESIDENT.—The case of Meriweather and Johnson is expressly in point.

The judgment must therefore be affirmed.

Edward M'Guire v. Warder Executor of Parker.

October Term, 1784.

Contracts—Presumption as to Usury.—The Court will never presume a contract to be usurious unless the usury be proved.

Same—Usury*—What Constitutes—Case at Bar.—Upon a mortgage for a sum of money payable in Pennsylvania currency, stipulating interest generally, if a decree be entered by consent for six per cent. interest, it will be considered as a Pennsylvania contract, and not usurious; Aliter, if the decree was so entered in consideration of forbearance.

The president stated the case, and delivered the opinion of the court to the following effect. In June 1764, the 369 *appellant mortgaged a tract of land lying in Virginia, to the testator of the appellee then a resident of Philadelphia for the purpose of securing the payment of £88: 12: 6½, Pennsylvania currency, with lawful interest thereon from the 5th day of March preceding. In 1773 the appellee institued a suit in Chancery, in the County Court of Frederick, to foreclose the equity of redemption in the mortgaged premises, and for a sale thereof, towards satisfying the principal debt and i terest. The appellant in his answer admitted the execution of the deed of mortgage, and that £88: 12: 6½ Pennsylvania currency with interest thereon at the rate of five per centum per annum from the 6th day of March 1764, was due and unpaid; but that Peter Hogg the attorney of the appellee had agreed that the sale of the mortgaged premises should be respited until the first Tuesday in August 1775. The appellant consented that a decree conformably with this agreement should be pronounced. The cause was heard in September 1773, by consent of the parties, by their counsel upon the bill and answer, and a decree was made, that the appellant should on or before the 10th day of September 1775, pay to the appellee £70: 18: 5 Virginia currency, with interest thereon after the rate of six per centum per annum, from the 6th day of March 1764, and in case of failure, that the sheriff should sell the mortgaged premises, for the purpose of satisfying the principal, interest, and costs, mentioned in the decree.

It is probable that this decree was entered by the consent of parties, as it varies from the answer in two circumstances,

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*Usury.—The principal case is cited in Watkins v. Taylor, 2 Munf. 436. See monographic *note* on Usury" appended to Coffman v. Miller, 26 Gratt. 698.

1st, in changing the rate of interest from five or six per cent. and 2dly in altering the time agreed upon for the sale of the property. If the change in the rate of interest were made from a consciousness in the parties, that the debt originated in a contract made in Pennsylvania, it was lawful and just that the decree should be for six per cent. If on the contrary, the interest was increased with a view to procure the two years indulgence, it would have been usurious and void. This court presume the former for many reasons. 1st, The residence of the creditor usually fixes the place of the contract. Money-lenders or vendors of goods, do not generally travel to seek for borrowers, or purchasers, but the reverse. 2dly, the payment is stipulated to be made in Pennsylvania money. But 3dly and principally, this court will never presume a contract to be usurious unless it be proved; especially in this case where such a presumption, would be at variance with the decree of a court, which it is not to be supposed would sanction such a contract. We therefore consider the 370 decree for six per cent. *to have been entered by consent, upon the ground of the creditor being entitled to it, by his original contract.

The next point in the cause which deserves attention, is a receipt given in May 1777 by Hogg (the attorney of the appellee tho' he does not stile himself such) to the appellant, for £117: 12: Virginia money, being the amount of principal and interest due upon the mortgage. In September 1778, the appellant sent the money by Mr. Jones to Philadelphia, requesting him to pay it to the appellee, but it was not paid, in consequence of the absence of the appellee, and the money was returned to the appellant. In October 1778 the appellant gave to Hogg a receipt in the following words, viz. "Received of Capt. Hogg £117: 12, to be paid into the continental loan office, for the executors of Richard Parker of Philadelphia, by me Edward M'Guire." The appellant acknowledged to the executor of Hogg, that he had given such a receipt, and that he had paid into the treasury of Virginia in January 1780, the sum of 380 dollars for the executors of Richard Parker, for which payment, a receipt was given by the treasurer, as for so much received from the appellee, without noticing by whom it was paid. In March 1789 a sci. fa. issued at the suit of the appellee to revive the decree, to which the plea of payment was filed and issue taken upon it. The trial of the issue being referred to a jury to be empanelled on the law side of the same court, Hogg's receipt of May 1777, was admitted as evidence, and the jury found for the appellant. An exception was taken to the admission of the receipt, because Hogg had no authority, nor warrant of attorney from the appellee to institute, or to prosecute that, or any other suit for him, and because no process had issued to enforce the decree prior to the receipt given by Hogg. The County Court dismissed the sci. fa. with costs.

Upon an appeal, the High Court of Chancery reversed the decree, and directed a new trial of the issue, on which, the receipt was not to be admitted in evidence, unless the appellant could give other proof that Hogg was the attorney of the appellee, than what appeared in the record.

From this decree M'Guire has appealed to this court.

In both Courts, the cause appears to have been discussed upon the question, whether Hogg, as attorney for the appellee, could properly receive the money, and discharge the appellant. But we deem it unnecessary to decide that point. We are satisfied from the record, that the receipt was either fictitious and without actual payment, or 371 if genuine, that all its effects *were done away by the return of the money to the appellant in October 1778, (above ten years before the sci. fa. was sued out.) and therefore that the payment could not be considered as obligatory upon the appellees at that time, although it should be admitted, that Hogg had authority to receive it. That the receipt was merely colourable, is highly probable from the general complexion of the evidence. We do not find Hogg in any instance endeavoring to convey the money to the appellees, but on the contrary, it appears always to have remained in the possession of the appellant; who delivered it to Mr. Jones in 1778 to carry to Philadelphia, and who paid it into the treasury for the use of the appellee. This indeed was after the date of the appellant's receipt to Hogg in October 1778. But that receipt, so far from removing the suspicion, strongly confirms it. If Hogg had really received the money as attorney for the executor, and in consequence of his refusal to accept it, he had intended to pay it into the treasury, under the act relating to debts due to British subjects; it was Hogg's business to have paid it in, and not to have returned it to the debtor for that purpose. The money was not paid into the treasury for fifteen months after the date of the receipt, and from the evidence in the cause it is clear that it was not entrusted to the appellant by Hogg, as an immediate bearer of it, but for some other purpose which it is not difficult to develope.

It is observable that M'Guire's receipt is dated the 9th of October 1778, immediately after Mr. Jones's return from Philadelphia, when Hogg probably suspecting, that the appellee wished to avoid receiving the money, began to reflect upon the consequences which might result to himself from his former fictitious receipt, and therefore secured himself by a counter receipt equally fictitious, no money passing at either time. In this view of the case, we are of opinion, that the receipt ought not to be admitted as evidence of a payment, altho' it should be proved, that Hogg had a legal authority to receive the money, and so far we reverse the Chancellor's decree. In all other respects it is to be affirmed, and as the appellees have prevailed, they are to recover costs.

372 *Barnett & Woolfolk v. Watson & Urquhart.

October Term, 1794.

Assumpsit*—Sterling Money—Finding of Jury.—Indebitatus Assumpsit for 171l. 5s. 4d. sterling, of the value of 228l. 7s. current money of Virginia, for so much advanced by the plaintiffs to F. and S. at the request of the defendants, &c. laying the damages in current money. Verdict in current money. The jury were right in finding the value of the sterling money instead of leaving it to the court.

Same—Against Some Members of Firm—Failure of Plea to Declare Other Members of Firm—Effect.—Declaration against Barnett, Woolfolk, & Co.—W. appears and pleads non assumpsit; afterwards B. against whom the suit had been entered abated, entered himself a defendant, and without filing a plea, united in defending the action. Judgment against B. and W. only. The judgment is proper against those two, as they did not discover by a plea in abatement who were the other partners. B. by entering himself a defendant, and going to trial, bound himself to abide by the plea of his partner.

Same—Verdict—Sufficiency of.—Upon non assumpsit pleaded, the jury find that the defendant has not paid the debt, and assess the damages, by occasion of the non-performance of that assumpsit, to a certain sum. The verdict substantially pursues the issue.

Depositions—Failure to Sign—Effect.—It is no objection to a deposition, that it is not signed by the witness.

Witness—Interest.—What degree of interest disqualifies a witness.

This cause which was argued at the last court, and being continued to be re-argued, came on again, at the present term. It was an action on the case brought by the appellees in the County Court, against Barnett, Woolfolk & Co. The declaration states, "that the defendants were indebted to the plaintiffs in the sum of £171: 5: 4, sterling money of Great Britain, worth in Virginia currency £228; 7, for so much advanced by the plaintiffs to Forest and Stoddart, at the special instance and request of the said Barnett, Woolfolk & Co. and being so indebted they assumed to pay &c. The damages are laid at £500. The writ being served upon Woolfolk, he pleaded separately the general issue; and an abatement of the suit was entered as to Barnett, who was returned "no inhabitant." An order was made for taking the deposition of Benjamin Stoddart on the part of the appellees, and at a subsequent term, and after a jury had been sworn upon the above issue, and withdrawn, Barnett, as the record states, "came into court, and entered himself a defendant at the suit of Watson and Urquhart, and the said defendants acknowledged legal notice, as to the taking of the above deposition, and on the motion of the defendants, the suit was continued at their costs." At another day, (it is stated) "the parties aforesaid came, as also a jury, who say upon their oaths, that the defendants have not paid the debt in the declaration mentioned, as in pleading they have alledged, and assess the plaintiff's damages, by occasion of the non-performance of that assumption, to £294: 12, current money." Upon this verdict, judgment was entered for the appellees. Barnett and Woolfolk filed a bill of exceptions to the opinion of the court, which admitted the deposition of Benjamin Stoddart to be read in evidence at the trial; the objection was made upon the score of incompetency. The substance of the deposition (which is spread at large upon the record) is, that Barnett, Woolfolk & Co. shipped to Forest and Stoddart 16 hogsheads of tobacco, and drew on them for £240 sterling, in favor of the appellees, who remitted the bill, and requested that it might be honoured, though the tobacco should not produce that sum, agreeing to be answerable themselves to
373 the drawees for *the deficiency, if any. In consequence of this request, Forest and Stoddart paid the bill, although the tobacco netted only £68: 14: 8 sterling; that Forest and Stoddart have since demanded and received from the plaintiffs the balance due from Barnett, Woolfolk & Co. The deposition was not signed by Stoddart and was excepted to, for this reason also. The magistrates who took the deposition certified, "that in pursuance of a commission, they had examined the said Benjamin Stoddart, a witness, as well on the part of Watson and Urquhart, as on behalf of Joseph Woolfolk, in a suit depending in Orange Court, the witness being first duly sworn." The defendants Barnett and Woolfolk moved for a new trial, which being refused, they excepted for that reason likewise, stating as the ground of it, that a material witness was absent; that the damages were excessive, being a few pounds more than the debt in the declaration mentioned, and that the court would not permit them to urge any other reasons for a new trial, except the two above stated.

Upon an appeal to the District Court of Fredericksburg, the judgment of the County Court was affirmed; and a writ of supersedeas to this latter judgment was awarded by one of the judges of this court.

Warden for the appellants. I rely upon the following errors in the judgment of the County Court. 1st, The plaintiff in his declaration claims a sterling money debt, of the value of so much in current money, whereas the demand should have been made in sterling money only. In support of this objection, the case of Scott's executors v. Call, (ante 115) is fully in point.

2d, The declaration states a demand against Barnett, Woolfolk & Co. and the judgment is against Barnett and Woolfolk only, which is a fatal variance. The contract as stated is a joint one, and the judgment should have also been joint, that the whole might assist in bearing the burthen.

*The principal case is cited in Moss v. Moss, 4 Hen. & M. 301, 302; Williams v. Ewart, 29 W. Va. 670, 2 S. E. Rep. 887. See monographic *note* on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 183.

3d. There is no issue as to Barnett, and yet a verdict and judgment is rendered against him. The plea of Woolfolk is several, that he did not assume, and Barnett, who was not bound to state his defence upon this issue, might have chosen to put in a special plea: but instead of his having an opportunity to do so, a verdict was rendered upon the plea of Woolfolk alone, against Barnett as well as Woolfolk, tho' the former was in truth no party to the suit, and probably was not, nay could not, be defended upon any special ground, which he might have chosen, distinct from that taken by Woolfolk.

374 *4th, The deposition of Stoddart does not go to prove that the appellants assumed, or that the money was paid by Watson and Urquhart, at their request.

5th, Stoddart appears clearly to have been an interested witness. Barnett and Woolfolk considered their tobacco as having been either disposed of at an under value, or as having been sold at a higher price than that stated by Forest and Stoddart, and they would have been entitled, in case Forest and Stoddart had sued them on their bill, (and which was alone prevented by the officious interference of Watson and Urquhart) to oppose the demand by proofs of improper conduct in the sale of their tobacco. Stoddart therefore was a very improper witness, to prove the price at which the tobacco sold.

6th, The deposition not being signed by Stoddart, it ought not to have been read, since if perjury had been committed, a prosecution could not have been instituted against the witness in consequence of this omission. 1 Morg. Ess. 124.

Duval on the same side. For any thing which appears in the record, the bill drawn by Barnett, Woolfolk & Co. may yet be in circulation, and may at some future time rise up against the drawers, for it does not appear, that Watson and Urquhart took it up. Upon the third objection made by Mr. Warden, he cited 3 Morg. Ess. 10.

Washington for the appellees. The first objection is, that the current money value of the sterling debt ought not to have been stated, in the declaration; and in support of this, the case of Scott's executors v. Call, is relied upon. That was an action of debt for a specific sum, where the jury failed to ascertain the value of the money, tho' that subject was rendered by the pleadings an essential part of the matter in issue. This is an action on the case, sounding entirely in damages, and the jury have assessed those damages in current money, leaving nothing for the court to do.

In answer to the second objection let it be premised, that contracts by partners are joint and several. If the action be not brought against all, those who are sued may plead in abatement, discovering the names of the other partners, so as to prevent the plaintiff from making more than one mistake. But if they do not plead in abatement, they cannot afterwards object that all are not joined. If there be any thing in the objection now insisted upon, a recovery can never be had upon a partnership contract where some of the firm, are not named, but included under the general stile of the company, if the 375 members *will only keep their own secret. For if, as in this case, the suit is brought against Barnett, Woolfolk & Co. it is objected, that a judgment cannot be obtained against Barnett and Woolfolk only; and it is clear that it cannot be rendered against the whole if the unnamed partners be unknown, since they cannot be made parties to the suit. You cannot sue the known partners only, for then the contract must be stated to be made by them, and if this be done, then it would be variant from the real one, which would be clearly fatal. So that, if the present objection, be a good one, the plaintiff, in a case like this, would be without any remedy at all at law, whereas on the other hand, the defendants may discover who are the concealed partners by a plea in abatement, and ought to do so, if they mean to make it a joint burthen.

There is more difficulty in the next objection, than in any which has been mentioned. To understand it, we must consider the real nature and end of pleading. A plea consists of two parts; the first is the making of defence, and the other is the extension of that defence, under all the various modifications of which the case admits. Making defence, is the denial of the plaintiff's demand as he has stated it. 3 Blac. Com. 296. If the defendant mean not to rely upon a bare denial, but would go farther and oppose the plaintiff's claim by something not necessarily growing out of the defence, but quite collateral thereto, he must state such other ground in the form of a plea. Thus in assumpsit, the defendant by making defence, and consequently denying the plaintiff's demand set forth in the declaration, substantially says, that he did not assume; because the affirmation being that he did assume, the negation must be that he did not assume, which forms a compleat issue: but if the defendant would go farther, and say, for instance, that he did not assume within five years, he must plead that special matter, (because this is not necessarily implied by a mere negation,) so as to give the plaintiff notice of the real ground of defence, which is the primary and only end of pleading. In this case then, Barnett, by entering himself a defendant which is tantamount to defending the force and injury, denies the assumpsit charged, as much, as if he had said so, in a more regular plea. But what puts this question beyond doubt is, that his co-defendant had regularly pleaded non-assumpsit, to a joint demand, and therefore Barnett, by entering himself defendant, going to trial on the plea, and actually defending the suit in all its stages, as the record shews he did, made Woolfolk's plea his own, and after a verdict against him, ought not to be permitted to set it aside,

because he had neglected to put in a
376 formal plea. The *want of a similter
appears from the case of Cooper v. Spencer. 1 Str. 641 cited in 3 Morg. essays, p. 10, to have been considered as fatal, and not aided by the statute of Jeofails, yet after defence made, the objection is removed. 21 Vin. p. 480.

4th, This objection, as well as that made by Mr. Duval, may be answered together, by observing that the whole evidence is not stated. This is not a demurrer to evidence, where all the testimony is spread upon the record, but it is merely an exception to the admissibility of a particular deposition. So that this court cannot say that evidence was not produced of the assumpsit, or of the request, or that the bill was taken up by Watson and Urquhart. Besides, as to the first, the law creates the assumpsit, and as to the latter, the bill not having been protested never can charge the appellants.

5th, Stoddart can neither gain, nor lose by the event of this cause, and this is the touchstone by which to try the interest of a witness. The claim of Forest and Stoddart, against Watson and Urquhart, was independent of Barnett, Woolfolk & Co. It arose from their special undertaking, they did that without suit, which they might have been compelled to do. They could not defend themselves, by alledging an injury done by Forest and Stoddart, to Barnett, Woolfolk & Co. nor are they precluded by this judgment, nor by the payment made by the appellees from contesting that point with Forest and Stoddart, who could not in such a suit avail themselves of any benefit from the evidence given in this cause. If Forest and Stoddart has injured the appellants, it is nothing to the appellees, who only claim the money advanced for them, and to prove the amount of that advance, the receiver is a proper and often the only witness.

6th, This objection is supported neither by authorities, nor by principle. 2 Str. 920, which is referred to, does not warrant the doctrine contended for, and the reason assigned for it, is totally unfounded. The signing of the deposition cannot be necessary, even for the purpose of furnishing evidence of the oath, since upon a prosecution for perjury, it would be requisite to prove, that the evidence stated in the deposition and signed by the witness was sworn to by him. The certificate of the magistrate would not be sufficient. The signature, if proved, (for this too must be done,) might be evidence of his having deposed what is there written; but, that he deposed it upon oath, would still remain to be proved. So that after all, other evidence must be resorted to, in order to sustain the
prosecution. If the false oath were
377 not committed *to writing, yet upon
proving it, the witness might suffer for perjury, and surely it is not less perjury if it be committed to writing, because it is not signed.

Campbell in reply. The objections upon which I rely, are 1st, That no plea is put in by Barnett, and yet judgment is entered against him. But it is contended that there is a plea. I ask what is it? Is it payment? Non assumpsit? The act of limitations, or what? For if there be a plea, it may be all or either of those which I have mentioned. The oath administered to the jurors is, that they shall well and truly try the issue joined. But if there be no plea, there can be no issue, and consequently the jury cannot answer to their charge. It is essential that the pleadings should be so far formal at least, as to submit some point or other to the consideration of the jury, for otherwise, the court cannot even presume, that the matters in difference between the parties have been settled by the verdict. We know, that wherever an immaterial point is put in issue, a repleader will be awarded, and for the very reason which I have mentioned, namely, that the rights of the parties were not involved in the issue, and therefore could not have been decided by the jury. There is certainly a great distinction between making defence, and pleading. The former is no more than an introduction to the latter, and although it imports a general denial of the plaintiff's right to recover, it does not disclose the ground upon which that right is opposed, so as that it may appear whether the question decided by the jury, was upon a point material to the merits of the cause or not. Co. Lit. 127, b. The truth is, that no defence in this case, according to the technical meaning of the word, was made, the appellant Barnett having done no more than enter his appearance to the suit, so as to dispense with the necessity of process being served upon him. But if any particular plea can be presumed to have been intended by Barnett, the probable one would be the general issue; and if so, it may properly be objected 2dly, that the verdict is totally immaterial, since it is neither for nor against the appellants. The jury have found "that the defendants have not paid the debt in the declaration mentioned;" now they may not have paid the debt claimed, and yet they may never have assumed to pay it. The former may be the consequence of the latter, and the jury have not found that he did assume. So that the very gist of the issue (if there be any) is still left undetermined. 3 Salk. 374.

3d, Stoddart was certainly an interested witness. If the tobacco sold for a price
equal to the sum drawn for by the
378 appellants, *then Forest and Stoddart
had no right to demand any thing from either the drawers, or endorsers of the bill, and an action, for money had and received, might have been maintained against them by the appellees, in case they had failed in this suit, upon the ground of the tobacco having sold for a greater price than that credited by Forest and Stoddart. The success of the appellees, was consequently interesting to Stoddart.

Washington in reply. The case from Salk. 374, was decided when the courts were much more rigid, than they now are, respecting the doctrine of verdicts. The rule now is, that after a fair trial, the court will not set aside a verdict, merely because it may be informal, but will mould it into form. And if this be the rule in England, it should be very liberally adopted in this country, when it is recollected, that in the County Courts, a short minute only is made of the proceedings by the clerk, during the sitting of the court; the verdict is usually drawn by the jury in general terms, and the extension of it so as to make it responsive to the issue, is always left to the clerk, who does it after the term is ended, when he makes out a complete record. So that errors of this sort are the mere misprisions of the clerk. But in this case, the verdict stated in the record substantially corresponds with the issue; for the damages assessed, are from the plaintiff's non-performance of his assumption: which is clearly finding an assumpsit and a non-performance of it.

The PRESIDENT. The first objection stated to the judgment of the County Court is, that the demand is for sterling money of the value of so much in Virginia currency; in support of which, the case of Scott's executors v. Call is relied upon. The principle of that case is a strong one in support of this judgment. The error in that was, that the jury left the value of the sterling money to be ascertained by the court, instead of settling it themselves; the very reverse of which has been done in the present case.

The next objection is, that the declaration is against Barnett, Woolfolk & Co. and the judgment is against Barnett & Woolfolk only. The answer to this is obvious. Barnett & Woolfolk are sued as the ostensible partners of the company, and have it completely in their power to make it a joint charge upon the whole company, by disclosing the names of the unknown partners by a plea in abatement. But instead of pleading this matter, they take the whole defence upon themselves, and it is certainly too late after verdict, to complain that the judgment is not against all the members of the company.

379 *But it is objected, that no plea was put in by Barnett, and consequently, that a verdict against him was improper. The declaration is against both; Woolfolk alone, pleaded, and an issue was made up. Barnett voluntarily appeared and desired to be made a defendant with Woolfolk. It is true, that he might have pleaded separately if he had been inclined to do so: but not desiring it, his being made a defendant with the other, who was at issue, implies a consent to be united with him in his plea. This consent is sufficiently established by his subsequent conduct. He acknowledged notice of the taking of Stoddarts deposition; proceeded to the trial and defended the suit.

The 4th objection is, that no assumpsit was proven. To this there are two answers. —1st, That the deposition does not appear to have been the only evidence given at the trial. 2dly, The plaintiff having proved a debt to be due, the law implies an assumpsit to pay it.

The 5th objection is, to Stoddart's deposition on the score of interest. The only evidence as to this point is the deposition itself. From that it appears, that Forest and Stoddart paid the excess of the bill beyond the proceeds of the tobacco, at the request of Watson and Urquhart, and upon their special promise to be answerable for such payment. When that was ascertained, they applied to Watson and Urquhart, who performed their promise, without any agreement to refund, or to connect it in any manner with the fate of the present dispute. So that Stoddart could be in no wise interested in the event of this cause. But it has been contended that the sales of the tobacco were fraudulent, and that there was a combination between Forest and Stoddart, and Watson andUrquhart, to shift the demand for the balance into the hands of the latter, to deprive Barnett, Woolfolk & Co. of their defence on the ground of the fraudulent sales. Of this combination there is no proof. On the contrary, there is the strongest ground to presume otherwise. Watson and Urquhart appear to have been the friends of Barnett, Woolfolk & Co. and, as such, they endorsed their bill and gave it credit. They went further, and requested honor to the bill, tho' the funds upon which it was drawn should prove deficient: by which friendly interference they preserved the credit of the drawers, and saved them from the payment of damages which would have been the consequence of the bill's being protested. This conduct does not warrant a suspicion of combination to the prejudice of Barnett, Woolfolk & Co. But it was said that Watson and Urquhart ought

380 not to have paid *the money without the consent of Barnett, Woolfolk & Co. If they had been litigious, or inclined to evade a performance of their promise, they might have delayed payment under a pretext of this sort. But knowing that they had induced Forest and Stoddart to advance the money, they very properly and without delay repaid it with interest, having nothing to do with any dispute between them and the appellants; but leaving it to be litigated between them, when and how they pleased. This may still be done if the appellants are inclined, and nothing sworn by Stoddart in this suit, can avail him in that.

Another objection to this deposition is, that the witness has not subscribed it. Whether Stoddart could be prosecuted for perjury (in case he has taken a false oath,) in consequence of this omission, is a question which we leave to be determined by those before whom the prosecution shall be instituted. The deposition is certified, by two magistrates, to have been taken before

them upon oath, which gives it sufficient authenticity.

The objection to the verdict applies merely to the form of it. The damages assessed by the jury are for the non-performance of the assumption, in the declaration mentioned, and the irregularity, in the extension of the verdict, is apparently a clerical misprision and therefore amendable.

Judgment of the District Court affirmed.

Braxton v. Morris.

October Term, 1794.

Appeals*—Plaintiff in Chancery—Bond.†—Where the plaintiff in Chancery appeals, that Court cannot require any other bond than one in the penalty of 20l.

This was an appeal from a decree of the High Court of Chancery. At the last term, a rule was obtained by the counsel for the appellee, that the appellant should shew cause, why this appeal should not be dismissed, unless bond and security in a penalty sufficient to cover the decree were given. The Chancellor allowed the appeal upon the appellants giving bond in a sum merely nominal. The question depended upon the construction of the acts of Assembly relating to this subject.

The PRESIDENT. The law constituting the Court of Appeals passed in 1792, refers (as to this point) to the law relating to appeals from the County Courts, to the High Court of Chancery and District Courts.

The County Court law, after referring to the Chancery law for the manner of exercising the right of appeal, declares that bond and security shall be given by
381 the plaintiff if he appeal, but *totally omits the clause in the old County Court law, which directed bond and security to be given by the defendant; if he appealed. The chancery law does not supply the defect in a case where the appeal is prayed for at the time of pronouncing the decree, although (where that has been neglected) it provides for the case of a petition of appeal afterwards, and in this latter case, requires bond and security to be given. It takes no further notice of an appeal prayed for at the time of a decree, as it respects the bond, than to declare it valid, if given by sureties of sufficient ability, tho' it should not be executed by the party himself. But this is not enough to warrant a County Court in demanding bond and security from a defendant praying an appeal, as the condition upon which it is granted; nor can the Chancellor require it. This was probably a mere omission in the legislature, but it belongs to them, not to this court to rectify it.

The court are therefore of opinion, that the Chancellor took the only bond which he was authorised to require: viz. a bond in the penalty of £20, from Mr. Braxton as a plaintiff appealing.

Pendleton v. Vandevier.

October Term, 1794.

Wills—Construction—Case at Bar.—The testator devises to his daughter M. 20l., as her full legacy, and in bar of any claim she may have on his estate. He then gives a tract of land to her heirs lawfully begotten on her body, to be held by them under the limitations contained in the devise to the heirs of his son A. V. He devises to the said A. V. and his heirs lawfully begotten, another tract of land with sundry limitations over. At the time the will was made, M. had a daughter, and afterwards a son, who immediately after his birth died. The daughter of M. took by purchase as heir apparent, at the death of the testator.

Life Tenant—Deed of Lease and Release—Effect.—If tenant for life by deeds of lease and release, under the Statute of Uses, conveys the fee, it creates no forfeiture.

Juries—Finding—Correction of Mistake in.—The jury find a conveyance to James, the lessor of the plaintiff, whereas his name is Jacobus. This is a plain mistake, which may be corrected by the other part of the finding, that he is the lessor of the plaintiff.

Wills—Devise of Land—Effect Where Testator Leaves Out a Course.—The testator in attempting to describe the boundaries of a tract of land he is disposing of, leaves out a course, which throws the whole into confusion. The jury in a special verdict, say, that if the testator intended to convey by such boundaries as they describe, then they find that to be the land in question; if by certain other boundaries, which they also describe, then they find that the land devised was according to those bounds. The Court may decide which are the true boundaries.

Appellate Practice—Judgment in Favor of Appellant—Reversal—Costs.*—If the judgment below be in part favourable to the appellant, and it is reversed as to that part, he shall pay the costs of the appeal.

This was an ejectment brought upon the demise of Jacobus Vandevier the appellee, against the appellant, in the District Court of Winchester. The jury found a special verdict to the following effect viz: That John Vanmeter being seized in fee simple of a tract of land, of which the land in question was a part, departed this life at some time previous to September 1745, having first duly made and published his last will and testament, bearing date the 13th

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***Appeals.**—See monographic *note* on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 2 Rob. 263.

†**Statutory Bonds.**—See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

The principal case is cited in Nelson v. Matthews, 2 Hen. & M. 176.

***Appeals—Costs.**—On this question the principal case is cited in Preston v. Harvey, 2 Hen. & M. 66; Mantz v. Hendley, 2 Hen. & M. 308; Todd v. Bowyer, 1 Munf. 447. See monographic *note* on "Appeal and Error" appended to Hill v. Salem & Pepper's Ferry Turnpike Co., 1 Rob. 263; monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

of August, in the same year, whereby he devised the land in question by the following clause viz: "Item, I give and bequeath to my daughter Magdalena, twenty shillings, as her full legacy, which when paid, is to bar her of any title to my real or personal estate, and I do devise unto her heirs lawfully begotten on her body, a certain tract of land part of that on which I now live, bounded as follows; [here follows a particular description of this parcel according to certain courses and distances] containing by estimation 250 acres more or less, to be held by the heirs of my said daughter under the limitations and restrictions according to the devise made to my son Abraham Vanmeter's heirs." That he devised to
382 *Abraham Vanmeter another parcel of the same tract particularly described by metes and bounds to him and his heirs, lawfully begotten; but if there should be no heirs male or female of his said son or sons (thereafter named) who should attain the age of 21 years, then after the death of his said son or sons, or their heirs, remainder to his surviving devisees equally to be divided. The residue of the tract he devised in the same manner to his other children describing accurately the courses and distances of each parcel. That at the time of making the will, Magdalena had one daughter named Prudence born in the year 1744. That she had also a son born about 20 months after the birth of Prudence who lived only a few days. That Prudence (who is still living) did in the year 1769, convey the land in question by deeds of lease and release to Jacob Vandevier, the father of the lessor of the plaintiff.

The jury find a survey of the entire tract, as well as of the several parcels given to the respective devisees with the boundaries of the whole (except of the part bequeathed to the heirs of Magdalena) particularly laid off and described, and corresponding with the courses and distances mentioned in the will. The parcel devised to the heirs of Magdalena, is laid off in the plat referred to by the jury, in two ways, the one comprehending about 30 acres more than the other. The verdict then proceeds as follows: "If from the words of the will the testator's intention can be legally construed so as to convey unto the heirs begotten on the body of the said Magdalena, the lands contained between the lines and letters s, t and K,* then we find that the part of the land devised to the heirs lawfully begotten on the body of the said Magdalena, and which is the land in the declaration mentioned, is contained within the lines and letters, m, n, o, p, q, r, s, t, E, D, C, B and m. But if from the words of the will, the intention cannot be legally construed so as to convey the lands between the lines and letters s, t and E, to the heirs begotten on the body of said Magdalena, then we find that the part of the lands devised to the heirs lawfully begotten of the body of the said Magdalena (which is in that case the land in the declaration mentioned) is described in the plat aforesaid by the letters m, n, o, p, q, r, s, E, D, C, B and m." They further find that Jacob Vandevier the father of the plaintiff, being seised &c. departed this life having by his will devised the land in question to his son James the lessor of the plaintiff.

383 *To several of his children he devises ("after his wife's thirds of his moveable estate, and legacies are paid) an equal proportional child's part arising therefrom, as well of lands to be disposed of, if any there be, as of all things else."

The District Court gave judgment for the plaintiff according to the lines which included the smallest quantity of land, from which the defendant appealed.

Williams for the appellant. The first question is, whether Prudence took any estate at all or not? 2dly, If she did, then what estate she did take? 3dly, Whether the verdict be not so defective, as that no judgment can properly be rendered upon it?

First, the rule of law is well established, that no person can take by the name of heir during the life of the ancestor, for nemo est hæres viventis. From this general rule, a departure is sometimes permitted, in the case of last wills in favor of intention; but then, the person who is intended to take by that name, must be almost as accurately described, as if he were named. The word heir, unconnected with some other description, is a word of limitation, Cowp. Rep. 309, 313. In all the cases which form exceptions from this general rule, there will be found superadded words descriptive of the person intended to take: Thus in Long and Beaumont, 1 P. Williams 229, which was a devise to the heirs male of a person then living, there is not only a legacy given to the ancestor, by which the testator takes notice that he is alive, but legacies are also given to his three sons by name, who were of course known by the testator to be then living; and in that case it was resolved, that the eldest son should take as heir thus described. So in Burchett & Durdant, 2 Vent. 311. The devise was to the heirs male of the body of R. D. then living. But in the case now under consideration, there are no words descriptive of the daughter of Magdalena. The testator takes no notice of her at all, nor does it appear that he knew she was in being; for she was born only in 1744, the year before the testator's death. It is also to be observed, throughout the will, that when the testator gives any thing to grandchildren, he mentions them by name.

2dly, If Prudence takes any thing, it cannot be a greater estate than for life, for the devise is to the heirs of the body of Magdalena without words of limitation superadded, and the reference to the devise, to Abraham Vanmeter's heirs does not enlarge the estate; for the words in that clause are not (as in this) to the heirs of

*This is a mistake. it should have been E, as it is apparent from the plat.

Abraham, but to Abraham and the
384 heirs of his body. *So that there is
no such devise in the will, as that to which the reference is made.

If then Prudence only took an estate for life, her conveyance being by lease and release amounts to a forfeiture of her estate. I admit, that if this had been a conveyance operating under the statute of uses, it would have been otherwise; but a lease and release like the present is a common law conveyance. The consequence is, that the heir at law was the only person entitled to enter for the forfeiture.

3dly, It may be very seriously questioned, whether as Jacobus the lessor of the plaintiff must recover by deducing a clear title to himself, he can succeed upon this verdict which finds that the devise from Jacob Vandevier was to his son James.

As to the conclusion of the jury, it seems too vague for the court to decide upon, since there is nothing but the will itself from which the intention of the testator can be discovered.

Whether the testator in describing the parcel of land in question meant to confine, or to extend its limits, according to either of the two lines stated in the verdict is a question, which must depend entirely upon evidence. The courses mentioned in the will do in no respect fit either of them, but might have been explained to the satisfaction of the jury by a variety of circumstances of which they were, as I conceive, the only proper judges.

Lee for the appellee. In this case, both parties may be considered as appellants. Pendleton complains because a judgment is rendered against him for any thing, and Vandevier contends that he is entitled to a judgment for the whole of the land.

As to the first point, I shall admit the general rule, nemo est hœres viventis. But it is equally clear, that to favor the intention of a testator, the word heir may be as descriptive of the person to take, as if he were particularly named. In this case, it is evident from the mispelling, and from other inaccuracies in the will, that it was written by an illiterate man. The testator was about to divide a large tract of land between his children and grand-children, and intended to describe each parcel by certain metes and bounds. He then gives all the residue of his estate to be divided amongst several of his children, which proves that he did not intend to die intestate as to any part, or to leave any thing to descend to his heir at law. He takes notice that Magdalena is living, and of course, that she could not have heirs in the legal sense of the word. Prudence is
also found to have been born before
385 the will was made, *with which it
is presumed he was acquainted, tho' she is not noticed in the will. All these circumstances are as strong as can occur in any case. to shew an intent in the testator, to describe Prudence by the words which he used. The case of Doe and Lamming, 2 Burr. 1100, was that of a present devise, unattended by any particular description of the persons meant to take as heirs, other than may be drawn from the manner in which they were directed to take. The case of Brooking v. White 2 Blac. Rep. 1010, is a very strong and pointed authority.

As to the second point, it is immaterial whether Prudence took an estate for life, or intail, for as she is found to be still living, the conveyance to Jacob Vandevier is sufficient to enable the appellee to recover in this action, and the conveyance does not produce a forfeiture, as is supposed. If it were necessary to contend that she took an estate of inheritance, the reference to the devise to Abraham Vanmeter might without violence to the words be construed to mean "to Abraham Vanmeter and the heirs of his body," since the devise in that clause is not to the heirs of Abraham Vanmeter &c. but to "Abraham Vanmeter, and the heirs of his body."

The third objection does not seem to be much relied upon. The jury having found that the devise was to the lessor of the plaintiff (whose name is Jacobus) and the devise being to Jacobus, the court will at once perceive that it is a mistake of the jury, and will reject the word Jacobus in the verdict as surplusage.

The last objection is, that the jury ought to have found the boundaries of the land in question and not to have submitted that question to the court.

The court being the proper tribunal to decide upon the construction of deeds and wills, and of the intention of the makers thereof, the jury did right in submitting to them the question respecting the disputed lines, as they depended entirely upon a comparison of the courses and distances mentioned in the will, with those laid down and described in the plat of the land found by the verdict. From that it appears, that the testator intended to parcel out one entire tract amongst the different members of his family, according to certain metes and bounds. There is a perfect correspondence between the will, and the plat, as to every subdivision, except that in question. It is clear therefore that he meant to devise the whole, and not to leave a remnant of 30 acres in a tract of 1700 undisposed of, which will be the case, if the judgment
below be right. Now it is plain, that
386 the testator *had the plat found by
the jury before him, at the time he was writing his will, and after pursuing the boundaries of this parcel of land to a particular point, by mistake he left out a course, and consequently if the will be literally pursued, the lines of the survey could never be made to unite. This would be absurd and repugnant. To effectuate the intention of the testator therefore, the court will supply the line which was omitted, so as to produce a compleat disposition of the whole tract. If then the court is of opinion that the testator meant to dispose of the whole tract, the judgment below will be reversed and entered for the

whole; if otherwise, the judgment will be affirmed.

Washington on the same side. The rule of law, as a general one, is truly stated by Mr. Williams. The doctrine formerly prevailed in all its rigor, but it has long since been mitigated, and it is now as well settled, as any principle whatever, that heirs in a will may take eo nomine by purchase, if the court be satisfied that such was the intention of the testator. The case of Long and Beaumont, cited by Mr. Williams, proves it, and is much like the present. In this, as in that case, the heir was living when the will was made, and the testator took notice that the ancestor also was living, a circumstance much relied upon in that case. In this case, as in that of Brooking and White, the testator has made a provision for his heir at law, which proves that he could not intend to leave any thing to descend. But, what renders this case still stronger is, that there was an evident intention to make an equal division of this tract of land amongst the children, and to prevent the possibility of an intestacy as to any part, the residuum of the real estate is disposed of.

2d point. Independent of the strong argument to be derived from the reference to the devise to the heirs of Abraham Vanmeter, it is clear that the heirs of Magdalena took an estate tail. It is not true, I conceive, that where heirs or issue take by purchase, they take only an estate for life. If they be described by the former name, they take the absolute property and dominion; if by the latter, a limited fee. Trevor and Trevor 1 Eq. Ca. Ab. 387.

But suppose only an estate for life passed, still that is sufficient to entitle the lessor of the plaintiff to recover. And in that case the deed from Prudence to Vandevier could not produce a forfeiture as Mr. Williams supposes, because the conveyance has its operation under the statute of uses. The lease is a deed of bargain and sale, which by the operation of the statute, 387 vests *the possession, so as enable the lessee to receive a release. The only difference between this mode of conveyance before, and since the statute is, that in the one case, actual entry by the lessee was necessary for the release to operate upon; in the other, the bargain and sale passes the use, and the statute executes the possession, which enables the lessee to receive a release. Now the lease in question is made by the deed of bargains and sale, and recites the intent of it to be, to put the lessee in possession, do so as to enable him by virtue of the statute of uses to receive a release.

Marshall for the appellant. We do not contend, that heirs or issue, so named, are incapable of taking by purchase, but that the general rule as stated by us, and admitted on the other side, is never departed from, but in favor of a clear intention, plainly describing the person who by that name is to take. Is Prudence so described? There is not a circumstance in the case to prove that she was meant. It does appear that the testator knew that she existed; for if he had, it is probable he would have named her, in the same manner as he has done others of his grand children; and if he knew she was living, then it would seem that he rather meant to exclude her. The description is too vague for the court to say who was intended, and therefore the devise is void for uncertainty. Suppose there had been a son who had lived;—could the court say that Prudence should take in exclusion of that son? Or is it not more probable, that the testator would prefer the male to the female issue?—If the case supposed had happened, and the son would have been entitled, then it cannot be said that Prudence was intended to be described. The argument that no person can be supposed to intend a partial intestacy, if admitted in the latitude contended for, would entirely defeat the general rule, because it would apply in all the cases which have been cited, where the heir not being properly described, it has been determined, that he could not take as a purchaser. Long and Lamming is not like this case; the devise there, is to A. C. and to her heirs male and female equally to be divided, as well those begotten as to be begotten. So that there was no uncertainty who was to take. In this case it might mean a son, or a daughter. The case of Brooking v. White, comes within the exception, as the testator took notice that the ancestor had children living. The devise in question is therefore void, being an immediate one, which could not take effect upon the death of the testator.

388 *As to the nature of the estate given to Prudence, (if she be entitled to any thing) it cannot I conceive exceed an estate for life. I know of no case in which the heir takes by purchase, that he takes a greater estate than for life, unless words of inheritance are engrafted upon the devise, or a strong intention appears to pass a greater estate. As to the reference to the limitations to Abraham Vanmeter's heirs, the counsel ask too much when they call upon the court to supply the words "to Abraham Vanmeter and his heirs" &c. instead of those actually used by the testator.

As to the last point, I think it impossible for the court to supply a whole course, without a single fact being stated by the jury. The testator may have blundered, but I cannot perceive upon what principle this court can correct it. It would be to make not to interpret a will.

LYONS J. delivered the opinion of the court.

The first question made in this cause is, whether the devise to the heirs of the body of Magdalena be void or not. The argument to prove it void is, that no person can be the heir of an ancestor whilst living, and therefore, as such, cannot take. But the court are of opinion that the word heir

may mean heir apparent, and that such was the intention in the present case. We are clear, that the testator meant to give the estate to the person who should be the heir apparent of Magdalena at the time of the testator's death, and that he has used proper words to convey such an intention. If the heir apparent at that period had been a son, he would certainly have taken, but being a daughter, she took as such by purchase.

The second question was, what estate she took? It is unimportant for the court to decide, whether she took an estate of inheritance or not, since as she is found to be still living, her grantee has a title to recover in this action, though she only took an estate for life.

But it was contended, that if she took only an estate for life, the deeds of lease and release produced a forfeiture of it. We are of opinion that there is nothing in this objection. The conveyance has its operation under the statute of uses, and therefore the grantor could pass no greater estate than she might lawfully part with.

The next objection is that the verdict finds the land in question to have been devised to James instead of Jacobus who is the lessor. This is clearly a mistake in
389 the jury, and ought *not to be regarded, since the description of the devise is sufficiently plain when he is called the lessor of the plaintiff.

The last point is attended with more difficulty. It respects the boundaries of the land upon the special statements in the verdict. There is some inconsistency in the finding, which might be important, if the court doubted about the true boundaries of the land intended to be devised. It is evident that the testator had surveyed this land, and marked down by specified boundaries, the part intended for each of the devisees, and that he must have had the plat before him when he made his will. The boundaries of the other devisees are right; when he comes to describe the parcel in question, he begins right and continues so, with little variation in course or distance, till he gets to s; then by mistake in transcribing the courses, from the plat, into the will, he appears to have overlooked one line viz. s, t, which creates the difficulty. If it be omitted altogether, none of the subsequent lines are right; if it be supplied from the plat, then they are all right and the disposition of the whole tract is compleat. The court has no hesitation in saying, that the testator's intention was to pursue the lines which comprehends the 30 acres not included in the judgment of the District Court, and therefore, that their judgment though right as to the plaintiff's title, is erroneous in not comprehending the land contained within the lines of the survey described by the letters s, t, E, and to s again.

But as that error was in favor of the appellant, the costs of this court ought to be paid by him to the appellee as the party prevailing, although the judgment be reversed.

The judgment must therefore be reversed and entered for the appellee, for the land contained within the survey taken in this cause and described by the small letters m, n, o, p, q, r, s, t, and the large letters E, D, C, B, and to little m, together with his costs in this court.

Judgment reversed.

Hoomes Executor of Elliott v. Smock.

October Term, 1794.

Bonds — Gaming Consideration — Assignment — When Assignee May Recover from Obligor.*—The assignee of a bond given for a gaming consideration, has no more Equity than the assignor, unless he was induced to purchase the bond by the obligor, believing it at the time to be a valid obligation.

Elliott having brought a suit at law against Stanard upon a bond, Smock, the appellee, became Stanard's appear-
390 ance *bail. Stanard having failed to give special bail, judgment was rendered against Smock in the County Court. On the chancery side of that court, Smock filed a bill, stating, that Beverley being possessed of Stanard's bond, given for a sum of money lost at unlawful gaming, assigned it to Elliott, who afterwards understanding the nature of the consideration for which it had been given, delivered up that bond to Stanard and obtained from him another in lieu thereof, upon which the judgment was obtained. The bill seeks a discovery of those circumstances and prays for an injunction. Elliott by his answer insists that the assignment to him was made for a valuable consideration. That he is ignorant of the consideration for which Stanard gave his bond to Beverley, but that the whole transaction relative to his obtaining the bond, was on his part fair and bona fide, and as far as he knows and believes in strict conformity with the laws of the land. He further states that Stanard acknowledged that the debt was justly due, and promised that he would pay it. That he applied to Stanard for payment, which not being made, he proposed to him to take in the bond and an order drawn by Beverley, and to give a

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***Bonds—Gaming Consideration—Assignment—When Assignor May Recover against Obligor.**—On this question the principal case is cited in *foot-note* to Buckner v. Smith, 1 Wash. 296; Woodson v. Barrett, 2 Hen. & M. 88; Nicolson v. Hancock, 4 Hen. & M. 495; Skipwith v. Strother, 3 Rand. 216; Dade v. Madison, 5 Leigh 403, 407; Steptoe v. Pollard, 30 Gratt. 701.

See monographic *notes* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801, "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409, and "Gaming" appended to Neal v. Com., 22 Gratt. 917.

†**Answers—Responsive to Bill—Effect.**—On this question the principal case is cited in *foot-note* to Maupin v. Whiting, 1 Call 224; *foot-note* to Shurtz v. Johnson, 28 Gratt. 657; Robinson v. Cathcart, 20 Fed. Cas. 990. See also, Crenshaw v. Clark, 5 Leigh 65; Dade v. Madison, 5 Leigh 401.

See monographic *note* on "Answers in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

new obligation for the whole, to which Stanard readily consented. Beverley, who was also made a defendant, states in his answer, that a bond was given by Stanard to him for money won at gaming, amounting to £80—that he owed 35 barrels of corn to Elliott, which not being able to pay when it was demanded, he assigned the above bond to him, and also drew an order for £10: 10, (making together the exact amount of the bond for which this judgment was recovered) in discharge of the corn debt, which Elliott accepted; that Elliott knew those sums were due on account of money won at gaming. Only one witness was examined, who proves the bond for £80 to have been given for a gaming debt, and that after the assignment but before the execution of the new bond he informed Elliott of this fact.

The County Court perpetuated the injunction, from which Elliott appealed to the High Court of Chancery, and pending the appeal died. The suit being revived by his administrator the decree was affirmed, from which an appeal was prayed to this court.

Wickham for the appellant. I contend 1st, that the decree in this cause was not warranted by the proofs exhibited, and 2dly, That a court of equity ought not to relieve in such a case as this, but leave the parties as the law had placed them.

391 *1st, It is a rule, that the answer of one defendant is not evidence against another; and therefore, Beverley's answer must be put out of the case; if so, there is no proof at all of notice to Elliott prior to the assignment, and therefore he is not liable to the original equity attached to the bond. The case of Buckner and others v. Smith &c. (ante 296) is strong authority for the appellant.

2dly, But if notice were proved, the appellee is not I conceive entitled to the relief prayed for. Smock can be in no better situation than Stanard would have been, had he been plaintiff in equity. The matter relied upon in equity, to defeat the legal advantage obtained by the appellant, might at law have furnished a compleat defence; but after a judgment obtained there, a Court of Equity will not relieve against an innocent assignee, without notice of the illegal consideration, so as to deprive him of the advantage which that judgment has given him. The equity of an innocent assignee who has fairly paid his money for this bond, is at least equal with that of the obligor, and therefore the law must prevail.

Lee for the appellee. I admit that in general, the answer of one defendant cannot be read for, or against another; but there are exceptions to the rule, and this case furnishes an example. For Beverley having assigned this debt to Elliott, there is a privity between them, and the latter, deriving his right under the former, is bound by his acts. Beverley's answer therefore, which acknowledges that the bond was given upon an illegal consideration, ought, as against Elliott, to be taken as evidence of that fact.

2dly, Whether Elliott had notice or not before the assignment of the bond, that it was given upon a gaming consideration, is immaterial, because the bond is by the law absolutely void, and can never be made valid by assignment. The statute considers it as being so tainted, that no shift or change whatever can purge it of its original sin. It is the duty of all courts to arrest the money before it is paid, though the parties may confederate to elude the law, and therefore a court of equity is bound to interpose, though a judgment has been obtained. The case of Buckner and others, v. Smith &c. is entirely unlike to the present, for the ground upon which that decision was made, was the fraud practised by Beverley upon Dixon, by inducing him to purchase the bond.

The bill having expressly charged notice, and Elliott having declined answering it, the facts proved in the case and stated

392 in *his answer, furnish strong presumption that the charge is true. It is a rule, that where a man defends himself on the ground of want of notice, he must in direct terms admit or deny it, if it be charged. A person claiming a gaming debt in a court of justice, can never be considered as having equal equity with the opposite party; because such a claim is in itself iniquitous.

LYONS J. delivered the opinion of the court. It has been rightly contended by the counsel for the appellee, that all bonds given for a gaming consideration are void as between the parties; and it is equally true that the assignee cannot stand in a better situation than the obligee, unless there be some particular circumstances in his favor independent of the mere assignment. But if an innocent man shall be induced by the obligor to become a purchaser of such a bond, it is a deceit upon him, and he ought not to be subject to the same equity to which the obligor was entitled against the obligee. In this case, Elliot was induced by the debtor to take the bond, who renewed it without disclosing his objection; afterwards suffered a judgment to pass at law, and then resorts to a Court of Equity for relief. The province of that court is to relieve against fraud, and not to sanction it, and in general it will leave the parties to the law even if their equity were equal; much less will that court interfere, where the equity is altogether on the side of him who has obtained a legal advantage. As to the facts in the case, they are with the plaintiff at law; his answer is contradicted by one witness only, without circumstances to strengthen the testimony, for the answer of the other defendant as it could not benefit his co-defendant, cannot injure him.

The Court entered a decree to the follow-

ing effect, viz: William Elliott by his answer having denied notice of the illegal consideration, upon which, it is suggested by the bill, the bond from Beverley Stanard was given, and there appearing but one witness to contradict the answer in this respect, without sufficient circumstances to corroborate his testimony, Elliot ought to be considered as an innocent assignee of the said bond, and the subsequent bond taken by him of Stanard upon which the judgment was obtained was not tainted or effected by the illegal consideration of the first bond. That the decree which injoins the plaintiff below from proceeding to execute his judgment is erroneous. The decree of the High Court of Chancery and County Court, must be reversed with costs, the injunction obtained is to be dissolved, and the bill dismissed.

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2. The defendant, as Treasurer of the Jockey Club, agreed to rent from the plaintiff a piece of ground for the use of the club and by an agreement in writing bound himself to pay the rent. He is individually liable.
M'Williams v. Willis, 199

3. If in consequence of a notorious agency, the agent is in the habit of drawing bills, which the principal has regularly paid, this is such an affirmance of his power to draw, that the principal will be bound to pay other bills, tho' the agent should misapply the money raised by the bills.
Hoe & Harrison v. Oxley, 23

AGREED CASE.

See Abatement, No. 2.

AGREEMENT.

1. An agreement between the children of a family, in the life time of their parent, to divide his estate equally between them at his death, let him make amongst them whatever distribution he might think proper, will be enforced in equity, if made out clearly by proof.
Nelson v. Nelson, 136

2. A private, domestic conversation between a husband and his wife, wherein the former speaks of an intention once formed, (but then relinquished,) of giving a certain portion to his daughter, shall not bind the father to give that portion to the future husband of the daughter.
Banister's Ex. v. Shore, 173

3. A. agrees to sell his right to land in possession of B. if 3 persons (then named) shall by such a day decide, that he has a title, and shall fix the price which B. shall pay for it. No award was made. C. a purchaser from B. (but with notice of this agreement) cannot compel A. to make a conveyance, nor to submit those points to any other mode of adjustment.
Smallwood v. Hansborough, 290

4. The parties agreed to endorse upon the written contract, a memorandum permitting the debtor to pay in money, or in property, at a valuation to be made by two honest men to be chosen by the parties. If the creditor refuse to make the endorsement, chancery will relieve, and will consider the memorandum as endorsed.
Dandridge v. Harris, 326

5. In the above case, if the creditor refuse to join in nominating the valuer, the debtor might plead the special matter, & avail himself of it at law; or

the Court of Chancery might name valuers, unless the parties will do it by a certain day. Ibid
6. See Contract. No. 1, 2, 3.

AMENDMENT.

1. The court reversed the judgment of the inferior court, because that court (after judgment upon a special demurrer) refused to permit the defendant to amend his plea.
Cooke v. Beale's Executor, 313
2. Where one party is permitted to amend, or amend without leave, the other has a right to plead de novo, whether the new plea be material to his defence or not.
Cosby &c. v. Hite, 365
3. Verdict that the land in question was devised to James (instead of Jacobus,) the lessor of the plaintiff. This is an evident mistake in the jury, and amendable.
Pendleton v. Vandevier, 388

APPEAL.

1. Upon a bond with a penalty, the jury may make their verdict of the aggregate of principal and interest, and if they do, the defendant cannot appeal, for it is for his benefit.
Smith v. Harmanson, 7
2. The appellant dies, and the appeal being revived against his executor, the judgment is affirmed. Damages ought not to be awarded against the proper estate of the executor, in case of deficiency in that of the testator.
Hudson v. Ross. 74
3. The appellee being dead, an appearance was entered for the executors, and on the motion of their counsel, the cause was tried without waiting for a sci. fa.
Daniel v. Robinson's executor, 154
Contra.
Wood v. Webb [note to page 154.]
4. Upon an appeal from the judgment of an Inferior Court, errors in the execution, or replevy bond, issued, or taken after the judgment, will not be noticed. They are merely ministerial acts, and must be corrected in the same court upon motion; and if the court give an erroneous opinion on that motion, the party injured may then appeal and have it corrected.
Leftwich v. Stoval, 306
5. Security given upon an appeal from the High Court of Chancery—What?
Braxton v. Morris, 380
6. If judgment be in part favorable to the appellant, and it is reversed as to that part, the appellant shall pay costs.
Pendleton v. Vandevier, 389

APPLICATION.

See Payment.

APPOINTMENT.

1. See Agreement No. 5.

ARBITRAMENT AND AWARD.

1. Reasons for setting aside awards, are either for some illegality, or injustice apparent on the face of them, or for misbehavior in the arbitrators.
Shermer v. Beal, 14
2. The Court of Chancery having directed an issue, the parties waved the trial by jury, and submitted the question to five persons mutually chosen by them, and agreed that their report should be certified in lieu of a verdict. The court must consider the report of the arbitrators as an award, and to be governed by the same rules and principles which prevail in cases of awards.
Pleasants &c. v. Ross, 156
3. To set aside an award for mistake in the arbitrators, either as to law, or fact, the mistake must appear on the face of it. Or if the arbitrators will certify the principles on which they proceeded, the court will set aside the award, if improperly decided. Affidavits may be introduced, but they must go to prove partiality, or misbehavior, and not mistakes in law or fact, 158
4. When an issue is tried, it is under the superintendance of the court, who will prevent the introduction of improper testimony, and if the verdict be against evidence, the court will certify this, and the Chancellor will not be satisfied. If no certificate be given, still the Chancellor may direct a new trial on affidavits, tending to prove misbehavior in the jury, but not that their verdict is against evidence. Ibid
5. Where an award is for the performance of a special thing, as to make a conveyance, equity will decree it.
Smallwood v. Mercer, 290
6. See Agreement No. 3.
7. An award made for tobacco, upon a reference by rule of court, in an action where no declaration was filed, but the damages laid in the writ were in money; determined to be good.
Leftwich v. Stoval. 303
8. If the arbitrators be made parties to a suit for setting aside an award, they may demur to the bill.
Shermer v. Beal, 14

ASSIGNMENT.

1. The assignee of a gaming bond, stands in no better situation than the obligee would have done; but it is otherwise, both at law and in equity, if he be induced by assurances of payment from the obligor, to become the purchaser of it.
Buckner v. Smith &c., 299
2. If a man be induced to purchase a bond given for a gaming consideration, (not knowing that circumstance) by the obligor, equity will not relieve against a judgment obtained upon it.
Hoomes v. Smock, 389

ASSUMPSIT.

1. Declaration, that the plaintiff having obtained a judgment against I. G. and being willing to give the said I. G. an opportunity of selling his property to advantage, an agreement was entered into, (which is set forth verbatim) between the plaintiff, the defendant, and the said I. G. whereby, the defendant bound himself to see the balance of the debt, (which should remain unsatisfied by the sale of the property) paid by such a day. That the intention was to favor the said I. G. in consideration whereof, defendant assumed to pay such balance: avers a sale made, and that a balance still remained unsatisfied. To the agreement are three scrolls annexed, but it is not said to be sealed in the agreement itself, nor in the attestation. The agreement is the only inducement to the action, and the foundation of the action is the subsequent assumpsit, and therefore it is sustainable.
Baird &c. v. Blaigrove, 170
2. A parol agreement made subsequent to one under seal, may be declared upon, tho' it should alter the terms of the written agreement. Ibid
3. D. carried a letter to the defendant upon the subject of the defendant's prior promise to indemnify F, and the defendant after reading the letter promised that he would indemnify F. F, may recover upon this promise.
Field v. Spotswood, 280
4. Promise to indemnify against an act then performed—where good?
Field v. Spotswood, 280

ATTORNEY.

1. Payment to an attorney at law is good, on the custom of the country, particularly if he have possession of the specialty. Under particular circumstances it might be otherwise, as if notice were given that no such power was vested in the attorney.
Hudson v. Johnson, 10

BAIL.

1. If an office judgment be entered against the sheriff for not having taken or returned a bail bond, in a case where bail is not demandable, the court ought to set it aside as to the sheriff.
Williams v. Campbell, 153
2. It is no objection to a bail piece given by one defendant, that it takes no notice of the other defendant.
Smith v. Wallace, 254
3. If the special bail before or after judgment, surrender the principal to the sheriff, his discharge is compleat by the surrender, whether he return the receipt forthwith to the clerk or not, and if any injury result to the plaintiff on that account, his action is against the bail.
Cooke v. Beal's executor, 313

BAR.

See Chancery No. 6.

BILL OF EXCHANGE.

1. See Agent No. 3.
2. If notice of the protest of a foreign bill be given within 18 months, it will suffice under the act of Assembly, unless there be particular circumstances to warrant an exception from the general rule.
Stott v. Alexander, 335

BILL OF EXCEPTIONS.

1. A bill of exceptions cannot be considered in the light of a demurrer to evidence. In the latter, the

court may (if the case be clear) refuse to compel the other party to join, and may instruct the jury, or leave the question with them.
Wroe v. Washington &c., 362

BOND.

1. See Appeal No. 1.
2. An endorsement on a bond, made by consent of parties, tho' at a future day, is to be considered as part of the bond, as much so as if it had been incorporated with it.
Shermer v. Beale, 14
3. Upon a motion against a deputy sheriff and his securities upon a joint bond, if the principal plead non est factum, this must be first tried and decided against the plea, before judgment can be rendered against the securities.
Asberry v. Calloway, 72
4. See Assignment No. 1 and 2.
5. In a joint bond, the charge will survive against the surviving obligor, but the fact of the survivorship must be pleaded.
Bentley v. Harmanson, 273

BREACH.

1. Bond with condition, that the defendant would faithfully collect certain debts due to the obligee, and would pay the amount so collected, and return an account of his collections, and surrender up all bonds not fully paid, except such as might be lodged with lawyers and clerks. Declaration lays the breach in the defendant's neglecting to bring suits for the recovery of the debts—variance not material.
Hawkins's Executors v. Berkley, 204
2. In a motion upon a forthcoming bond, it is the business of the defendant to prove performance, and not of the plaintiff to shew a breach.
Nicolas v. Fletcher, 330
3. In a joint bond, the charge will survive against the surviving obligor but the fact of the survivorship must be pleaded.
Bentley v. Harmanson, 273

CAVEAT.

1. The effect of a caveat is to prevent the emanation of a grant, not to set one aside.
Wilcox v. Calloway, 40

CHANCERY.

1. A court of Equity may set aside a verdict improperly obtained, and award a new trial.
Cochran v. Street, 79
2. Where a man fraudulently obtains a patent in preference to one having a prior equitable title, if this be proved, a court of equity has competent jurisdiction, and can afford the most ample relief.
White v. Jones, 118
3. In what case a court of equity has jurisdiction? See
Thornton & Spotswood, 142
Hunter v. Spotswood, 145
4. If a cause come on upon bill and answer, the latter must be considered as true in all its parts.
Kennedy v. Baylor, 163
5. Bill to fore-close.—The county court appointed Commissioners to ascertain the damages which the land had sustained whilst in the possession of the mortgagee, and deducted the amount reported, from the payments made by the mortgagor. Decree affirmed.
Kennedy v. Baylor, 162
6. The plaintiff went to trial, in a case where he might have sued in equity, and a verdict by surprise was rendered against him. He shall not afterwards resort to a Court of Chancery.
Tarpley v. Dobyns, 185
7. The value and profits of land being in the nature of damages, ought to be ascertained by a jury upon an issue to be directed by the Court of Chancery, and not by commissioners.
Eustace v. Gatkins, 190
8. If after answer filed, and depositions taken, the plaintiff makes new parties, and files a new bill, the depositions previously taken, cannot be read against the new defendants.
Jones v. Williams, 230
9. If the judge before whom the issue is tried, certifies the verdict to be against evidence, the Chancellor ought not to be satisfied with it, but should set it aside.
Southall v. M'Keand, 337
10. See Arbitrament and Award No. 2, 3, 4, 5.
Agreement No. 5.
Equity No. 1, 3, 4, 5.

CLERK.

1. Quere, If a sheriff may levy a distress for fees due the deputy clerk of a court.
Anderson v. Bernard, 186

COMMISSION.

1. An executor, who is also a nephew to the testator, and to whom a legacy is given, is entitled to his commission also, and that, by custom, is generally fixed at 5 per cent.
Granberry v. Granberry, 250

COMPENSATION.

See Contract No. 3.

CONDITION.

1. Devise of land to A. upon condition, that so soon as he arrives at full age, he joins the executors in a conveyance of certain slaves to such persons as they may sell them to. Upon A's arrival at age, he makes a declaration in writing which is recorded, that he will perform the conditions in the will. He afterwards sells and conveys the land to I S. and then settles the slaves upon his family. This is no breach of the condition.
Keene v. Lee, 239
2. The declaration passed away all his right to the slaves, Ibid
3d. He was not bound to convey, until the executors had sold and applied to him to join in a conveyance. Ibid
4. The settlement was a fraud upon I. S. and void as to all the world but the grantor. Ibid
5. See Breach No. 2.

CONSIDERATION.

1. What is a sufficient consideration to give validity to a promise to save harmless.
Carr v. Gooch, 260
2. See Assumpsit No. 1, 4.

CONTRACT.

1. A. contracts to deliver to B. £260 current money in final settlements, at the rate of 20s. such settlements, for each 13d. current money, on the 1st of Dec. But B. agrees, that the same may be discharged by the payment of a like sum in said settlements at any time on or before the 1st of Nov. preceding, at the rate of 20s. such settlements, for each 26d. current money. The contract is not usurious, but the 13d. is to be considered as a penalty, and the time of delivery is the 1st of November.
Groves v. Graves, 1
2. The rule for estimating the damages in this case, is the value of the certificates at the time when they ought to have been delivered, and not that at which the cause was tried. 3
3. A contract to pay a larger sum at a future day upon nonpayment of the sum agreed upon at a prior day, is not usurious, but the encreased sum will be considered as a penalty, and relievable against in a court of equity upon compensation being made, and that compensation is legal interest, unless some specific damage can be shewn.
Winslow v. Dawson, 119
4. See Damages No. 2.

COSTS.

1. Costs by whom payable.
Thompson v. Davenport, 128
2. If an executor lay an assumpsit to himself and fails in his suit, he shall pay costs.
Thornton v. Jett, 139
3. See Appeal No. 6.
New Trial No. 3.

COURT.

1. The court must decide upon the admissibility of evidence, but cannot give a direction respecting the weight of it.
Ross v. Gill, 90
2. The court have no right to instruct the jury as to the weight of evidence, this being a subject proper only for the jury to decide upon, unless it be brought before the court by a demurrer to evidence.
Keel &c. v. Herbert, 203
3. Upon a motion for a nonsuit, the court may give their opinion that the plaintiff has no cause of action, and may direct him to be called, but he may appear and refuse to be nonsuited. So, the court may declare the action not maintainable; or may refuse to give any opinion, and so leave the whole to the jury.
Thweat &c. v. Finch, 219
4. Though in general, the court need not state the facts which induced them to grant a new trial, yet

if it be awarded against an established rule of practice, the ground for doing so ought to be disclosed.
Boswell &c. v. Jones, 325

COVENANT.

1. Upon a covenant to warrant the title of a slave in which the heirs only are bound, an action will lie against the executors.
Lee v. Cooke, 306

DAMAGES.

1. What interest judgment shall be entered for, upon a motion of the sheriff against his deputy, where a judgment has been obtained against the sheriff for taxes.
Asberry v. Calloway, 72
2. If a man fraudulently purchase certificates, by taking an improper advantage of the person from whom he purchases, a court of equity in setting aside the contract will decree the defendant, in case he has parted with the original certificates, to purchase others, or to pay in specie the value they are of, at the time the cause is tried.
Reynolds v. Waller, 164
3. See Contract No. 1, 2.
Appeal No. 2.
Chancery No. 5, 7.

DEBT.

1. See Appeal No. 1.

DECLARATION.

1. Action of debt on a protested bill of exchange for £187: 15, sterling money, of the value of £250: 6: 8, current money. The declaration ought not to have demanded the current money value of a debt due in sterling money.
Scott's executor v. Call, 115
2. A parol agreement reduced to writing does not change the nature of the contract; the writing is merely evidence of the agreement, and it ought to be produced, though not specially declared upon.
M'Williams v. Willis, 202
3. Case against 2 inspectors of tobacco at Robert Bolling's warehouse, for that they having inspected a hogshead of tobacco, the property of the plaintiff, they refused to deliver the notes, as by law and the duty of their office, they were bound to do, but had delivered the notes and the tobacco to another, having no authority to receive it, contrary to law, and the duty of their office. Objections to the declaration for being multifarious, and for not stating the warehouse to be a public one overruled.
Thweat and Hinton v. Finch, 217
4. Quere, If in an action against A, upon a bond given by A and B, it is necessary to alledge non-repayment by B?
Peter v. Cocke, 257
5. Indeb. assump. for £171: 5: 4, sterling, of the value of £228: 7 currency, for so much advanced by the plaintiffs to F and S at the request of the defendant &c. laying the damages in current money. Verdict in current money. The jury were right in finding the value of the sterling money, instead of leaving it to the court, as in the case of Scott's executors v. Call.
Barnett &c. v. Watson &c., 378
6. See Breach No. 1.
Pleading No. 2.
Interest No. 1.
Jurisdiction No. 1.
7. Reference by rule of court. After judgment entered upon the award, defendant cannot object to the want of a declaration.
Leftwich v. Stovall, 303
8. In an action by the vendee of a slave, against the vendor, upon a covenant of warranty, he need not state in the declaration, nor prove, that he gave notice to the vendor, of the pendency of the suit in which the possession was recovered from him.
Lee &c. v. Cooke, 306

DEED.

1. In what court a mortgage of personal property may be recorded?
Clayborn v. Hill, 177
2. A father by deed executed, conveyed to his daughter several tracts of land with many slaves &c. After this, the father got possession of the deed surreptitiously, and cancelled it, upon a bill brought by the daughter, the court restored the deed to its legal force.
Ward v. Webber, 274
3. If the proof, or acknowledgment of a deed, made by a non resident, for land lying in Virginia, be not certified according to law, tho' it should be admitted to record, it cannot be read in evidence as a recorded deed. But it will be sufficient at the trial to prove the execution by one witness, tho' he be not the subscribing witness, if the subscribing witnesses be dead, or cannot be procured.
Turner v. Stip, 319
4. A deed tho' not recorded, is valid between the parties.
Turner v. Stip, 319
5. If tenant for life, by deeds of lease and release under the statute of uses, conveys the fee, it creates no forfeiture.
Pendleton v. Vandevier, 388
6. See Advancement No. 2.
Agreement No. 4.
Equity No. 4.

DEMURRER TO EVIDENCE.

1. A demurrer to evidence may be allowed at any time before the jury retire, altho' the party offering the demurrer may have examined witnesses, the whole evidence on both sides being stated, (which ought always to be done) unless the court think the case clear against the party, in which case, the court may refuse to receive the demurrer.
Hoyle v. Young, 151
2. If one of the parties offer a demurrer to the evidence, the court (if the evidence be clearly against him) may refuse to compel the other party to join.
Thweat &c. v. Finch, 220
3. See Bill of Exceptions No. 1.
Court No. 2.

DEPOSITION.

See Witness No. 2.

DEPRECIATION.

1. Bond dated 1st of February 1780, payable on or before the 17th of December 1781, with interest from the 16th of February 1779. These latter words, with other circumstances, will fix the period at which the scale of depreciation ought to be applied, to February 1779
Pleasants v. Bibb, 8
2. An account for goods not delivered, nor accepted as a payment, nor liquidated between the parties, ought not to be taken as a payment in paper money, so as to stand at the nominal value, according to the strict words of the act, but should be received as an off-sett, and adjusted (especially in equity) upon just principles.
Hill v. Southerland's executor, 133
3. The legal scale of 1777, and 1778, is not a just rule in itself, not corresponding with the general opinion of the citizens at the time it was made, as to depreciation; nor does the scale at any time, give a proper rule for fixing the price of imported goods. 134
4. In April 1778, a sum of paper money was lent, not to be repaid in less than 12 months thereafter. The money was tendered shortly after the 12 months, (but not on the very day) and was refused. A mortgage having been given to secure the debt, the mortgagee brought an ejectment and recovered the possession, but the judgment was injoined. The mortgagee shall receive the money according to the scale of the day it was borrowed (notwithstanding he had received the identical money in discharge of a specie debt and notwithstanding the mortgagor made use of it to discharge a specie debt) without interest, from the time of the tender, to that of new demand.
Wilson v. Keeling, 194
5. To make an executor answerable for paper money, at the scale of the day on which he received it, is in general wrong, but if he hath charged himself so, and pointed out no other mode of adjusting it, he shall be bound by his own act.
Granberry v. Granberry, 246, 248
6. A conveyance of land in 1779 in fee simple, upon a ground rent payable for ever in current money, the rent is subject to the scale of depreciation.
Watson v. Alexander, 353
7. See Acts of Assembly No. 4, 5.
8. See Executors &c. No. 5.
Guardian No. 2.

DETINUE.

1. In an action of detinue, for five slaves, if the jury find for the plaintiff as to four of them, without also finding for the plaintiff or defendant as to the fifth, the verdict will be set aside.
Butler v. Parks, 76
2. In detinue, the plaintiff must prove property in

himself, and possession in the defendant; but proof of a possession anterior to the bringing of the action is sufficient, unless he has been legally dispossessed, and this the defendant is to shew.

Burnley v. Lambert, 308

DEVISE.

1. The testator devises to five persons being his brothers and nephews, to each a tract of land by name, with all the cattle &c. and appurtenances thereto belonging in fee. Then gives all his negroes young and old, at all his plantations before named, to be equally divided between his three brothers before mentioned: After some pecuniary legacies he directs, that if his two nephews should either of them die before marriage, or without issue, the legacies left to one, to go to the other, and if both die before marriage, or without issue, their legacies to go to the testator's three brothers. The testator when he made his will, had no lands but those devised, nor any slaves, but those who were on the plantations. He afterwards purchased another plantation called W. & 8 slaves, only 3 of whom were at W. at his death: the others were at the devised plantations from whence others were removed to W. & some were out at nurse for their maintenance. The words all my negroes, young and old, at all my plantations, above named, form a specific restrictive devise of the slaves on the devised plantations at the time of the testators death, and not a devise of all his slaves; nor is there any difference between the after purchased slaves and the others, for in this respect, they are to be considered as personal property. But their settled habitations, as fixed by the testator, ought to give the rule and not any casual absence therefrom at his death. P. 58, 59, 60.

3. The negroes found on the plantation at W. at the time of the testator's death, do not pass under this clause, but descend to the heir at law. 60

4. The crops growing at the time of the testator's death (he having died in September) do not pass under the word appurtenances, to the devisees of the respective plantations, but go into the surplus. 61, 62, 63

5. The residuary estate in the case goes to the executors, as is always the case where there are many executors, and unequal legacies are given to them. 64

6. Devise in 1764 to A. for life, and after her decease to the testator's nephew and the heirs of his body lawfully begotten, for ever; but in case he died without such issue, then to T. H. the brother of the testator in fee. The nephew died in 1780 under age, intestate and without issue. A. died in 1786, the remainder over cannot take effect, but the estate will descend to the heir at law of the first remainder-man.

Hunter v. Haynes, 71

7. R. M. seized of three tracts of land, and entitled to the equity of redemption in a fourth, made his will in 1748, and after declaring "that as touching his temporal estate he desires the same may be employed as follows," in the first place directs that all his just debts be paid. He then devises to his eldest son all his lands at O & F with some negroes and stocks. To his other son all his lands at C with some negroes and stocks. To his wife and daughter he gives all the rest of his estate real and personal (saving one negro by name which he gives to his second son;) but no words of inheritance are annexed to any of the devises. The inheritance in the land devised to the heir at law descended upon him, and did not pass under the residuary clause to the wife and daughter.

Kennon v. M'Robert & wife, 96

8. In a general devise of lands without limitation or restriction, the reversion will not pass under a general residuary clause, but will descend to the heir at law. Ibid

9. A reversion in slaves after an estate for life given by the same will, will pass under a general devise of "all the rest and residue of my slaves."

Cole v. Claiborne, 262

10. The testator devises the whole of his estate to his wife during her natural life, and after that is ended, then to be equally divided between whoever his wife should think proper to make her heir or heirs, and his brother R. S. The wife died without making any appointment. She took a fee simple in the moiety which will descend to her heir at law.

Shermer v. Shermer, 266

11. If a man having both freehold and leasehold lands in the same county, devise all his lands in that county; only the freehold lands will pass.

Minnis v. Aylett, 300

12. The testator devises to his daughter M. 20s. as her full legacy, and in bar of any claim she might have on his estate. He then gives a tract of land to her heirs lawfully begotten on her body, to be held by them under the limitations contained in the devise to the heirs of A. V. He devises to A. V. and his heirs lawfully begotten, a tract of land with sundry limitations over. At the time the will was made, M. had a daughter, and afterwards a son who immediately after his birth died. The daughter of M. took by purchase as heir apparent at the death of the testator.

Pendleton v. Vandevier, 381

13. See Conditions No. 1.

Verdict No. 5.

Slaves No. 1.

DISTRESS.

1. See Clerks.

EQUITY.

1. Courts of equity, never interfere to deprive the plaintiff at law of a legal advantage, which he may have gained, unless the party seeking relief, will do complete justice by paying what is really due. Upon the same principle, that court has refused its aid in relieving against a judgment obtained by fraud.

Payne v. Dudley, 199

2. Though equitable rights, may in favor of a fair bona fide purchaser for valuable consideration, and without notice, be lost by a sale; legal rights never can, unless there be fraud.

Hooe and Harrison v. Pierce, 217

3. A judgment entered against a sheriff under a false idea in the clerk, that the bail piece was insufficient, where the counsel had agreed that it might be filed, relieved against in equity.

Smith v. Wallace, 254

4. The grand father who had promised before marriage, to give his daughter a negro, made a deed of the negro to the children of his daughter begotten or to be begotten, (with the consent of the husband.) The next day, the grand father and father agreed to exchange the above negro for another, which was done. Bill to set up the first deed which was lost, and for a decree for the negro conveyed by that deed,—dismissed.

Applebury v. Anthony, 287

5. If a man purchase land with notice of anothers equitable title, but that other neglects to assert his right for a long time, during which, valuable improvements are made, he ought not in equity to lose the value of those improvements, aliter if after the right is asserted, the improvements are made.

Southall v. M'Keand, 336

6. In this case, the lawful proprietor is entitled as against the purchaser, or one claiming under him with notice, to the value of the land at the time it was purchased, for which he would have a lien on the land. But he would have no lien on the land in the hands of a purchaser without notice, or against one who claimed under such a purchaser. Ibid

ERROR.

1. See Declaration No. 7.

SUPERSEDEAS & WRIT OF ERROR THROUGHOUT.

Appeal No. 4.

Amendment No. 1.

ESCAPE.

1. In an action for an escape, the actual escape forms the gists of the action, and therefore, must be proved by the plaintiff, but he is not bound to prove that it was with the consent, or through the negligence of the officer, for this is to be presumed, unless a tortious escape be shewn, and that fresh pursuit was made.

Johnson v. Macon, 5

ESTATE TAIL.

1. See Devise No. 6.

EVIDENCE.

1. Parol proof may be admitted to prove, that an absolute deed was intended to operate as a mortgage.

Ross v. Norvell, 15

2. It cannot be laid down as a general rule, that parol proof to contradict a deed, is not to be admitted in any case, or that it is to be admitted in all cases. 15

3. A book of accounts in the hand writing of, and kept by a clerk who is since dead, is proper evidence, upon those facts being proved.

Lewis v. Norton, 76

4. The execution book kept by a clerk, will be prima facie evidence of the truth of the entries made in it, but it may be contradicted by other evidence.
Taylor v. Dundass, 94
5. Hearsay evidence, in what case to be admitted?
Jenkins v. Tom, 123
6. If separate actions be brought against two for a joint trespass, one defendant may be a witness for the other.
Johnson v. Bourn, 187
7. Upon a charge of fraud in obtaining a deed, witnesses were examined, who proved an incapacity in the donor, both before and after the execution of it. But the evidence of the attesting witnesses, as to his capacity at the time of the execution, overcame all the rest of the testimony.
Beckwith v. Butler, 225
8. If the defendant without taking oyer of the bond, plead to issue, the plaintiff may offer a copy in evidence, if the original be proved to be lost or destroyed.
Taylor's administratrix v. Peyton's administratrix, 252
9. See Escape No. 1.
Court No. 1.
Chancery No. 4, 8.
Acts of Assembly No. 3.
Declaration No. 2, 8.
Deed No. 3.
Executors &c. No. 4.

EXECUTION.

1. An execution being levied upon the property of one defendant, and a replevy bond taken, a second execution against the other defendant cannot issue, so long as the replevy bond is in force, it being a satisfaction of the original judgment.
Taylor v. Dundass, 94
2. If a debtor in execution obtain an injunction, the sheriff must discharge him out of custody.
Ross v. Poythress, 120
3. Quere, If an injunction be obtained after seizure of property under a fi. fa. if the officer may restore the property? Ibid
4. After the assent of an executor to a specific legacy, the property is changed, and a creditor obtaining a judgment against the executor, cannot levy an execution upon the property in the hands of the legatee. He may pursue the executor, or follow the property in equity, making all the legatees parties.
Burnley v. Lambert, 308
5. If a judgment be obtained against an executor, and the execution be levied upon a specific legacy in possession of the legatee, (with the assent of the executor) a purchaser at the sheriff's sale acquires no title thereto. Ibid
6. A purchaser under a judgment and execution which is afterwards reversed, shall not have his title impeached, but the injured party shall be restored to the money arising from the sale.
Burnley v. Lambert, 313

EXECUTORS AND ADMINISTRATORS.

1. Tho' a judgment against an executor, amounts to an admission of assets, and a court of equity would not relieve against the consequences of the judgment, yet it would not by an original decree charge an executor on that ground.
White, Whittle & Co. v. Bannister's executors, 168
2. There is no general rule as to an executor's liability to pay interest on money in his hands. In this case, he was charged with it from the end of each year, for the balance then resting in his hands, but such interest, not to be carried to the balance of the succeeding years.
Granberry v. Granberry, 249
3. A legacy is given to an executor as nephew to the testator. He will be entitled to the legacy tho' he renounce the executorship. 250 Ibid
4. An executor by the will is allowed the use of £500. for 5 years, without interest. He may pay it in depreciated paper money, and the entry of the payment in his account, will be evidence of his having paid it.
Granberry v. Granberry, 251
5. A debtor by becoming an executor, not precluded from paying a debt due the testator in depreciated paper money. Ibid
6. See Action No. 1.
Devise No. 5.
Appeal No. 2.
Acts No. 2.
Depreciation No. 5.
Commission No. 1.
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7. A legacy to executors, which shall exclude them from taking the surplus, must always be of a personal nature.
Shelton v. Shelton, 67

EXTINGUISHMENT.

1. An annuity extinguished in equity, (under the circumstances of the case) by a bill of exchange and bond.
Thornton v. Spotswood, 142

FACTOR.

1. See Agent No. 1, 3.

FAIRFAX LORD.

1. The maxim, "nullum tempus occurrit regi" never did apply to lord Fairfax.
Birch v. Alexander, 37

FEES.

1. See Clerk No. 1.

FORFEITURE.

1. If land be forfeited for non-payment of quitrents &c. still if they be paid, or the conditions performed, before the land is petitioned for, it is saved.
Wilcox v. Calloway, 39
2. See Deed No. 5.

FORTHCOMING BOND.

1. In a bond for the forthcoming of property taken under execution, it is not necessary that the time appointed for the delivery should be stated to be that, at which the sale is to take place.
Wood v. Davis, 69
2. The condition of a forthcoming bond ought to be certain as to the time and the place of sale, but need not state, that the day mentioned is that appointed for the sale.
Irvin, &c. v. Eldridge, 161
3. A forthcoming bond appoints no place at which the delivery is to be made, yet good.
Burwell v. Court, 254
4. The condition ought to recite, against whom the execution issued, and upon whose property it was levied.
Hubbard v. Taylor, 259
5. A partial delivery is not a performance; but if the sheriff receive and sell what is so delivered, the amount is to be credited in the judgment on the bond.
Pleasants &c. v. Lewis, 273
6. See Breach No. 2,
Action No. 5.

FRAUD.

1. A mortgagor of personal property continuing in possession, is not an evidence of fraud, if the mortgage be upon a bona fide consideration, and be duly recorded.
Claiborne v. Hill, 177
2. See Chancery No. 2.
Damage No. 2.
Condition No. 1, & 4.
Deed No. 2.
Agreement No. 4.

FREIGHT.

1. A merchantman being also a letter of marque, having taken in goods on freight, may chase an enemy in sight, but cannot cruize out of her course to look for one. If therefore she be injured in an action with an enemy, in sight when she chased, by which she is forced into a port different from that of her destination, she is entitled to freight. But if the goods be not afterwards sent to the port of delivery, she is entitled only to freight pro rata itineris, unless prevented from doing so by the freighter.
Hooe & Harrison v. Mason, 211

GAMING.

1. See Assignment No. 1, 2.

GRANT.

1. A lapse patent relates back to the original grant, so as to avoid all mesne grants from the crown.
Wilcox v. Calloway, 39

GUARDIAN AND WARD.

1. A guardian may lease the lands of his ward during infancy, if the guardianship so long continue, and may reserve the rents to the ward, or to himself; and payment of the rent in either case to the guardian would be good.
Ross v. Gill, 90

2. A legacy paid in 1778 to the guardian, in depreciated paper money, is good, and will be a discharge at the nominal amount. And the guardian, having lent out part of the money, and received it in depreciated paper which he at last funded, he is not liable for the loss by depreciation.
Sallee v. Yates, 226

HEIR.

1. See Devise No. 12.

HOTCHPOT.

1. See Advancement No. 1.

HUSBAND AND WIFE.

1. A feme sole entitled to slaves in remainder, or reversion, and afterwards marrying and dying before the determination of the particular estate, tlfe right vests in the husband.
Dade v. Alexander, 30

JEOFAIL AND AMENDMENT.

1. See Pleading No. 2.
Judgment No. 1.

IMPROVEMENT.

1. See Equity No. 5, 6.

INDIANS.

1. When Indians might be made slaves, and when they could not, and what Indians they were which could be made slaves?
Jenkins v. Tom, 123
2. Since the year 1705, no American Indian could be made a slave. But foreign Indians coming within the description of that act might be made slaves.
Dick v. Coleman, 239
3. The jury having found that the plaintiffs were brought into this state generally, without saying from whence, is a sufficient finding for the plaintiffs. Ibid

INDORSEMENT.

1. See Bond No. 2.

INFANT.

1. The privileges allowed to infants are for their protection, and not to furnish them with the means of defrauding others. A man tho' not bound by a bond given during infancy, may after full age bind himself by his assumpsit to pay it.
Buckner v. Smith, 299

INJUNCTION.

1. See Execution No. 2, 3.

INSOLVENT.

1. The property of an insolvent debtor afterwards acquired, is not exempted from the payment of prior debts; it is his person only which is protected.
Payne v. Dudley, 198

INSPECTOR.

1. If an inspector deliver tobacco to a forged order, he is liable.
Thweat v. Finch, 217

INTEREST.

1. Debt upon a note for the payment of a certain sum with interest from the date. If the declaration do not claim interest, judgment upon non sum informatus, must be entered for the principal only.
Hubbard v. Blow, 70
2. See Damages No. 1.
Executors No. 2.
3. An officer of a court having in his possession money raised by the sale of attached effects, which the court had forbid him to pay over, shall pay interest, unless he kept the principal by him.
Hunter v. Spotswood, 145

ISSUE.

1. The omission of a similiter after a trial, shall not vitiate the verdict.
Brewer v. Tarpley, 363
2. Judgment reversed for want of an issue.
Stevens v. Taliaferro, 155
3. A special plea concludes thus "and this &c." This is bad if specially demurrer to.
Cooke v. Beale's executors, 313
4. Where one defendant entering himself a defendant, shall after a trial and verdict, be confined to the issue made up by the other defendant.
Barnet v. Watson, 379
5. See Arbitrament &c. No. 2, 4.
Chancery No. 7, 9.
Pleading No. 2, 5, 6.

JUDGMENT.

1. In debt for rent, the verdict was for £490 the debt in the declaration mentioned, and £130: 16: 3, dam. Judgment was entered for the same, to be discharged by the payment of £420. The latter part is no part of the judgment, and will be considered as a release of the difference.
Ross v. Gill, 90
2. The judgment in an action upon a bond brought in the name of the commonwealth, for the benefit of an individual injured by a breach of the condition, ought not to attach the recovery to that individual as to future injuries, but should leave other persons who may be so injured, to sue out a sci. fa. upon it.
Bibb v. Cauthorne, 91
3. See Appeal No. 4.

JURISDICTION.

1. Where a suit is brought in a Corporation Court, the cause of action must be laid to have arisen within the jurisdiction of the court.
Thornton v. Smith, 81
Winder v. Eddy, 87
5. See Chancery No. 3, 6.

JURY.

1. The trial by jury is not to be taken away, without positive words in an act of Assembly.
Watson v. Alexander, 356
2. See Court No. 2.

LAND.

1. A right by settlement in the crown lands, could not be acquired until the act of 1779, and this act only gives to settlers a preference, in lands at that time waste and unappropriated, and which had not before that time been located under warrants.
Jones v. Williams, 231
2. See Forfeiture No. 1.

LANDLORD & TENANT.

1. If the tenant has enjoyed the land, he cannot repel the landlord's claim for rent, by saying he had nothing in the land, or that the conveyance was void.
Watson v. Alexander, 351
Aliter if he be evicted.
Ross v. Gill, 90
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1. See Equity No. 6.

LIMITATIONS, ACT OF.

1. In what cases, the act of limitations will not bar a right in equity.
Hunter v. Spotswood, 145
2. If the action be commenced within 5 years, and that time runs out, and then the suit abates, the plaintiff is within the equity of the proviso in the act, if he recommence his action within a year after the abatement.
Brown's exec. v. Putney, 302

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Roane's ex. v. Hearne, 47
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See Declaration No. 1, 5.
Depreciation No. 2, 3, 4, 5, 6.
Guardian No. 2.
Tender & Refusal No. 2.

MORTGAGE.

1. The reason why 20 years is generally fixed upon as the time, within which an application for redemption must be made, is not because the entry is taken away after that period, but because the right of redeeming after such a length of time, is presumed to have been abandoned.
Ross v. Norvell, 18

2. Slaves may be redeemed after 5 years, and within 20. Ibid

3. What is a mortgage, and what a defeasible purchase.
Thompson v. Davenport, 125

4. See Evidence No. 1.
Chancery No. 5.
Fraud No. 1.
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MOTION.

See Bond No. 3.

NEW TRIAL.

1. Where some of the jury are persuaded by the others, that a majority agreeing to the verdict must prevail, in consequence of which they do not object, this being proved by the testimony of many of the jurors, will set aside the verdict.
Cochran v. Street, 79

3. In trespass against 2, if one be found guilty, and the other be acquitted, a new trial ought not (upon the motion of the former) to be awarded.
Boswell v. Jones, 325

3. It is error to award a new trial without costs. Ibid

4. See Chancery No. 1, 9.
Court No. 4.

5. It is irregular and improper to move for a new trial upon the ground of misdirection.
Johnson v. Macon, 5

NONSUIT.

1. The court cannot compel the plaintiff to suffer a nonsuit; they may advise it, and order the plaintiff to be called, but if he will appear, the court can no otherwise protect its opinion, in case the jury find against the direction, but by granting a new trial.
Ross v. Gill, 87

2. If the court direct a nonsuit, and the plaintiff submit to it, he deserts his case, and cannot avail himself (by a bill of exceptions) of an erroneous opinion delivered by the court.
Thornton v. Jett, 138

3. See Court No. 3.

NOTICE.

See Declaration No. 8.
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OBLIGATION.

See Bond.

OYER.

See Evidence No. 8.

PARENT AND CHILD.

See Equity No. 4.

PARTNERS.

1. One partner may be sued alone, and he can help himself only by a plea in abatement.
Brown v. Belches, 9

2. A debt due from an individual partner cannot be set off against a partnership demand. But a payment to one partner is a payment to all, unless perhaps where it is forbidden by the company.
Scot v. Trent. 79

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1. In what manner payments are to be applied.
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2. Declaration upon a marriage promise, by which the defendant agreed to give to the plaintiff, as much of his estate as he should give to any of his own children. The plaintiff should have averred the quantity and quality of the estate given to the defendant's own children. This might have been cured by verdict, if rendered upon the trial of a proper issue.
Smith v. Walker, 135

3. The plea of non-assumpsit within 5 years, if general, will refer to the time of the plea, whereas it ought to refer to the institution of the suit, and ought to conclude with an averment. 135

4. If all the pleadings including the declaration be faulty, the court will dismiss the suit, and will not award a repleader, tho' in a case, where otherwise a repleader would have been proper. Ibid

5. Debt upon a bond. Plea "that I. S. was jointly bound with the testator of the defendant in the bond, and survived him." Replication, "that it is not expressed in the bond, that the said I. S. was jointly bound with the defendant's testator, and if it were, by the act of 1786 intituled an act &c. it declared, that the representative of one jointly bound with another, may be sued, as well as the surviving obligor, and insists therefore, that the action does not survive &c. and this he is ready to verify &c." The record states "and thereupon an issue was joined by the parties." The plea is good, and the replication vicious, and a repleader from the plea awarded.
Stevens v. Taliaferro, 155

6. The judgment in this case also erroneous, because no issue joined. Ibid

7. Power given to 4 executors to make a conveyance, which is executed by 3 only, but the declaration states that all of them joined in deed, and the defendant without craving oyer, pleads covenants performed. After verdict, it cannot be objected, that all the executors did not execute the deed.
Watson v. Alexander, 340, 351

8. Declaration v. B. W. & co. W. appears and pleads non-assumpsit. Afterwards B. against whom the suit had abated by the return, entered himself a defendant, and without filing a plea, entered into the trial and defended the suit. Judgment against B. & W. only. The judgment is proper against those two, as they did not discover by a proper plea, that there were other partners.
Barnet v. Watson, 372

9. In the above case, B by entering himself a defendant and going to trial, without putting in a separate plea, bound himself to abide by the plea of his partner.
Barnet v. Watson, 379

10. See Tender & Refusal No. 1, 2.

POWER.

See Devise, No 10.
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PRACTICE.

1. After office judgment, the court has a discretionary power to admit any plea, which appears necessary for the defendant's defence, tho' not issuable, and should refuse it only, where delay appears to be intended.
Downman v. Downman's ex., 28

2. The court will not permit the clerk to give out a copy of any judgment during the term, without a special order, which will never be given but for strong reasons: as if the delay would endanger the debt.
Hudson v. Ross, 75

3. If after a supersedeas obtained, the defendant in error die, a sci. fa. must be awarded against his executors or administrators, and not a new writ of supersedeas, because the latter, could not be considered as a continuing process, and therefore the executor could not sue upon the supersedeas bond first given.
Keel and Roberts v. Herbert, 138

4. If in trover, the true nature of the action be not endorsed, the court may upon inspection of the writ, dismiss the suit, if the motion be made at or before the term, next after an office judgment has been entered, but not after.
Williams v. Campbell, 152
5. Where both of the plaintiffs in error die, a sci. fa. must issue in the name of both of their executors.
Boswell v. Jones, 325
6. See Appeal No. 3.
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PRESUMPTION.

1. The Presumption arising from length of time, may be repelled by accounting for the delay.
Eustace v. Gaskins, 188
2. See Escape No. 1.

PRETENSED TITLES.

1. The act for preventing the purchasing of pretensed titles does not extend to a person in possession, so as to prevent him from confirming that possession by purchasing the rights of others.
Wilcox v. Calloway, 391

PRIZE.

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See Admiralty No. 1.
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PURCHASER.

1. The rule caveat emptor, applies only to the purchasers of defective legal titles. The purchaser of the legal title, is not to be affected by a latent equity, of which he had no notice, actual or constructive.
Wilcox v. Colloway, 41
2. See Equity No. 2, 5, 6.
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1. See Grant No. 1.
2. Priority of title will draw to it priority of relation.
Wilcox v. Calloway, 40

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1. A scroll is a seal.
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SEISIN.

1. In tracing a title in a special verdict it is not necessary to find a seisin in the crown, because that is the ultimate point, beyond which the party is not bound to go. 36
Birch v. Alexander,

SENTENCE.

See Admiralty No. 1.

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SET-OFF.

1. A tenant having leased land from an executor, cannot purchase in judgment against the testator and set them off against the rent. It might be otherwise, if the executor should have acknowledged that he had a sufficiency of assets.
White, Whittle & Co. v. Bannister's executors, 167
2. An executrix having advertised the sale of the property of her testator, and agreed that creditors purchasing at the sale should be entitled to a discount of 5 per cent., the defendant (who was not a creditor) purchased at the sale and gave his bond. Upon the plea of payment, the defendant offered to sett-off 2 bonds due from the testator, which were assigned to him since the institution of the suit. The advertisement extended only to purchasing creditors, and the bonds were not a proper off-sett.
Brown's administratix v. Garland, 221
3. See Partners No. 2.
Depreciation No. 2.

SHERIFF.

1. The high sheriff alone is liable for the official acts of his deputy, unless in those cases, where the law provides a special remedy against the latter.
White v. Johnson, 159
2. The law requires a deputy sheriff to add the name of his principal, as well as his own to all mesne process executed by him. But if he fail to do so, it does not authorise the entering a judgment against him for failing to take a bail bond, tho' individually he is liable to a penalty for the omission. Ibid
3. A judgment cannot be entered against a deputy sheriff, for failing to take a bail bond.
Armistead v. Marks, 326
4. If a judgment be entered against the defendant and deputy sheriff, the latter may alone obtain a supersedeas. Ibid
See Damages, No. 1.
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SLANDER.

1. Declaration; that the defendant with intention to injure the reputation of the plaintiff as a merchant, falsely and maliciously spoke of him (then being a merchant) the following words, "Mr. Y. I must tell you, that you have received more tobacco than you have accounted for to the House," (meaning the mercantile house of which the plaintiff and defendant were partners) but no colloquum is laid. After verdict, the judgment ought not to be arrested.
Hoyle v. Young, 150

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1. Money directed by will to be laid out in slaves and annexed to lands devised in tail by the same will, are to be considered as slaves, and will go with the land in tail.
Dade v. Alexander, 30
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SUPERSEDEAS AND WRIT OF ERROR.

1. A supersedeas is sometimes an auxiliary process, but most commonly it is a mean, by which the record of an inferior court may be removed before a superior one for revision. In the former case, it can have no effect after the decree or judgment is executed, tho' the suit may still go on, and if a reversal take place, a writ of restitution will be awarded.
White v. Jones, 118

2. See Practice No. 3, 5.
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1. Plea of tender—what good one.
Downman v. Downman's Ex., 28
2. Where paper money was tendered, the plea ought to state specially the sort of money, which was offered, "and that the defendant was always ready to pay that very money." But if it alleged a tender of money generally, the defendant must bring into court, that which is money at the time of the plea pleaded. If he do not, the plaintiff may sign judgment, or the plea, if offered upon setting aside an office judgment, ought not to be received.
Downman v. Downman's Ex., 29
3. Where a man is to pay money, or to deliver property at a valuation, he is not bound to carry the property to the creditor, but the latter should receive it at the debtor's house.
Dandridge v. Harris, 326
See Depreciation No. 4.
Bond No. 3.

USURY.

1. The court will never presume a contract to be usurious, unless it be proved. Upon a contract payable in Pennsylvania currency, reserving interest generally, if a decree be entered by consent, for 6 per cent. it will be considered as a Pennsylvania contract and not usurious. Aliter if the decree were entered for 6 per cent. in consideration of indulgence as to the time of payment.
M'Guire v. Warder, 368
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VALUER.

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1. The obligor is stated in the bond to be of the county of E which is omitted in the declaration. This not a material variance.
Evans v. Smith, 72
2. Agreement by one as treasurer of a jockey club. Declaration against him without this description. Determined not to be a material variance.
M'Williams v. Willis, 199
3. Declaration upon a bond given to W. P. of the county of S. on account of Mess. G & P. merchants in Glasgow. The declaration is in the name of W. P. without stating for whose use, variance immaterial.
Peter v. Cock, 257
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1. What is a sufficient finding of such a length of seizin as to give a title.
Birch v. Alexander.
2. Verdict set aside as being uncertain and contradictory.
Murra v. Northern, 282
3. Ind. aff. Plea non assumpsit. Verdict that the defendant has not paid the debt, and assets the damages by occasion of the non-performance of that assumption to £941. The verdict substantially pursues the issue.
Barnett &c. v. Watson, 380
4. See Appeal No. 1.
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5. The testator in attempting to describe the boundaries of a tract of land he is disposing of, leaves out a course, which throws the whole into confusion. The jury in a special verdict say "that if the testator intended to convey by such boundaries as they describe, then they find that to be the land in question; if by certain other bounds, then they find that the land devised was according to those bounds." The court upon such finding, may decide which are the true boundaries.
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Turpin v. Turpin, 75
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Wilcox v. Rootes, 140

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REPORTS OF CASES

ARGUED AND DETERMINED
IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY BUSHROD WASHINGTON.

VOL. II.

TO THE PUBLIC.

The case of Maze and Hamilton, with one other, I had intended to publish in an appendix to this volume. But the manuscript having been unfortunately deposited in a house which was lately consumed by fire. I have great reason to apprehend that it was either burnt, or by some other means destroyed.

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CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS,

IN THE FALL TERM OF THE YEAR.

OCTOBER TERM, 1794.

Walden Executor of Walden v. Payne.

October Term, 1794.

Slaves—Nature of Property—Payment of Debt.*—Slaves from their nature are chattels; and though in the hands of executors they are exempted from the payment of debts, where there is a sufficiency of other personal estate, they are nevertheless assets.—They are real estate only in particular cases, such as descents, &c.

Executor—Distribution of Estate—Refunding Bonds.†—An executor is not bound by the order of a County Court, directing a division of the testator's estate amongst the distributees, to deliver up slaves, without reserving a sufficiency to pay the debts, or taking bonds to refund.

Construction of Statute—Scale of Depreciation.—The Act of November, 1781, c. 22, establishing a scale of depreciation, does not extend to contracts made antecedent to the 1st of January, 1777.

Pleading and Practice—Informal Joinder of Issue—Verdict.‡—The pleas conclude with a verification, and the record states, "that to these several pleas the plaintiff replied generally, and issue was thereupon joined." This, though informal, is sufficient after verdict.

This was an action of debt, brought by the appellee against the appellant, in the District Court of Fredericksburg, on a bond dated in December 1776. The defendant put in the following pleas: 1st, Payment. 2dly, That at the time of issuing the original writ in this suit, he had fully administered all the goods and chattels of his testator, except £430, paper money of the value of specie and that he hath not nor at the time of suing out the original writ in this cause, nor at any time since, had any goods of his said testator in his hands unadministered, except the sum aforesaid. 3dly, That the non-payment of the debt was owing to the plaintiff, wherefore and by virtue of the act entitled "an* act directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes," he prays the court to award such judgment as to them shall appear just and equitable. The two first pleas conclude with a verification, and the record states that to these several pleas the plaintiff replied generally, and issue was thereupon joined."

The jury found a special verdict as follows: that the defendant on the 27th of November 1778, had the estate of his testator duly appraised according to law,
2 and at the same time *proceeded to sell the whole of the personal estate except slaves, having by advertisement previously published in the gazette, given notice of the sale, and required all the creditors of the estate to make known their demands, and to receive payment. That the defendant on the first day of January, as well as in November 1778, offered to pay to the plaintiff the amount of his debt, including interest thereon, in the then circulating paper money, which the plaintiff at each time refused to receive. That the non-payment of the debt was owing to the creditor, the same having been offered and refused as aforesaid. That the defendant sold a sufficiency of the estate together with money in the house, and debts due to the testator, to pay all the debts owing by the estate. That on the motion of one of the legatees, an order was made by the County Court of Stafford in September 1778, appointing commissioners (of whom the plaintiff was one and acted as such) to divide the estate of the testator according to his will, in consequence of which, the estate remaining unsold and not disbursed in the payment of debts, or offered to the creditors, was on the 27th of November (more than a year after the testator's death) divided, and the share of each claimant delivered, no bond to refund being taken. That the estate so divided consisted entirely of slaves. That the money offered as afore-

*Slaves—Nature of Property—Payment of Debts.—That slaves are assets in the hands of an executor, and liable to the payment of debts, see the principal case cited in Sale v. Roy, 2 Hen. & M. 77. The principal case is cited on page 76 of Sale v. Roy.

In Poindexter v. Davis, 6 Gratt. 500, the court said: "By the act of 1727, 4 Hen. St. 222, important changes were made in slave property, by which it was made in most respects, and indeed in nearly all respects, except descents, personal estate. Lee, Ex'or of Daniel v. Cooke, 1 Wash. 306; *Walden's Ex'or v. Payne*, 2 *Wash.* 1."

†**Executor—Distribution of Estate—Refunding Bonds.**—As to whether an executor can refuse to pay a legacy, or to make distribution of the residuum, unless the legatee or distributee will give him a refunding bond, see the principal case cited in Whitehorn v. Hines, 1 Munf. 585. See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

‡**Pleading and Practice—Trial of Issues.**—It is well settled that, though the jury are sworn to try the issue, yet if several issues are joined and the verdict of the jury responds to them all, the appellate court will disregard such irregularity and consider that all the issues have been tried by the jury. The First Nat. Bank v. Kimberlands, 16 W. Va. 572, citing the principal case: White v. Clay, 7 Leigh 68; Baylor v. B. & O. R. R. Co., 9 W. Va. 270. To this point, the principal case is cited with approval in Baylor v. B. & O. R. R. Co., 9 W. Va. 282.

Statute of Jeofails—Joinder of Issue.—The statute of jeofails cures misjoinder or informal joinder of issue, when it appears that the cause has been tried upon its merits, as though the issue had been formally joined. But it does not cure the nonjoinder or want of issue altogether. 4 Min. Insts. (4th Ed.) 942, citing *Walden v. Payne*, 2 *Wash.* 1; Moore v. Mauro, 4 Rand. 488; White v. Clay, 7 Leigh 68; Southside R. R. Co. v. Daniel, 20 Gratt. 361; Stevens v. Taliaferro, 1 Wash. 155; Totty v. Donald, 4 Munf. 480; Sydnor v. Burke, 4 Rand. 161; Lockridge v. Carlisle, 6 Rand. 21; McMillion v. Dobbins, 9 Leigh 422. See monographic *note* on "Amendments" appended to Snead v. Coleman, 7 Gratt. 300.

*See this act recited in a note to the case of Watson and Hartshorn v. Alexander, ante, vol. 1, p. 341.—Note in Original Edition.

said, was of the paper money then in circulation, and was liable and subject to the law for calling in and redeeming the said paper money, at one for 1000, and that the defendant had received of the same sort of money, to a greater amount than the plaintiff's demand, for debts due to his testator, and contracted previous to the year 1776. That one of the legatees is insolvent, and two others have removed to parts of this state, very distant from the defendant. That the defendant divested himself of the whole estate of his testator before the institution of this suit, in paying the debts, and in obedience to the order and division aforesaid, except £427 paper money, so offered by him to creditors. That the defendant has not paid the debt in the declaration mentioned. If upon the whole, the law be for the plaintiff, then they find for him, the debt in the declaration mentioned, to be discharged by the payment of the principal and interest, or so much thereof as to the court might appear just and equitable; otherwise for the defendant. Upon this verdict, the court gave judgment for the plaintiff for the full amount of principle and interest, from which the defendant appealed.

Marshall for the appellant. I shall insist first, that slaves are not assets in the hands of executors, if the personal estate be 3 *sufficient to pay the debts. If so, then secondly, that the defendant has fully administered the assets. Thirdly, if these points be against the appellant, still the court may give an equitable judgment.

1st, Slaves by the act of Assembly passed in 1705, C. 3, are declared to be real estate with certain exceptions; and tho' some of the exceptions render them like to chattels, yet, there is no law which declares them to be assets, nor can the executor dispose of them as he may of the personal estate, for the payment of debts, unless there be a deficiency of the latter; in that case only can he sell slaves. The laws passed in 1727,* and in 1748† were made, because slaves having been declared to be real estate, could not, as such, have been applied by the executor to the payment of debts, and the legislature, in these laws, have been carefull to distinguish this species of property from chattels. If we refer to other laws, we shall find, that slaves are always contemplated as a species of property totally unlike to personal estate. Thus, in the law respecting distributions, slaves are not comprehended under the words goods, chattels and personal estate. Again, by the same law, the executors or administrators may distribute the personal estate after nine months from the death of the testator, taking bond and security to refund. But by the act of 1748, C. 3, § 30, the slaves of a decedent are to continue on the land to finish the crop (where the testator or intestate dies between the 1st of March, and the 25th of December,) until the latter period, when they are to be delivered to those having a right to them, well cloathed at the expence of the estate, and their crops are declared to be assets. Now mark the difference between slaves and personal estate. The latter may be distributed at one time, the former shall be delivered at another; in the latter, security to refund may be required, but not in the former. Why? Because they are not assets, nor as such liable to pay the debts, unless the personal estate be deficient. The obvious conclusion is, that this sort of property is made an auxiliary fund for the payment of debts, where the assets are insufficient, and the executors are empowered by a special law, to sell them for that purpose only. The executor in this case had no power to retain possession of the slaves, there being a sufficiency of personal estate, 1st, because the law not only imposed it as a duty upon him to deliver them up, but the judgment of a court having 4 *competent jurisdiction compelled him to do so, and this order, he was bound to obey, without a power given to him of protecting himself, by taking security to refund. Let it also be remarked, that it would be exercising an unnecessary, as well as an unjust rigor against the executor, to charge him with a devastavit, when the legatees may in a court of equity be resorted to. 2 Vern. 75, 205—1 Vern. 94, 162—2 Ventr. 360, 358—2 P. Will. 447. Should it be contended, that an executor before he delivers or pays a legacy, may demand security to refund, and that if he neglect to require such a security, he cannot compel the legatee to refund, I answer: 1st, that the cases on this head relate to personal estate only, which are always assets, and liable to pay debts; whereas, slaves are real estate, and are liable to pay debts, only as an auxiliary fund; that the executor is obliged to deliver them up within a limited time, without security, unless there be a deficiency of the personal estate. 2dly, The delivery in this case was not voluntary.

2d point. The verdict finds, that all the estate hath been administered except the slaves which were delivered to the commissioners, to be divided under the order of court, and £427 paper money. Now this money was either funded, or it was not. If the former, it remains a debt due from the public (worth according to the scale 8s. 6 specie) payable at a future day, as the public acts of the legislature prove. If the latter, it is taken out of circulation by an act of the government, and thereby deprived of all its value. In either point of view, it forms no part of the assets in the hands of the executor, being a debt due and uncollected. 2 Bac. ab. 417.

To charge the executor with a devastavit, he should be guilty of mismanagement, misapplication, fraud, or of paying legacies when the assets are insufficient to pay the debts. 2 Bac. ab. 435. The executor in this case did not mismanage, nor misapply the assets, by selling the personal estate and offering the money in discharge of the debts, because this was a part of his duty. Neither has he left debts unpaid, by disposing of the assets to legatees, if I am right upon the first point. If then, the executor is subject to no blame for delivering up the slaves under all the circumstances of the case, there is no possible

*Act of 1727, C. 4, § 7.
†Act of 1748, C. 3, § 29.

ground left to charge him, unless indeed he can be chargeable with the consequences of a legislative act which destroyed in
5 his hands the funds *reserved for paying the debt; an idea too monstrous to be contended for.

3d point. The issue upon the third plea is with the defendant, the jury having found, that the non-payment was owing to the creditor; and therefore, the court may give an equitable judgment on the case. I will not repeat all the equitable circumstances which appear to favor the executor, believing that no case ever exhibited more than the present. The case of Kenner and Turner in the old General Court, was not so strong in favor of the defendant as the present, for in that, the court interfered, even after a verdict rendered upon the plea of payment. The case was, that Turner, who was indebted to Kenner, offered to pay the debt, (without making a legal tender) which was refused. The court scaled the debt as of the day when the offer was made, because Turner, holding the money in his own right, was presumed to have afterwards made use of it, it not being improper in him to do so; it was therefore thought just, that he should sustain the loss by subsequent depreciation. But in this case, the executor, acting as a trustee, ought not to be presumed to have used the money, because it was improper that he should have done it, and therefore, it would be unjust to make him bear any part of the loss by depreciation, but it should be borne by the creditor, for whose use the trustee held it.

Ronold for the appellee. There might be some weight in the arguments drawn from the hardship of this case, if the jury had not expressly found, that the executor had notice of the debt in question before the division took place. But the arguments chiefly relied upon are 1st, that slaves are assets only sub modo. 2dly, That they were delivered to the legatees under the judgment of a court. In answer to the first, I would observe, that slaves in the hands of an executor, resemble personal chattels in almost every respect; for 1st, the possession of them belong to the executor. 2dly, They cannot be taken by a legatee without his assent. and 3dly, They are subject to the payment of the testator's debts.

That the possession of them belongs to the executor is evident, because he is to deliver them to the legatee, which he could not do, if he had no right to possess them, and they, like the personal estate, are to be inventoried and appraised, * which would be absurd, if they were considered as real estate. That the executors assent to vest the possession in the legatee is necessary,
6 *is not only proved by the law just alluded to, but is necessarily implied from the power given him to sell them for payment of debts. These circumstances form the strong line of distinction between real and personal property. But it is contended, that they cannot be sold but as an auxiliary fund to the personal estate. This is equally the case with specific legacies, which cannot be sold, unless there be a deficiency of other property, and yet it never was contended, that they are not assets. Another circumstance is, that the penalty of an executor's bond, is always so fixed, as to cover the supposed value of the slaves, as well as of the personal estate. Were it otherwise, an executor might waste that part of the estate, so as to defeat the rights, not only of creditors, but of others. The truth is, that slaves, though real property in a course of descents, are considered like other chattels in cases where the executor has a power over them for payment of debts. They cannot be sold any more than specific legacies can, for the purpose of paying pecuniary legacies, nor even debts, unless there be a deficiency of the personal assets.

As to the order of the County Court, I do not conceive that it was obligatory upon the executor, as it was made upon an ex parte motion, and without a regular suit. There is no law which authorises this mode of proceeding, and consequently the order was entirely extrajudicial. Besides, the executor was bound to oppose it, and to state the necessity of his retaining the possession until all the debts were paid; this at least he ought to have done, before he could attempt to excuse himself against the consequences of his having obeyed it to the prejudice of others.

As to the finding upon the third plea, it surely cannot avail the appellant, because the act pleaded and relied upon, relates by express words to contracts made after the 1st day of January 1777, and this was entered into prior to that date. The preamble of the law states the inconveniences resulting from the depreciation of the money, in respect of contracts entered into between the 1st day of January 1777, and the first day of January 1782, and is therefore inapplicable to all other cases. Besides, if a legal tender had been made, yet the jury should have found, that the money was such, as might be lawfully tendered, which they have not done.

Marshall in reply. It must be admitted, that the decision of the County Court was not made upon proceedings regularly conducted; yet as that court had jurisdiction over the subject, the judgment standing in force and unreversed, was obligatory upon the executor.

7 *It is true, that the 2d section of the act of 1781, is confined to contracts made after the 1st day of January 1777, but it does not follow that the law is confined entirely to contracts entered into between the periods mentioned in that section. The third section (since it declares, that execution shall not issue upon any judgment theretofore obtained, before December 1783;) obviously is not, and why should the 5th section, which is as general as language could make it, be restrained in its operation, when the mischief intended to be remedied, is the same? If it were just, that an equitable judgment should be given upon a contract made on the 1st of January 1777, where the non-payment was owing to the creditor, is it not as much so, if it had been made on the last day of December 1776? And since the words of the 5th clause of the law, do not expressly confine the cases to particular contracts, the court will so construe the

*Act of 1748. C. 3, § 22.

as to extend the relief to every case coming within the mischief.

An objection which was over-looked in opening the cause, may here be mentioned; it is, that no issue is made up. The pleas conclude with an averment as it was proper they should, to which there is no replication. The case of Stevens and Taliafero (ante vol. 1, page 155) is in point.

Ronold. There is certainly no ground for this objection after verdict, and a defence made. The record states, that the plaintiff replied generally to the plea, and that issue was thereupon joined. Although the pleadings might have been more formal, yet it is too late after verdict to make an objection.

LYONS J. delivered the opinion of the court. The principal point made in this cause on the part of the appellant is, that slaves are real estate, and can only be considered as assets in the hands of the executors sub modo.

Slaves from their nature are chattels. They were originally so, and the law made them real estate only in particular cases, such as in descents &c. But in most other instances, and especially in the payment of debts, they were declared to be personal estate. It is true, the law has protected slaves from distress, or sale, where there is a sufficiency of other personal estate to pay debts or levies, and in this respect they differ from other chattels; but this qualified exemption does not change their nature, or give to them the qualities of real property. Slaves therefore, being clearly assets in the hands of an executor, and liable to the payment of debts, the executor had a right to demand security of the legatees before he delivered them up, and a court of equity would not have compelled him to part
8 with the possession, *without such security being given, upon the principal of making him do equity who would have it. The executor appears in this case to have consented to the division directed by the County Court, since it does not appear, that he disclosed the fact of debts subsisting against the estate, or that he opposed the order which was made upon any principal whatever. That order should be construed according to the reason and justice of the case, and that it was intended only to compel a division of the estate which should remain, after satisfying all legal demands against it. If the executor, with a knowledge of this claim, chose to deliver the slaves to the legatees, without taking security to refund, under an opinion, that he had money in his hands to satisfy the debt, he might have made a legal tender of the money, and thus have exonerated himself. But this he did not do. The executor being a trustee for creditors, ought to have taken care to keep enough in his hands to satisfy them, and it is no answer to their demand against him to say, that they may pursue the legatees. They are under no obligation to follow the estate, though they may do so, if they please. Whether the executor has subjected himself to a devastavit or not, would be a premature inquiry at this time; when a suit is brought suggesting a devastavit, that question may properly be decided.

As to the other objections, there is no weight in them. The act of 1781 relied upon in the third plea, does not extend to contracts made antecedent to the 1st of January 1777. This act has been greatly misunderstood. The principle of the decision in the case of Kenner and Turner was soon after reconsidered and corrected; for it was absurd to scale specie debts. Whether the executor in this case kept the money or not, does not appear; but if he did not make a legal tender and keep it, it was his own fault.

Tho' the issues are not formally joined, yet they have been fairly tried, and being found by the jury, it is now too late to seek an advantage in consequence of that informality.

Judgment affirmed.

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9 *James Roy and Others v. Muscoe Garnett.

October Term, 1794.

Devise—Construction*—Case at Bar.—A. devises certain lands to his son J. for life, remainder to his son M. and his heirs in trust, and for the use of the first and every other son of his said son J. who should survive him, in tail male, equally to be divided; but if his said son J. should die without male issue, then he gives the said lands to his said son M. during his life, with like remainders to his first and other sons who should survive him, in tail male, equally to be divided; but if he should die without heirs male, then in trust for the testator's three grandsons, with like remainders to the first and every son of his said grandsons who should survive them in tail male, equally, &c. remainder to M. in fee. He then desires that the widows of his sons and grandsons should be entitled to dower.

HELD:

J. took an estate for life, in possession, with remainder in tail male, expectant upon the determination of the estate tail to his surviving sons. The estate for life did not incorporate with the implicative branch of the devise, because the estates were of different natures; the former being a legal estate, and the latter remaining an equitable estate not executed by the Statute of Uses, for the want of male issue of James.

***Executory Devise—Construction—Contingency.**—In Murdock v. Shackelford, 17 Fed. Cas. No. 9,937, a testator lent his son William a tract of land for life, "and if he has children, at his death, he may dispose of it to them as he thinks proper, reserving to his now wife the use of the land during her life, as long as she remains his widow; but if she marry, then she is to have only one-third part; the whole or part, whichever she has, is to be held without committing waste. If my son William dies without heirs of his body, then the land, with the consideration above mentioned, to go to my son Zachariah," &c. The court said: "This is an executory devise to William, in tail, after an estate for life in himself, remainder in fee to his children, living at the time of his death, which executory devise in tail, is to take effect on the contingency of his dying, without children living at the time of his death. * * * This case very strongly resembles that of *Roy v. Garnett*, 2 *Wash.* (*Va.*) 11, which was very maturely considered, both by the bench and bar. The doubt, in *Roy v. Garnett*, was, whether in the event of the devisee for life, dying without male children, his estate would be enlarged by the implicative devise, so as to enable his issue to take before the remainderman; but it was conceded by the counsel for that issue, that if any male child, or children of the devisee for life, had been living at the time of his death, such male child or children must have taken under the will, and the estate of the devisee for life would not have been enlarged into an estate tail." The principal case is cited with approval in Smith v. Chapman, 1 Hen. & M. 296.

Construction of Words "Heirs" and "Issue."—The principal case and Warners v. Mason, 5 Munf. 242, are cited in Tidball v. Lupton, 1 Rand. 197, as authority for the proposition that the word *heirs* as well as *issue*, may be construed a word purchase, as descriptive of the persons to take, if that shall appear to be the intention of the testator, and is not necessarily a word of limitation.

This case, which on account of its importance and difficulty, had been continued for a full court, came on this term, to be argued. It was an ejectment, brought in the District Court of King and Queen, by the lessee of the appellants, against the appellee, wherein the parties agreed a case, the material parts of which, are as follows, viz: That James Garnett the elder, being seised of the lands in question, as well as of other tracts, by his will dated the 18th day of April 1765, devised the premises in question to his son James, by the following clause viz: "I give to my son James the tracts of land purchased of Thomas Hawkins, Young Hawkins &c. for and during the natural life of my said son James, remainder to my son Muscoe, and his heirs, in trust, and for the use of the first, and every other son of my son James, who shall survive him, in tail male equally to be divided; but if my son James should die without without male issue, then I give all the said lands to my son Muscoe, during his life," with like remainders to his first and other sons, who should survive him, in tail male equally to be divided, but if he should die without heirs male, then in trust for the testator's three grandsons, with like remainders to the first and every other son of his said grandsons who should survive them, in tail male, equally to be divided, remainder to Muscoe in fee. To his other sons, and to three grandsons, the children of a deceased son, he also devises lands with like limitations, and after disposing of his saves and personal estate he says, "It is my will, that whatever woman my sons and grandsons marry, or have married, they the said woman, shall be entitled to dower in the lands and slaves, devised to my said sons and grandsons respectively." [The other clauses in the will, so far as they were thought important, are taken notice of in the argument, and therefore need not be here stated.] It is further agreed, that James the devisee, died in October 1780, having never had male issue, and by his will devised the land in question to his daughter Molly, who died in October 1790, leaving the lessors of the plaintiffs her only children. That the defendant is the same person as is mentioned in the will of James Garnett the elder by the name Muscoe.

The District Court gave judgment for the defendant.

10 *Campbell for the appellants. The question is whether James the son took an estate tail, or only an estate for life. If the former, then the act of 1776 for docking intails, enlarged this estate into a fee simple, and the plaintiffs as heirs of Molly, the daughter of James the son, are entitled. If the latter, then James having died without leaving male issue, the remainder took effect in the defendant. I am to contend for the former construction.

The clause of the will under consideration has three branches, 1st, The devise to James for life. 2d, The limitation to his surviving sons in tail male, equally to be divided. 3d, The limitation to Muscoe, if James should die without male issue.

The first branch of the devise must be enlarged by one or other of the remaining branches; that is to say, either by the 2d, which contains the limitation "to the first and every other son of his said son James, who should survive him in tail male, equally to be divided;" or by the last, which gives the estate to Muscoe, "if his said son James should die without male issue."

The rule of law under which this enlargement of the estate for life must take place is, "that wherever the ancestor takes an estate for life, and there is a limitation to his heirs or issue, in the same deed or will, these words, shall be words of limitation and not of purchase, and will vest the inheritance in the ancestor;" Shelly's case; 1 Co. Rep. 99. Tho' this rule in modern times hath not governed universally, yet it is stated by Lord Mansfield in the case of Long and Lamming, 2 Burr. 1106, 1107," that it is never departed from but in favor of intention.

The rule with the exception from it, being thus established, we are to inquire, whether the devise to James for life, be enlarged, either by the 2d, or by the 3d branch of the clause under consideration?

I shall not contend that the estate is enlarged by the 2d branch of the devise, "to his first and every other son who shall survive him, in tail male, equally to be divided," 1st, because the words are descriptive only of certain issue male, namely, surviving sons &c. and not of his issue male generally. 2dly, Because the estate is to go to them as tenants in common, under the words, "equally to be divided,' and therefore, cannot pass in a course of descents, which would carry it to the eldest son only. The sons therefore, must take as purchasers, and consequently under the rule which I have before mentioned, the life estate of the ancestor is not enlarged by the devise to them.

But I shall insist, that the estate for life is enlarged by implication, by the operation of the words, "and if my said
11 son *James shall die without issue male, then to my son Muscoe," &c. In order to determine, and to support the truth of this proposition, I will 1st, consider the devise, as if the 1st and 3d branches of it had stood together, without the 2d being interposed; as if it had been thus, "To James for life, and if he die without issue male then to Muscoe" &c.

2dly, I will consider, how far the intervention of the devise "to the first and every other son in tail male equally to be divided," will alter the case; and lastly, I will close with an enquiry, concerning the intention of the testator, in order to ascertain the influence which it can have in this case, upon the results of the previous reasonings.

1st, I am to contend, that a devise to James for life, and if he die without issue male, &c. would have passed an estate tail to James. Inheritances have been created chiefly by necessary implication. The rule in Shelley's case, furnishes no doctrine, which is not exemplified, and proved by almost every gift or devise that can be conceived. Thus, in a gift to A. and his heirs, or heirs male, A. has only an estate for life, which is enlarged by the subsequent words, "to the heirs or heirs male." A devise to a man and his heirs male, gives him an

estate tail, and the law will supply the words, "of his body lawfully begotten." Co. Lit. 9 b.

There are also other expressions, which are considered as being tantamount to those before mentioned; such as to a man and his seed; 2 Vern. 766. To one, and if he hath issue male, that issue to have it. 9 Co. Rep. 128—Owen 29—Ventr. 227, so to one, and if he die without issue. 1 Ventr. 214, King and Melling Hob. 30—Ventr. 230—1 Co. Rep. 99. If then, the clause stood as I am now considering it, without the intervention of the devise to the surviving sons, it is clear, that an estate tail would have passed to James, because the remainder to Muscoe, being limited upon the condition, that James should die without issue, it could never vest until that event should take place. This brings me to the consideration of the

2d point, viz: does the intervening devise make any difference in the case? If it do, it must be upon one or other of two grounds; either that the general words, "and if he die without issue" must be referred to the intervening and preceding branch of the clause, so as to mean such issue as is there spoken of, to wit, surviving sons: Or, that the intervening estate, hinders the first devise for life, and the last devise to the issue male from uniting, so as to make the latter, enlarge the former, or in other words, to vest in James an estate tail.

12 *I say these are the only grounds; because if the devise is (notwithstanding the intervening estate,) to be construed in the same manner, as if it had been "to James for life, and if he die without issue male remainder over;" and if the words, "and if he die without issue male" are unrestrained, and mean a general failure of issue male, and not of any particular issue, then it is absolutely necessary, that James should have taken an estate tail as all the cases prove, because, it is clear, that the remainder over could not vest until there should be a general failure of issue male.

Here then seem to lie the great points between us. It is admitted, that the devise to the surviving sons does not enlarge the estate; or if issue male mean such issue, it is equally clear, that an estate tail did not vest in the father. But if it can be shewn that the implicative words are not so restrained, then it must be conceded on the other side, that James took an estate tail.

I shall at once admit, that an implication to enlarge an estate, must be a necessary one. "Thus if there be a devise to A, remainder to all his sons in tail, and if he die without issue male, then to B; it is clear, that the latter words "and if he die without issue male," will not enlarge the estate previously given; because, as the first part of the devise had comprehended all the issue male, the latter part can have reference to none other, and therefore, shall be construed to mean such issue male, and consequently will not operate to enlarge the estate. The whole male issue being comprehended, there is no necessity to enlarge the meaning of the latter words.

But if there be a devise to the 1st, 2d and 3d sons, down to the 6th, or to any other particular number of sons, and "if the tenant for life die without issue male, remainder over;" these words, shall not be construed to mean such issue, because the testator by the generality of the latter words clearly meant, that all the issue male should take, and the former words having only given the estate to a certain number, if the latter words were construed to mean such issue, a part of the issue would be left unprovided for, contrary to the evident will of the testator. In such a case therefore, the judges will not restrict the general meaning of the words, "issue male," but will construe them to mean all the issue male, and consequently, will determine the estate to be an intail in the ancestor. Langly v. Baldwin, Fitzg. 14. The Attorney General v. Sutton, 1 P. Wil. 759. These cases seem to be decisive. They are founded upon the strongest reason, and are in union with the best established principles

13 *of law. And if cases seemingly opposite to these should be produced, they will, if examined, be found not to vary from, but to strengthen the principle established in these cases.

The last point to be considered, is the intention. If it be contended that the testator meant to give an estate for life only, to James, because he has used expressions proper to evince such an intention, the answer is, that the intention is equally clear and strong, that all the issue male of James should take, and that Muscoe was not to take, so long as James should have issue male; and unless James took an estate tail, some of his sons might have died in his life time, leaving issue, who would be entirely unprovided for. If then there be two intentions, the one contradictory to the other, all the authorities prove, that a preference is given to that, which favors the issue, where it is clear they were meant to be provided for. The authorities, from Shelley's case, down to the latest that we meet with, prove, that an estate given expressly for life, may be enlarged by words of implication. But I doubt if one can be produced, where, if the issue were meant to be provided for, a construction has been adopted, which went to defeat them, merely because the estate was given to the ancestor expressly for life.

Let it also be remarked that the reason upon which the cases in England which aim at the destruction of the rule in Shelley's case is founded, is, that the tenant in tail might by suffering a common recovery bar the provisions intended for the issue, if a construction be made so as to vest the inheritance in the ancestor. This I consider to be the operative reason which has prevailed in those modern decisions which seem to weaken the force of the rule I have been contending for. But this reason could have no influence in this country whilst estates tail were permitted, because they could not be barred with the same facility.

I rely therefore, that upon principle, and upon authorities, James Garnett took an estate tail by implication; and if so, that estate was converted into a fee simple by the act of 1776, and descended to the lessors of the plaintiff, as the heirs at law of Molly, the only daughter of James Garnett.

Warden for the appellee. The rule laid

down in Shelley's case considered as a general one, is not denied. But this rule is always departed from, in cases where it appears that the testator intended to give only an estate for life to the ancestor. That such an intention appears in the present case, we are to prove.

Let it be remembered that the intent of a testator is to be collected from his whole will, and not from any particular
14 clause *in it. This principle is laid down in the case of Baddeley v. Lappingwell, 3 Burr. 1541, and also in the case of Frogmorton, on the demise of Bramston v. Holiday, 3 Burr. 1618. No rule of law is better established than this, that an estate given without any words of limitation, passes only an estate for life, and yet, in the last mentioned case, where there are no such words, other words evincing an intention to give a fee, were considered as sufficient to set aside the rule. The intent, is the polar star to guide the construction of a will, Swinb. 10—1 Burr. 39, 49, Robinson v. Robinson, Cro. Jac. 448, Dougl. 321. Having thus admitted the rule contended for to be generally true, and pointed out the principle by which it is to be corrected, I shall insist, 1st, that the intention of the testator in this case was clearly to give an estate for life only to James. 2dly, There being no rule of law to prevent the issue male of James from taking by purchase, if the intention be clear that they should do so, the words of the devise under consideration are not sufficient to bring this case within the rule which is contended for.

First. The will shews, that the testator was desirous of disposing of a large estate amongst the male descendants of his name. To effect this, it was necessary to devise it to his sons, and to their male descendants. Hence we see him devising parts to his sons; other parts to his grandsons, the grandchildren of a deceased son, for and during their natural lives severally, with remainders in trust in each devise, for the use of the sons of those sons and grandsons severally, who should survive them in tail male, thereby intimating an intention, that the estates tail might commence in the male descendants of the devisees for life, and hence we find him giving dower to such women as his sons and grandsons might marry, clearly demonstrating, that he considered them as only tenants for life, and that without such a devise they would not be entitled to dower. But what principally fixes the intention of the testator, and proves that he knew what he was about is, that where he gives express estates for life, he also gives a right of dower to the widows; but to the widows of the sons of his sons and grandsons, in whom he supposed an estate tail commenced, he says nothing about dower, knowing that the law provided for such. In Bagshaw and Spencer, 2 Atk. 570, 579, the words "without impeachment of waste," were considered as sufficient to take the case out of the rule; and surely, those words do not furnish stronger evidence of intention, than may be drawn from
15 the provision made in this case *respecting dower. The case of King and Melling does not weaken this argument; for tho' dower is an incident to an estate tail, yet a power to make a jointure (as in the case cited) of the whole estate devised, is not an incident, but repugnant to such an estate, and therefore such a power could not take the case out of the rule.

Blackborne and Edgley, 1 P. Wms. 601, may perhaps be relied upon against me. But it must be recollected, that this case was decided prior to that of Bagshaw and Spencer, and besides, the words "without impeachment of waste" were in that case passed over sub silentio, the decision turning upon another point, to wit, that words of implication would turn an express estate for life into an estate tail. And if this principle be true, surely words of implication shewing a strong intent to give no more than an estate for life, which was expressly given, shall retain it in that situation. This brings me to the

2d point. I shall consider this clause in the will according to the subdivision thereof made by Mr. Campbell. The first member of the sentence it is admitted gives only an estate for life. The second member gives the whole fee to Muscoe in trust, and his estate, commences only when the estate for life ends; so that the fee, was not to be for the use of the legal heir of James, but for his use, upon condition, that the first son should be that heir, and should survive him, jointly with the other sons, not as a joint tenancy, but as a tenancy in common of an estate tail which was to commence in the sons. The sons therefore could not take by descent as tenants in common, because only the eldest son, or his representative could be heir to the father. From this consideration it is evident, that the estate tail was to commence in the sons, which is further proved by the position of the words in the sentence; the words in tail male, being placed between the words "survive him," and "equally to be divided." Doe and Lamming, 2 Burr. 1100.

The third member of the sentence is principally relied upon to constitute this an estate tail in James. Considering the operation of this part of the sentence upon the plain principles of common sense, the words issue male would be intended to signify such issue male, that is, a son, or sons surviving James. It might perhaps be even construed to mean the male issue of a deceased son or sons. But here, if there were any surviving son, the heir might be disinherited, and if there were no surviving son, but the sons of several deceased sons, they would all of them be issue male under the contemplation of the former
16 member *of the sentence, and would take equally; and if they did, the estate would not pass according to the rules of inheritance to the heirs general or special; for by these rules, an eldest son is the heir, and so on, to his most remote posterity, and not all the male descendants, deriving their descent through males. The same difficulty would occur, if the words were construed to mean male descendants, either deriving their descent through sons, or daughters. Whichever exposition is taken, this conclusion follows, that the estate to the ancestor for life is not necessarily limited by the words "to his heirs

general or special," and therefore the words of the devise are not of themselves sufficient to bring the present case within the rule. Keeping in mind that the intention is to be sought for in the whole, and not in any one part of the will, this conclusion follows, that as it is evident by the second member of the clause, that an equal division was intended amongst all the sons who should survive James, so when the male issue are spoken of, a like intention as to them is to be presumed, in case any such should be left. This is the only implication, under which, the law will presume that any estate was by the words devised to them, and they can derive no estate from the words, but by implication Dougl. 264—3 Durnf. and East, 484. This exposition gives effect to all the words, and consistency to every part of the will. That this is a necessary construction, will appear, when another principle of law is considered, to wit, that an express estate for life, cannot be altered by words of implication. 1 P. Wms. 54, Bamfield and Popham which is recognized and confirmed in the case of Ives v. Legge, 3 Term Rep. 488.

Upon the whole, it seems clear, that the true construction of this will is to give to James an estate for life, and to the surviving sons, or to the issue male, estates tail as purchasers.

Washington on the same side. To avoid the confusion which will generally follow, from plunging at once into the consideration of a multitude of authorities, I will endeavor to class them under four different heads.

The first, which begins with Shelley's case, need not be mentioned, because the rule is well understood and admitted.

The second, comprehends those which modify the rule in Shelley's case, and establish the principle, that the intention of the testator shall prevail against the rule.

This will lead to an examination of the intention in the present case, independent of the latter, which is justly termed the implicative branch of the clause.

17 *Though Mr. Campbell has conceded, that the second branch does not enlarge the estate expressly given for life, yet it deserves our consideration, so far as it tends to throw light upon the testator's intention.

The inconsistency which Mr. Campbell is forced into, ought not to be passed over; for tho' he admits, that the parts of the will which we rely upon to prove that an estate for life was intended, do successfully establish it, and that the intention must prevail, yet he finally concludes that James took a greater estate: those parts are,

1st, That it is given expressly for life, which I mention merely to repel the implication arising under the 3d member of the clause.

2dly, It is given to sons which is a word of purchase.

3dly, To sons equally to be divided, thereby breaking the course of descent; for if they take in the character, they must take in the quality of heirs. Brow. Ch. Rep. 206, Jones v. Morgan; Doe and Lamming, 2 Burr. 1100.

4thly, There is a trustee appointed, which could only be for the purpose of preserving the contingent remainders. Sayer and Masterman cited in Fearne on Const. Rem. 122.

5thly, The wives of the sons and grandsons are to have dower, but no such provision is made for the wives of the issue of the sons. This is a circumstance of considerable weight, and has been well enforced by Mr. Warden.

If we look no farther into this clause of the will, what case can be produced, containing so many strong proofs of intention, and who can doubt for a moment, but that James was meant to take an estate for life only? What then has become of the rule in Shelley's case, or how can it operate upon this case? The rule is best stated by lord Hardwicke in the case of Bagshaw and Spencer to wit: "that though the intention is to prevail, yet it must not conflict with the settled rules of law." But what are those rules? The same judge describes them; he says, that they will not permit a testator to create a perpetuity; to produce an abeyance; mount a fee upon a fee, or make an heir take chattels by descent.

Shelley's case would not apply at all, if it were not so modified, for the devise there, is to heirs male, which are words of limitation, whereas issue is properly a word of purchase. And in Backhouse and Wells it was said, that if the words had been heirs male, the operation of law would have

18 over-ruled the intention*—Pow. on Dev. 360. Let me conclude my observations upon Shelley's case, by observing, that no judge has gone beyond the rule there laid down; the reason of it has ceased, and none are bound by it, but in cases coming strictly within it.

The above view of the question embraces the two first branches of the clause.

The 3d class of cases furnishes a rule, as well established as the one drawn from Shelley's case; it is, that an express estate for life, cannot be enlarged by words of implication, Bamfield and Popham 1 P. Wms. 54. This principle has never been controverted, and is recognized in the case of Ives v. Legge, 3 Durnf. and East 488; also in the case of Lethieullier and Tracy 3 Atk. 784. Now, this is a different rule from that in Shelley's case; not affected by it, and is in point, to defeat all the arguments drawn from the third branch of the will. This rule, I said was opposed by no case whatever; I ought to except that of Blackborne and Edgley; but that case is not an authority as to this point, because it is founded upon Sunday's case, which is not a devise of an express estate for life. This leads to the consideration of the

4th Class of cases, which operates upon the rule last mentioned, in the same manner, as the 2d class does upon that in Shelley's case, to wit, to correct and explain it. And the principle resulting from the rule thus corrected is, that an estate for life may be enlarged by words of implication, if the intention of the testator manifestly appearing, cannot otherwise be effectuated. Without this necessity the estate for life will not be encreased; but the word such will be supplied.

Under this view of the question it will be

found, that we occupy the strong ground which the appellant's counsel think they had secured. For in a case coming within the rule in Shelley's case, the person who would defeat the rule, must shew an intention opposed to it. And this would be our situation, if the issue male claimed by an express limitation. But the limitation in this case arising only by implication, we have the rule in Bamfield and Popham on our side, and the proof of an intention which cannot otherwise be effectuated than by enlarging the estate for life, lies upon the appellant. It is not necessary for us to shew an intention to give an estate for life; the appellant's counsel must shew an intention sufficient to subvert the rule.

This will serve to introduce the following cases, which will also contribute to exemplify the rule in Bamfield and Popham.

The first is the case, of the Attorney General v. Sutton, in *which it 19 was contended, that it was the clear intent to give to all the issue; and so it was. For 1st, a strict settlement was manifestly intended, since it is not to be supposed that the testator could have a preference to a 3d, more than to a 2d son, and of course his stopping at the 2d son, must have been an undersigned omission.

2dly, The words of the will in that case too plainly shew an intention to give an estate tail, to have admitted of a doubt: see the note to the report of this case in the last edition of P. Wms. 754.

3dly, The remainder there, is to a charity, here to son.

The second case is Langly and Baldwin, which is much relied upon. In this also it is to be observed, 1st, that there was a clear intention to provide for all the sons in strict settlement. 2d, The course of descents is there preserved—in our case it is broken. 3d, In that, the only mark of a contrary intention is the devisee being freed from impeachment of waste; for that the clause respecting jointure proves nothing, has been well explained by Mr. Warden.

4th, In that, the remainder over is to a stranger.

These cases only shew, that where the intention is clear, and can only be supported by enlarging the estate for life, the court will do so; and this we concede. To give James then an estate tail, it is absolutely necessary to prove, that the testator meant to provide for the son of a non-surviving son. It is not sufficient to say, that such person would otherwise be unprovided for, because, if this were all, it would be placing the proof of intention upon us, who are safe under the rule in Bamfield and Popham, unless an intention to give a larger estate than for life is shewn on the other side. In Bamfield and Popham, the rule was not departed from, tho' a posthumous son might have been disinherited under it, and this was an argument, much relied upon in opposition to the rule.

So in Blackborn and Edgley, tho' it was objected, that the adoption of the rule would prevent the sons and daughters from taking, yet the court would not for that reason dispense with the rule. So the same reason was urged in Lethieullier and Tracy, to wit, the exclusion of a great grand-daughter; yet the rule prevailed. In the case of Wyld and Lewis, 1 Atk. 432, cited in the case of Lethieullier and Tracy, an express estate for life was not devised. So too in 2 Bac. 68, who cites Bulstr. 63—Dy. 171, the rule was supported, tho' the heirs general might have been excluded. So the case of 20 Doe v. Reason, *cited in Doe v. Holme 3 Wils. 244, is precisely apposite to the present, and answers all the objections.

It is not true then, that because an inconvenience may happen from the adoption of the rule, that therefore it shall be dispensed with; but it is essentially necessary to shew an intention to provide for the son of a non-surviving son, growing out of the will, for it is admitted that the implication must be a necessary one.

Upon the whole, these points seem to be established. 1st, That the intention of the testator was to give an estate for life—the construction contended for, is to defeat that intention.

2dly, There is no evidence of an intention to provide for the case which is supposed, and therefore no necessity to enlarge the estate of James, by implication.

3dly, To do so, would defeat the intention in another respect. For if James took an estate tail, to open and let in the sons of a non-surviving son, the eldest would take by descent, in exclusion of the others, tho' it was evidently the intention, that those who took should take equally as purchasers, and in this respect, our case differs most essentially from that of Langly v. Baldwin, where the course of descents was preserved throughout.

The answer given to all our cases is, that they are founded upon the power of tenants in tail in England to bar the right of the issue. But this is not the reason, as the case of Lethieullier and Tracy proves; and besides, there were two ways of barring estates tail in this country whilst such estates existed; the one by a writ of ad quod damnum, and the other by application to the legislature.

But if after all, intention is to be sacrificed, and all the rules of law destroyed in order to let in the son of a non-surviving son, I can see no reason, why he might not take by purchase as well as by descent, for issue male are properly words of purchase.

Wickham on the same side. It is agreed, that an estate for life is given to James, but it is contended, that the remainder unites with and enlarges it; and this doctrine is bottomed upon the rule in Shelley's case.

To this rule, we oppose that in Bamfield and Popham, which does most certainly defeat it, wherever the limitation over is not by an express and direct devise to the heirs or issue. But I contend, that if the devise in this case had been directly to the issue male of James, that the remainder could not upon the principle laid down in Shelley's case, unite with the estate 21 for life. It is *admitted, that this union can never take place, where the estate for life and the remainder are of different natures; as if the one be a legal, and the other a trust estate. Now in this case, the inheritance after the death of James is

devised to Muscoe in trust, and consequently, the cestui que trust would have been entitled before the statute of uses to a merely equitable interest. Is this a case within the operation of the statute? I contend that it is not, because that statute only vests the legal estate in him, who is entitled to the use or equitable estate, which can only be effected, when there is a person in esse in whom the use resides, 1 Rep. 126. But in this case there never was such a person in being, James having never had any male issue; and consequently, the legal estate which continued in the trustee until James should have such issue, never was executed by the statute, and therefore, the limitation to the male issue, never could incorporate with the life estate vested in James. It is equally necessary to produce this union, that the two estates should pass by the same conveyance. But in this case, James took under the will, and the male issue, (if there had been such,) under the operation of the statute of uses. The only way by which James can take an estate tail, is by uniting the estate given by implication in the third branch of the clause, with the estate for life given to him in the first. But if this union cannot take place from the different natures of the two estates, the certain consequence is, that he never had a greater estate than for life. If I am correct in this argument, there is an end of the cause.

The estate for life can only be enlarged by implication to favor the intention of the testator. But an implication to destroy the intention is an absurdity in terms. That the testator well knew the difference between an estate for life and an entail, is proved by the very clause under consideration, where he gives an intermediate estate in fee to a trustee, which could only have been for the purpose of preventing the union of the two estates, and to preserve that which he knew was contingent.

The testator could not by stronger language have expressed his will not to give an estate tail to his sons and grandsons. The many circumstances to prove this intention, which have been mentioned by the counsel who have preceded me, one would suppose were sufficient. But there is another. There are several devisees, to each of whom he gives an estate for life; then to the issue. But how? In succession, as estates of inheritance must go? No. But it was certainly his intention, that the issue male should take in the same manner
22 as the sons did, and it is *admitted that they took as purchasers, because they did not take in succession. If then, James is construed to take an estate tail, the issue male would have taken in a way not intended by the testator. This then forms the striking difference between the present case, and all those which have been relied upon by the appellant's counsel. In King v. Melling, there is no intervening estate changing the course of descents. The Attorney General v. Sutton was reversed in the House of Lords. But admitting its authority, the line of succession was there preserved, and therefore the construction put upon the implicative branch of the devise went with the intention. The same observation applies to Langly and Baldwin, and Dodson v. Grew and others, 2 Wils. 322. This last case proves the principle which governed all the others, to wit, that the issue were intended to take in succession, which they could not do, if they took as purchasers. But here they were intended to take altogether, which they cannot do, if they take by descent.

It is contended, that Muscoe could not take so long as James had issue male living; and that the only way by which the son of a non-surviving son could take, was by descent from the father. It is evident that the testator never contemplated such an event, and therefore he could not mean to provide for it. But if he did intend that all the issue male should take, it was equally his intention that they should take all together, which they could not do, if the construction contended for be correct. Could a grandson of James have taken equally with the sons of James? Surely not; but the sons would have taken the whole, and left to their nephews a paltry remnant after the expiration of an estate tail. We have seen that the leaving of a posthumous son unprovided for, does not afford a reason for giving an estate tail by implication, where only an estate for life was intended, and yet this is an event as probable as that now supposed.

The last branch plainly refers to the children before mentioned; that is, to surviving sons; and the court will not stretch the meaning of it to issue generally, unless induced thereto, for the purpose of complying with the testator's intention, which I have endeavored to shew would be defeated by such a construction. The word but is plainly a word of reference to what had gone before; and that heirs general may by reference to preceding words be construed to mean heirs male, is proven by the cases read from 2 Bac. 68. So that the court will in this case take the whole clause together, and correct the last branch by the second, so as to mean, "if James die without male children surviving," &c.

23 *In many of the devises, the remainder is limited immediately over. For instance, the land devised to his grandson Augustine is "to him for life, remainder to James, in trust for the use of the sons of Augustine who shall survive him in tail male equally to be divided, remainder to all the sons of his grandsons Francis and Harry, who shall survive them in tail male equally, &c. remainder to his son James and his heirs for ever." Now is it probable, that the testator meant to provide for the issue male generally in some cases, and to exclude them in others? The whole will should be taken together, and the same intention be presumed throughout; for it seldom happens, that the same idea is by the same person, and in the same instrument always expressed in the same words. We here find the testator sometimes using the words, "for want of heirs"—"heirs male" "in default of issue male" &c.

But suppose that a devise to the issue male generally of James, must necessarily be implied. May they not take as purchasers? It is assumed as a point given up, that they could not; and yet I can see no

reason, why they should not, if it be so intended.

Even heirs, eo nomine, must take as purchasers, if they take otherwise than in the quality of heirs; and the issue male in this case cannot take at all, consistently with the intention of the testator, unless they take by purchase, for otherwise, they would come in by succession, and not altogether, which would contravene the intention.

Upon the whole, I think there is no principle which will bear the appellants out, in contending that James took an estate tail.

Marshall in reply. The single question in this cause is, did James Garnett take an estate for life, or an estate tail? I shall attempt to maintain the ground which Mr. Campbell has taken, though I shall not precisely follow him in the mode of discussing the subject. I shall contend,

1st, That upon authority, the male issue of the non-surviving son of James must take before Muscoe.

2dly, That according to the intention of the testator, they must take before him.

3dly, That they must take by descent, and cannot take by purchase.

4thly, That if they take by descent, the estate must be in the ancestor, and therefore that James took an estate tail.

1st, It is a rule supported by a connected train of authorities, that wherever in a will devising a legal estate, a remainder
24 over *is to take effect on the failure of issue of a particular devisee, or on failure of male issue, that such issue must take in infinitum by the implicative devise, before the remainder man, unless there be strong circumstances to take the case out of the rule. To prove this rule, I cite Robinson's case mentioned by Ld. Hale in King and Melling, 1 Vent. 230—Gilb. Dev. 38, 39—Eq. Ca. Ab. 185—Langly and Baldwin; Attorney General v. Sutton; Robinson and Robinson, 1 Burr. 58. To this rule, I admit there are exceptions, within none of which can the present case be brought, and within some one of them, all the cases cited against us are to be found.

A principle indeed has been urged, which if true in the latitude contended for, would embrace our case. It is, that an express estate for life cannot be enlarged by implication. In the extent it is laid in the books, I deny the principle to be law. Bamfield and Popham, a note in 3d Durnf. and East 488, and 2 Bac. 68, are cited in support of it. It is also laid down in Humberson and Humberson, which is decided upon the authority of Bamfield and Popham, and must therefore stand or fall with it. In Bamfield and Popham, all the sons and their issue are provided for. The only argument in favour of enlarging the estate for life was, that a posthumous son might be disinherited, unless the ancestor took an estate tail. It is not certain that the argument was applicable to the case, for even admitting that before the 10th and 11th of William and Mary, a posthumous son could not have taken, it is certain, that the case was provided for by that statute. This case was decided subsequent to the making of that statute, and we are not informed whether the testator died before or after it. But independent of this objection, I contend that that case is not law, and would shortly after have been otherwise decided. It is admitted, that the testator did not intend to exclude a posthumous son, and yet, the construction there put upon the will, was against the intention, upon the authority of the legal principle, that an express estate for life cannot be enlarged by implication. The principle as there laid down is totally unqualified and unrestrained, so that it would prevail against the clearest intention. The principle is exploded by all subsequent adjudications, and not attempted to be maintained by those which notice it. It is denied in the case of Blackborne and Edgley. I admit that Sunday's case does not support the principle for which it is there cited, but surely the cases which I have before mentioned, do most conclusively over-rule the solitary case of Bamfield
25 and Popham. The decision *on the case from Durnf. and East turned upon the words of limitation which are superadded, and is besides, a mere obiter dictum, unnecessarily stated. But above all, I rely upon the decision of this court in the case of Shermer v. Shermer (ante 266) as over-ruling this principle.

Having cleared the cause of this rule so much relied upon, I proceed to state the exceptions to the principle I am contending for.

The first is, where the whole issue is provided for by the intervening clause. For in such a case, it would be unnecessary, and therefore absurd to create an implication for the purpose of providing for those who took by an express devise.

The second is, where a plain intention appears to exclude such issue. Within this exception is the case of Blackborn and Edgley, for the testator having declared an intention to provide for his name, it would have been a manifest violation of his will, to create an implication which should let in the females, who were clearly meant to be excluded. The third exception is where words of limitation are superadded, so as to render the first word issue descriptive of the person, and yet the issue in infinitum may take by force of the subsequent limitation. Or where there are other words annexed, making it merely descriptive of the person. Under this exception, is to be ranked the cases cited from Moor 593—3 Wils. 244—3 Durnf. and East 484. Lyle and Gray; Long and Lamming, 2 Burr. 1100. The reason of the first member of this exception is obvious. Issue cannot be at the same time a word of purchase, and a word of limitation. If it be the former, only a life estate passes, as it merely describes the person of the first taker; where it is the latter, the issue take in infinitum.

Now if words of inheritance be superadded, the word issue may be taken as descriptive of the person, and the subsequent limitation will carry the estate to the heirs of the first taker; so that all the issue must be spent before the remainder-man can take. It is also evidence of intention, that the issue should take by purchase. This distinction was taken in Loddington and Kyme and has ever since been regarded.

The 4th exception comprehends the cases of trusts. For where application is neces-

sary to be made to a Court of Chancery, that court will so mould the conveyance, as that the legal construction upon the words of it, shall, in favor of the intention, be different from what it would have been, if a legal estate had been originally conveyed.

Upon this principle was Bagshaw
26 and *Spencer decided. I might go
further, and say, that this case is not easily to be reconciled with foregoing cases, or with Garth and Baldwin afterwards decided by the same judge. See Jones v. Morgan, Brow. Ch. Rep. 206. But it is not necessary to impeach that case, since the principle upon which the decision was made, is inapplicable to this.

This case comes not within any of the exceptions. For 1st, all the issue are not provided for, but on the contrary, the sons of non-surviving sons would be disinherited, unless protected by the implicative devise. 2d, They are not intended to be excluded. 3d, There are no words of inheritance grafted upon the limitation, nor are there any words descriptive of the person. 4th, Nor is it the case of a trust.

Second point. It is always presumable, that the issue in infinitum are intended to take before the remainder-man, where the limitation in remainder, depends on the failure of the issue of the first devisee. In this case, Muscoe Garnett is to take; but at what time? When James shall die without issue male. Can he then take sooner? The dying of James without male issue, is like a condition precedent. The construction contended for is the same, as it would have been, had the words "but if James shall die without issue male" been omitted: Why reject them? They are operative, there is abundant use for them, and they have a known, legal signification. Such words then are never to be rejected. This can only be the fate of such, as are senseless or repugnant. The intention to provide for the sons of non-surviving sons, is further proved from the devise to the surviving sons being in tail; for if they had been alone the objects of the testator's bounty, it would have been more beneficial to them to have had a fee simple, and tho' he might prefer the surviving sons to grandsons, it is not easy to assign a reason for preferring the sons of surviving sons, to Muscoe, and yet preferring Muscoe to the sons of non-surviving sons. It is also material, that the property is distributed in tail male amongst families; each son and grandson, being considered as the head of that family. It is reasonable to suppose an intention, that the property should remain in the respective families to which it was assigned, so long as there were any male issue to take it.

The counsel on the other side have labored to prove, rather that James was intended to take an estate for life, than that the testator did not intend to prefer all the male issue of James to Muscoe. The former we concede. I believe in all the controverted

cases upon this subject, the testator
27 meant to give an *estate for life; but
there is no incompatability of intention, between giving James an estate for life, and preferring all his male issue to Muscoe. The intention to provide for all the male issue is equally clear, and must over-rule the other intention. This is clearly stated in Hargr. law tracts 503; 2 Wils. 322; Brow. Chan. Rep. 220.

It is contended, that the provision for dower, is an unanswerable proof of the intention, to give only an estate for life. But does it shew an intention to exclude the male issue? A clause against impeachment of waste is not less strong.

Obj. That here are trustees to preserve contingent remainders.

Ans. The use of the trustee is not declared to be for this purpose, and therefore nothing as to intention is established by it. Besides, the trustee might have been necessary to preserve the contingent remainder to the surviving sons. Lewis Bowle's case cited in Fearne 28.

Obj. That if the testator intended to provide for the sons of non-surviving sons, he would not have given a remote remainder after the expiration of an estate tail.

Ans. If there were no surviving son, then the male issue of a non-surviving son is immediately provided for. If the sons had all survived, then all the male issue of James would have been provided for. If some survived, and others died leaving male issue, then the surviving sons are preferred, but the male issue of the non-surviving sons are preferred to the remainder man.

Obj. The word but, is a word of reference.

Ans. It is plainly intended to mean the same as and; in other devises, other words are used, obviously with the same intention.

Obj. The issue of non-surviving sons are certainly unprovided for in other parts of the will.

Ans. The limitations are not varied in the devises to his sons, and I do not see that the devises to his grandsons, can any more restrain those to his sons, than the latter can enlarge the former.

The case of the Attorney General v. Sutton, is said to be inapplicable, because in that, the will plainly meant to pass an estate tail. The words of the will in that case, to wit: that on a certain event, "the estate he had given to Thomas and the heirs of his body should be void," were not relied upon in making the decision of the court, nor are they mentioned by the counsel. But a trust and a legal estate were devised by the same words, and the devisee was adjudged to take an estate tail in the legal estate, and only

an estate for life in the trust. If the
28 words *relied upon had evidenced an
intention to give an estate tail, that intention would have controuled the trust, as well as the legal estate. Of course, the ground of that decision must have been that which was contended for, to wit, that all the issue were not provided for. Neither was the decision influenced by the remainder being limited to a charity; for it was admitted, that such limitations are favored. Tho' the plea was over-ruled in the House of Lords, yet the principle was established.

Many other objections are made to the application of Langly and Baldwin.

In that case, as in this, there is an express estate for life given; an estate tail to the sons, and the remainder was to take effect on the failure of issue. In what do

they differ? Tho the sons in this case do not take by succession as in that, yet no preference to the remainder-man can therefore be inferred. The intention to provide for all the male issue is as clear, as that the sons should take in a particular mode, and ought therefore to be effectuated. It is not more unlikely in this case, that the testator should mean to prefer the sons of surviving sons to the remainder-man, and not the sons of non-surviving sons also, than in that case, that he should prefer a 6th to a 7th son; both were equally unknown to the testator. But the ground of that decision, was obviously the principle we are contending for, to wit: that all the issue not being provided for by the express devise, there was an use to be made of the implicative branch of the clause.

Third point. This is bottomed upon the rule in Shelley's case, which has never been denied, and is admitted in the case of Jones v. Morgan. The reason of the rule is, that if the heir do not take by descent, he can only take an estate for life; for taking by purchase, he only, and not his posterity is described. This principle is stated very clearly in Shaw and Weigh Fortesc. 74, 78, that where the word issue is nomen collectivum, they must take by descent, and that in all cases where they take by purchase, it is nomen singulare, and the issue without further limitation can only take an estate for life. In our case, the word is nomen collectivum; it must mean all the male issue, or else the issue of that issue could not take, and the remainder would vest before a failure of issue, tho by the express words of the will, it is to be postponed until a failure of issue takes place. The case from 3d Atk. 784 is not in point, because the limitation to the issue is restrained to issue living at the death of the testator.

In Long and Lamming, the heirs are so described, as to render it impossible for them to take by descent; it would
29 have rendered *the devise totally void, and there are also words of inheritance superadded.

It is objected, that the sons of non-surviving sons must according to the intention of the testator take equally. But I conceive, this would go to defeat the intention, and could not be extracted out of the will, but by inserting limitations not in the will, and rejecting those that are.

4th point. The principle of this point is founded on Shelley's case, and is obvious. An estate cannot descend from an ancestor, unless it were first in him, and though James was intended to take an estate for life, yet his male issue were also intended to take, and if they can do so only by enlarging the estate of James, the particular must yield to the general; the less material, to the more important intention. The mode of taking, must be sacrificed to the more solid object of enabling them to take at all.

If I am right in these points, then it is plain, that James took an estate tail, which was turned into an estate in fee by the act of 1776, and of course, that the appellants are entitled to recover.

The PRESIDENT observed to Mr. Marshall, that he had not noticed an argument of Mr. Wickham's, which stated an objection to the union of the two estates in James; to wit: that the one was a legal, the other a trust estate not executed.

Mr. Marshall. The fact as stated by Mr. Wickham is not admitted, and if admitted, cannot I think be material. The devise to the trustees is for surviving sons, and may, or may not extend to the issue. If it do not extend to the implicative devise, then the fact is not as it is stated, and there exists no difficulty in the case.

But admit that it do not extend to it. Devises of estates executed by the statute are, (so far, as I have yet discerned, assimilated in every respect to a devise of a plain legal estate at common law. The devise under the statute would execute in the same person, and take effect beneficially to the devisee, precisely at the same time, with a devise of a legal estate at common law. I have seen no case determined on this distinction, and yet such would naturally occur. For if the statute in this case will not execute the use in the ancestor, until the issue come in esse, neither would it have executed it, if the devise had been to trustees for the use of James, remainder to the same trustees for the use of the issue; for the first devisee being in esse, no legal estate whatever with respect to him is in the trustee, and it is in
30 law *just the same, as if the devise had been immediate to James. Yet in such cases, the estates have been united, and therefore, the difficulty stated to the union in this case cannot be a solid one. The case in 2 Wils. 322, is a devise immediately to the first devisee, with remainder to the use of the issue, and there we find, that the two estates incorporated, and vested an estate tail in the first taker.

The PRESIDENT delivered the opinion of the court.

The material parts of the agreed case are, that James Garnett by will, devised the estate in question to his son James for life, remainder to his son Muscoe in fee, in trust, for the use of the first and every other son of James who should survive him in tail male, equally to be divided; but if James should die without issue male, then he gave the land to Muscoe for life, with like remainders to his first and every other son who should survive him in tail male, equally to be divided; but if Muscoe should die without issue male, then in trust for three grandsons and their surviving sons, in tail male, equally to be divided, remainder to his son Muscoe in fee.

After having disposed of his slaves and other property to his children and grandchildren by the different clauses of his will, he declares, that their respective wives should be entitled to dower. The testator died before the year 1776.

James survived that period, never having had a son, but leaving a daughter his heir at law, under whom the appellants claim, insisting that James took an estate tail, under the will, which by the act of 1776 was turned into a fee simple, which descended to his heir.

The appellee contends, that James took an estate for life only, on which the act di

not operate, and that the contingent remainders limited upon that estate, being at an end, the remainder to him is become vested in possession.

The conclusion of each party is right from his premises, and brings us to the question, which of those estates James took; whether for life or in tail?

Upon the face of the will itself, difficulties arise, what was the testator's intention. As usual therefore, authorities are produced, for the purpose of illustrating, or of controuling it; multifarious indeed, but in general unsatisfactory; containing rules of construction, as well as principles and reasoning from them by different judges, in many cases obscure and contradictory.

In bringing these into review, the gentlemen of the bar on both sides, have ably discharged their duty, in giving the court full information on this complicated subject.

31 *That the testator's intention is to be the general rule of construction, was laid down soon after the statute of wills. It has never been contradicted, but is amplified, rather than restrained in all subsequent instances.

The exception to this rule, "that he shall not be allowed to controul or change settled principles of law, as established by the judges," seems to be as fixed as the rule itself.

But another exception, that the intention shall not interfere with the established rules of construction, which judge Blackstone states, as of a flexible nature, has produced in its application, a variety of reasons and decisions, which I am not able to reconcile, and therefore am inclined, as I always have been, to look to the will itself, and not to those unsettled rules of construction.

That the testator intended to devise an estate for life to James, could not be made more manifest than from the will itself, if confirmed by one from the dead, even if that were the testator himself.

But if a subsequent part of the will shews a manifest intention, tho' not so strongly expressed, to provide for all the male issue of James, and both intentions cannot stand, that of the devise for life must yield to the other, which is supposed to be most important in the testator's mind.

Cases may be classed into those, where the conflict of intention arises from express devises in the will, and those, where they are to be implied from what is expressed. To the first sort, the case of King v. Melling applies. A devise to A for life, remainder to the issue of his body by a second wife, remainder over; A, was adjudged to take an estate in tail, as the only means of providing for the issue, who could not take as purchasers, not being in esse, and could only take through the ancestor; and for that purpose, the estate for life was turned into an inheritance according to the rule in Shelley's case. This case is constantly referred to, in most, if not in all subsequent cases, and its principle, as well as its authority is no where denied.

In questions of this sort, it has been thought a circumstance of considerable weight, that issue must be taken as a word of limitation, where no words of inheritance are superadded in the devise, because in such a case, if the issue take by purchase, they would only take an estate for life. From hence a distinction has arisen, that where words of inheritance have been superadded in the devise to the issue, the issue has been adjudged to take by purchase, so as not to enlarge the estate of the

32 ancestor; and *this was Archer's case, 1 Cooke 66, and in several cases since. But in others, it has been decided not to have produced that effect, and the point has been determined upon another circumstance, to wit: that of the issue being in esse at the death the testator, or of the tenant for life, or within a reasonable time after; as in the case of a devise to the heirs of I. S., who is living. And under this distinction, the parties have rightly agreed, that the devise to the surviving sons did not enlarge the estate for life in James, since the surviving sons not only might, but must take as purchasers, being to take, not in succession, but as tenants in common. The part of each son would descend to his male issue, which would thereafter go in succession in tail male to the eldest son, and would not, (as the appellee's counsel supposed,) continue to go in common to all future generations. So far then, the estate for life is preserved, being consistent wtih the other intention to provide for surviving sons.

But the difficulty results from the testator's being supposed to have devised the land to his male issue, upon the contingency of his having no surviving sons, which it is said, he manifestly intended, from having given over the estate to Muscoe, upon the death of James without male issue, thereby shewing that he did not intend Muscoe to take the land, so long as there were any male descendants of James. We come therefore to the second class of conflicting intentions, not collected from express devises to the issue, but to be implied from what is expressed, on which subject, there are a number of cases, the decisions in which are extremely various, and sometimes contradictory. But the most prevailing rule seems to be, that an express devise for life, is not to be changed into an estate of inheritance by implication, unless that implication be a necessary one, because the testator's intention to be collected from the whole will, cannot otherwise be effectuated. To take up the present case on this rule. If there be any apparent intention to provide for the issue male of James, in case there were no surviving sons, or in case their male issue should fail, it is evident, such provision, (if the case happened) could no otherwise take effect, than by a descent from James, and by that means changing his estate for life into an estate tail, thereby producing that sort of necessity, which will admit a devise even by implication to controul an express devise.

The case furnished by the will, of a chasm between the provisions for part of the issue of James, and the limitation over upon the failure of his whole male is-

33 sue, though uncommon, is *not new.

The case of Langly v. Baldwin, seems to apply directly to it. There, the testator gave to his grandson an estate for life without impeachment of waste, and with power to make a jointure to his wife for life, and after his death, devised to his six sons, one after another, in tail, and made provision for no other sons; but added, that if his grandson should die without issue male, the estate should go over. It was adjudged, that from the express limitation over, the testator intended to provide for all the issue male of his grandson, altho' they should not be one of the six; and as that could not be effected any other way than by descent from the grandson, the court adjudged him to take an estate tail, tho' expressly given for life.

The same thing was done in the case of the Attorney General v. Sutton, where a provision was made for two sons only of the tenant for life, with a limitation over upon his dying without issue male of his body. Here then are two according decisions, which apply to the case at bar in terms, and in principle, and if not contradicted, must be considered as fixing a rule of property. The case of Popham and Bamfield is produced in opposition to those I have just mentioned. That was a devise to Popham for life, remainder to his first &c. son successively in tail male, and for want of issue male of Popham, remainder over.

An attempt was made to bring this to the former cases, by supposing that there was a chasm between the provision for the sons, and the limitation over, and this could only happen, and might happen in the case of a posthumous son, who it was said could not take under the provision. Whether he could or could not is immaterial. The answer which the court gave was, that though it might have been intended that such posthumous son should take, yet the testator was herein mistaken as to the law, or he might not consider of it, being a remote mischief or contingency, and therefore supposing he had made provision for all the sons of the tenant for life, his intention might be complied with, without enlarging the estate for life, and both intentions might be preserved. Without taking notice, that this case, being produced afterwards in the case of Blackborn v. Edgley, the court is said to have exploded the notion, that words of implication should not turn an express estate for life into an estate tail, I observe, that the case in principle does not contradict the former cases, being unlike them in this, that in that all the sons are provided for. This curious case may happen; Muscoe Garnett takes this estate in remainder, as well as all the lands devised immediately to himself, in the same manner as
34 James did; *if he has several sons, and they should marry, it may happen, that all of them may die in his life time, and some, if not all of them leave sons, and his whole estate may go over in remainder from his grandsons, upon the principle he now contends for, that an implied remainder to the male issue shall not be admitted. This possibility, gives a striking proof of the impropriety of departing from established rules of construction.

An objection is then made, that the intervening bequest to the surviving sons, between the devise for life, and that to the issue by implication, prevents the union of the two last mentioned devises. The rule in Shelley's case enlarges the estate for life, into an inheritance, where the devise to the heirs or issue is mediate or immediate; the former describes the case of the present devises. In Fearne on contingent remainders 25, it is said, that the only difference between the limitation being mediate or immediate is, that in the latter case, the tenant for life takes an estate tail in possession, and in the former, he takes the estate tail in remainder, dependent upon the determination of the intermediate estate. So that this objection seems to have no weight.

Another point made was, that under the implied limitation to the male issue, they might take as purchasers, since they were to take not in succession in tail, but as tenants in common, in the same manner as the surviving sons were to take. This has been mentioned before, not to have been the testator's intention, or if it had, it was controuled by one of the rules of law, stated to be inflexible, to wit: that testator could not make his land descend to all his sons, instead of the eldest. So that upon the whole, it seems to me, that if there were nothing more in this case, that the point which has been noticed, the court would be compelled to adjudge, that James took an estate tail in remainder, expectant upon the determination of the estate tail to the surviving sons. But tho' I am well satisfied in this opinion, some of the other judges doubt about it, and we thought it unnecessary to decide that point, since admitting that James took such an estate tail in remainder, we are all of opinion against the appellant upon two remaining points.

The first depends upon the devise to the trustee. The trust commences at the death of James, so as not to include the estate for life devised to him; it comprehends the contingent remainders to the surviving sons and to their male issue, and the implied remainder to the male issue of James. Perhaps it goes farther, and extends to all the subsequent remainders, since after the estate for life to Muscoe, a further
35 trust is declared, without *naming a new trustee, or without a devise to such new trustee. The legal estate in fee therefore, in trust for the surviving sons in tail male, interposes between the estate for life of James, and the implied remainder to his male issue, which is supposed to enlarge the former into an estate tail.

To admit that effect, and to describe the whole interest which James took in the lands; he was tenant for life in possession, with remainder in tail male expectant upon the determination of the estate tail devised to his surviving sons. And we come to consider, what operation the statute of uses will have on this estate under the devise to the trustee.

The statute gives the legal estate to him

that hath the use, so that there must be an use, before the statute can operate upon it.

In Powell on Devises 283, it is said, that as to persons in esse, the legal estate is executed immediately, and as to persons not in esse, it vests immediately upon their coming into being if they come in good time, otherwise, it goes over to the next remainder man. To apply this. Here was a trust for surviving sons, and for male issue not in esse, and who never came into being, it being stated, that James never had a son in whom either use could vest. The good time therefore, for them to come into esse, was expired at the death of James, and the estate either remained in Muscoe as the trustee, (the trust not being executed by the statute, but remaining at common law,) or the estate passed over to him as the next remainder-man, either of which defeats the appellant's title.

But then a question arises upon the act of 1776, whether this was such an estate tail in James, as was by the act turned into a fee simple.

The act operates upon all estates tail in possession, and those in reversion or remainder, after the determination of an estate for life, or lives, or of any lesser estate. James's estate has been described as an estate tail in remainder, after the determination of a preceding estate tail. It was therefore a greater estate than for life or lives, and consequently not within the operation of the act, so as to defeat the remainder to Muscoe, now to take effect, as there are neither surviving sons, nor male issue in his way.

So that upon these two grounds to wit, 1st, that the estate at law remained in the trustee for want of a person coming into esse in whom the use could vest, or when that event was become impossible, passed over to Muscoe as the next remainder-man, and first cestui que use in esse.

36 *2dly, That James being seized of an estate tail in remainder, after the determination of a prior estate tail, is not such a tenant in tail, whose estate is to be changed into a fee simple by the act of Assembly of 1776.

The law therefore is in favor of the appellee, and the judgment of the District Court is to be affirmed.

Richards v. Hoome.

October Term, 1794.

Mills—Appeal from Order—Record—Ownership of Bed.* —Upon an appeal from an order, giving leave to build a mill, the record should state that it appeared to the Court granting the order, that the bed of the water-course was in the applicant, or in the Commonwealth.

This was an appeal from the District Court of Fredericksburg, reversing an order of the County Court of Stafford, giving leave to the appellant to build a mill on Rappahanock river.

Warden for the appellee, objected, that the record did not shew that the property in the bed of the river was in the commonwealth, or in the appellant, without which, the County Court ought not to have given leave to erect the mill.

Lee and Washington for the appellant, contended, that though the person applying for leave to build a mill, must satisfy the court, that the bed of the river is in himself, or in the commonwealth, yet it is not necessary to state this fact upon the record; particularly at this day, when an application may be made ore tenus, without the formality of a petition in writing. When in cases of this sort an appeal is prayed, all the facts are examined into de novo in the superior court; so that the statement of this fact upon the record, could not have availed the person petitioning, since he must still have proved it; neither can the omission of the clerk in not stating the fact upon the record, render such proof unnecessary here. If it had been stated, it might have been disproved in this court.

The court being equally divided.

The judgment was affirmed.

Ambler v. Wyld.

October Term, 1794.

Equity Jurisdiction—New Trial.—If the parties in an action at Law are at liberty by the issue to go fully into the examination of evidence, and having done so, a verdict is found, after a fair trial, a Court of Chancery ought not to direct a new trial. Aliter, if part of the evidence was suppressed by the Court.

Paper Money—Scale of Depreciation—Construction of Statute.†—The fifth section of the Act for scaling debts, was not intended to let men loose from their contracts, but to allow a departure from the established scale in cases where it might be necessary to meet the real contract of the parties.

Equity Jurisdiction—Relief against Judgment at Law.‡ —The Court of one County may, on its Equity side, relieve against a judgment at Law, rendered in another County Court, by way of original jurisdiction. And though it cannot award a new trial at the bar of that other Court, yet it may direct an issue to be tried at its own bar. And if the relief be afforded without the trial of an issue, where that is proper, the High Court of Chancery may, upon an appeal, after reversal, retain the cause, and direct an issue to be tried.

***Petition for Mill—Ownership of Bed.**—It was held in Martin v. Beverley, 5 Call 444, that it is necessary to state in the petition for a mill on navigable rivers, that the bed is in the commonwealth.

The principal case is cited in Mead v. Haynes, 3 Rand. 37.

Same—Same.—But a petition for leave to build a mill, where the bed of the stream belongs in part to the petitioner, will be sufficient, upon showing that fact, although the petition itself does not state it, but on the contrary states that the bed of the stream belongs to the commonwealth. Mead v. Haynes, 3 Rand. 33.

Principal Case Not a Precedent.—In Martin v. Beverley, 5 Call 447, 448, it was said by two judges that the principal case was not a precedent, because the judgment of the court was upon an equal division of the judges. See Home v. Richards, 4 Call 441; Wood v. Boughan, 1 Call 329.

See monographic *note* on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88

†**Paper Money—Scale of Depreciation—Construction of Statute.**—The principal case is cited with approval in Dearing v. Rucker, 18 Gratt. 466; Meredith v. Salmon, 21 Gratt. 775; Bierne v. Brown, 10 W. Va. 761; Gilkeson v. Smith, 15 W. Va. 60.

‡**Equity Jurisdiction—Relief against Judgment at Law.**—The principal case is cited with approval in Hord v. Dishman, 5 Call 293, but distinguished in Terrell v. Dick, 1 Call 550, 551, 553; Hudson v. Kline, 9 Gratt. 385. See monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518, and monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425. The principal case is cited in Henry v. Davis, 13 W. Va. 257. See Ambler v. Wyld, Wythe 235.

Chancery Practice—Reversal of Decree.—The principal case is cited in Hadfield v. Jameson, 2 Munf. 60, as authority for the proposition that the chancellor, after reversing the decree of an inferior court, has a right to retain the cause, and thereafter proceed therein as if it were an original suit.

In September 1778, the appellant sold to the appellee, his houses and lots in York town, the price of which was to
37 *be settled by the valuation of three persons, for that purpose, mutually chosen by the parties; one half of which was to be paid at the time of the valuation, and the other in a year afterwards.

On the 18th of the same month, the referees reported, that the property in the situation, in which it then was, was worth £1000, and signed a certificate to that effect. This was transmitted to Mr. Ambler, who was not present when the valuation was made; but it appears that Mr. Cary, who acted for him, was.

On the 20th of October following, the first payment was made, for which Mr. Ambler gave a receipt, as for so much current money in part payment for the above property; Wyld, at the same time agreeing, not to demand a conveyance until the balance was paid.

In autumn 1779, the appellee by an agent, offered to pay the balance to the appellant in paper money, who declined receiving it, saying, he should see Wyld that afternoon.

On the 10th of February 1782, the appellant procured from the persons who had valued the above property, a certificate in the following words, viz: "Some time in the year 1778, the underwritten were called upon by Mr. Thomas Wyld to value the houses and tenements in York town, then the property of Mr. J. Ambler, which he (as we were informed) had agreed to sell the said Wyld, at such a price as disinterested persons should determine the same were worth; agreeably thereto, the underwritten did value the said houses and tenements to £1000; and it being contrary to the laws of the land at that time in force, to make any difference between paper money and specie, we do further declare, that we did then, and do now think, the aforesaid houses and tenement were worth £1000 specie." To which paper, the names of the valuers were signed.

The appellant instituted an action at law against the appellee in the County Court of Henrico, sometime in the year 1783. The declaration contained 3 counts; the first of which was upon an indebitatus assumpsit, for £600 lawful money of Virginia, due to the plaintiff on the 1st of October 1778, for certain lots and tenements in the town of York. The 2d count was upon a quantum valebat, for the same property. The 3d was for £600 like money, laid out and expended for the defendant at the time before mentioned. Plea, non-assumpsit, with leave to give special matter in evidence at the trial. Verdict was given for the plaintiff, and damages assessed to the amount of £374:1:7½.
38 *The defendant moved for a new trial, the consideration of which, was postponed until the next day, when the motion was over-ruled, and judgment entered up according to the verdict. To the opinion of the court upon the motion, the defendant tendered a bill of exceptions, which was sealed, stating, that the jury had without the permission of the court, carried with them into their retirement the above certificate of the 10th of February 1782, which had been offered in evidence at the trial and rejected by the court, because the persons subscribing the same were present in court, and examined as witnesses, whose testimony did not vary from their said certificate. Upon which ground the motion for a new trial was made, but that the same was over-ruled by the court.

From this judgment of the County Court, Wyld appealed to the General Court, where it was affirmed in 1789.

In March 1791, the appellee filed a bill in the County Court of York, on the chancery side, stating the above facts, and in addition thereto, that at the trial in Henrico Court, he produced witnesses to invalidate the testimony of the witnesses produced by the appellant, and to prove that the valuers had invariably acknowledged, that they made the valuation in current money and had never thought of specie at that time; but the court refused to permit those witnesses to be examined; that the jury retired, taking with them the certificate of the 10th of February 1782, but without any evidence to prove the tenor of the valuation made in September 1778, the production of which was required by his counsel at the trial, but denied by the appellant's counsel to be in existence. The bill prayed to be relieved against the judgment of the General Court, and to be restored to the amount thereof, which had been paid to the appellant.

The answer insists, that the certificate of the 10th of February was not a new valuation, but an explanation of that formerly made. That this certificate was obtained for the purpose of shewing what had been the real valuation made of the property, by the persons appointed to fix its price, in order to entitle the defendant, to claim the benefit of the fifth clause of the law, fixing the rate of depreciation, which authorized a departure from the general scale established by that act, where the justice of the case required it. That the trial was fair, and the testimony of the three valuers explained to the jury, the estimate they had made of the property in 1778. That the whole question of law and equity was fully before the jury, and having
39 *been finally decided upon by them, and their verdict approved by the court, the defendant insists that no other tribunal ought to interpose. He admitted that the valuation was not made in specie, but the valuers thought it worth £1000 in specie, and rated the current money at par with specie. He also admits, that the jury by mistake took the certificate with them, but asserts that the whole testimony went to a valuation in 1778, and so he conceives did the certificate.

This answer being replied to, sundry depositions were taken, some of them proving, that the valuers had declared, they made their estimate in current money without once thinking of specie. This is acknowledged by themselves in their depositions, in which they state, that they knew of no depreciation, or difference between paper money and specie at the time they made the valuation.

One witness deposed, that he heard one of the valuers declare, that when he signed the certificate of the 10th of February 1782, his intention was, that Wyld should make the second payment of £500 equal to the first, which according to the scale of depreciation, would have been £100 specie, and that Ambler was entitled to no more. That he heard another of the valuers declare, that he did not believe the property would sell for a £1000 in specie, and that the certificate of 1782 was wrong if it mentioned specie.

Several witnesses deposed that the houses when sold were untenantable, (having been used as barracks,) and were in a very ruinous condition. That after Wyld had repaired them, they were offered at public sale for £500, and that no person would purchase them.

One witness deposed, that at the trial in Henrico Court, the valuers were examined, and declared, that they did conceive the property worth £1000 good money.

Another witness deposed, that he and two others attended as witnesses for Wyld at the trial in Henrico Court, but their examination was refused by the court, as it would invalidate the testimony of Ambler's witnesses. This witness says little else in his deposition, except, that he had heard one of the valuers declare, that the houses were not valued in specie; that they would not have dared to mention specie, as paper money was the legal circulating medium.

The County Court of York, decreed the appellant to pay to the appellee, £395: 11: 7½, with interest thereon from the 10th of June 1789, till payment, and the 40 costs. From this *decree, Ambler appealed to the High Court of Chancery, where the following opinion and decree was given, viz: "that if the appellee were injured by the verdict of the jury, and judgment of the County Court of Henrico, stated in his bill, the only mode by which he could regularly obtain redress, was a new trial of the issue between the parties in the action at common law, and consequently, that the decree of the County Court of York, which seems to have thought the principal money recovered by that decree, so much more than the appellant ought to have received from the appellee, is erroneous; and therefore this court doth reverse the said decree. But this court supposeth, that if certain facts now appearing by the testimony in this cause had been known to the jury who tried the issue, or to the court who rejected the motion for a new trial, either the former might not have found such a verdict, or the other, if they had found it, might have awarded a new trial: and is of opinion, that, although the County Court of York perhaps had no power to award such new trial, this court retaining the cause may now proceed in it, as if it had been originally commenced here; and therefore this court doth direct the said issue to be tried again before the said County Court of Henrico, and the verdict thereupon to be certified to this court. And the appellee here in court doth consent, (without which consent, the new trial would not have been awarded,) that if the damages which shall be assessed upon such trial, exceed the damages assessed on the former trial, which may be the event, this court may decree him to pay the excess, and award execution against him for the same."

From this decree Ambler appealed.

The PRESIDENT delivered the opinion of the court.

Neither of the parties appear to have been dissatisfied with the valuation of the property made in 1778, nor is it disputed, but that this was a paper money contract, and so understood by the parties; for besides the other proofs taken notice of at the bar, it appears that on the 20th of October, as soon probably as the parties met together after the valuation, Mr. Ambler received £500 the first installment, without objection, as according with the principles of the valuation then recently made. In autumn 1779 when the other payment became due, the depreciation was so visibly great, as to make a more serious impression upon parties to former contracts; and tho' no rule was then established, by which to graduate the sale of depreciation, 41 every person was *struck with the injury which would be sustained by a payment according to the nominal amount. Mr. Ambler therefore, might well think himself justifiable in evading the receipt of the £500 nominal money, which Mr. Wyld then offered to pay him.

This was not a legal tender by Wyld, nor could it be relied upon as such; and tho' the General Court may (as it is said) have adopted some rule as to its effect under a branch of the 5th section of the act of 1781, yet neither does that apply here, since the subject was submitted to a jury who were to judge for themselves.

Here the matter rested until the 10th of February 1781, when the act for scaling paper money contracts had passed, fixing a general rule for adjusting those contract according to the rate of depreciation at the time they were made, but allowing a departure from that rule in particular cases, so as to meet the ideas of the parties at the time of the contract. Mr. Ambler supposed that an enquiry into the relative value between paper and specie, as understood by the valuers at the time they made their estimate, was proper and necessary, in order to furnish an equitable rule for adjusting this contract. His application therefore for this explanation, was by no means inconsistent with the fair character which that gentleman has always supported.

The paper of the 10th of February was not a new valuation, but an explanation of the former. As such indeed it was somewhat oracular, and the court would perhaps find it difficult to develope its meaning, if it were necessary to do so. However, Mr. Ambler supposed that it entitled him to claim £500 specie, and he demanded that sum of Mr. Wyld, who on the other hand conceived, that this nominal sum was to be reduced by the legal scale of September 1778, which would bring it to £100 only. To settle this great difference in opinion, the parties go into the County Court of Henrico.

It was truly observed at the bar, that the

issue in that suit left the matter of controversy open to a full and fair enquiry on the merits, and if on the trial, all the testimony offered by the parties had been admitted, and after hearing it the jury had decided as they did, no good reason could have been urged for a new trial. But this was not the case; evidence was freely admitted on one side, and without a colour of reason was rejected on the other. The trial then was not fair and equal, nor such as ought to conclude the parties. And since the injured party did not, and now cannot obtain relief in
42 a court of law, it can *only be afforded by a Court of Equity, and may properly be so, as innumerable precedents will prove.

The County Court of York had original jurisdiction in equity, not to award a new trial in Henrico Court, but to direct an issue to the same effect to be tried at its own bar. But instead of doing this, that court by some rule of calculation, the principles of which are concealed from our view, make up an account, and decree Mr. Ambler to refund £395: 11: 7½ and costs. This was unquestionably erroneous, and was properly reversed.

Whether the Chancellor could assume original jurisdiction on this appeal, if York Court had it not, is a point which need not be decided, since this was not the case. He certainly had upon the reversal, a right to retain the cause, and might direct the issue to be tried at his own, or at any other bar.

It was pressed by the appellant's counsel, that if a new trial were directed, a special direction should accompany it, pointing the jury's inquiry to the value of the property at large, independent of the valuation fixed upon it by the persons who had made the estimate.

This would he highly improper. It was not the intention of the legislature to let men loose from their contracts, but to allow a departure from the established scale in cases where it was necessary, in order to meet the real contract of the parties.

The counsel need not be alarmed about objections to the form of proceeding, since being an issue out of chancery, and to be certified there, all forms in the proceedings at law will be out of the question.

Decree affirmed.

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43 *James Burnsides Appellant v. Andrew Reid, Samuel Culbertson, & Thomas Walker, Appellees.—& Andrew Reid Appellant v. James Burnsides Appellee.

October Term, 1794.

Land—Settlement and Pre-emption—Act of 1779 *—The Act of 1779, establishes the rights of prior settlers, and gives pre-emption when vacant lands can be found adjoining. But a right to pre-emption in the adjacent land, as a consequence of settlement, cannot prevail against a right claimed under a survey of the adjacent land made prior to 1779.

This was an appeal from a decree of the High Court of Chancery. The case, was, —Andrew Culbertson having made a settlement on a piece of land called Culbertson's bottom in the year 1753, or 1754, was compelled through fear of the Indians to leave it; after which, he sold it to Samuel Culbertson, who also lived on and improved it, and he too in 1755 was compelled to leave it from the same cause.

Although the two Culbertson's were for many years prevented from returning to this settlement on account of the savage enemy, yet Samuel Culbertson constantly asserted his claim to this land, and made frequent attempts to return to it.

In 1775, Thomas Farlow, having acquired the settlement right of two men by the names of Butcher and Gatliff to this land, being 355 acres, purchased the same from the Loyal company, paid the consideration money, and procured the same to be surveyed on the usual terms of that company. The survey was returned to the appellee Thomas Walker, (the company's agent,) and Farlow took a certificate thereof in order to obtain a grant so soon as one could issue. The appellant Burnsides having purchased the right of Farlow to this land, received an assignment thereof.

In 1782, Burnsides, as assignee of Farlow, who was assignee of Butcher and Gatliff exhibited his claim to this land, before the commissioners appointed by the act of 1779 to adjust disputes between litigant settlers, and claimed under a survey made by Farlow in 1775, for settlement in 1772, for 355 acres. The commissioners allowed him 400 acres (including the said 355 acres) for his settlement in 1792 together
44 with 600 acres pre-emption *adjoining. At the same session of the board of commissioners, Reid, on behalf of Culbertson exhibited his claim for the same land, asserting Culbertson's right of settlement in 1754, which was rejected by the commissioners, who decided the right in favor of Burnsides.

Burnsides states in his bill, that he laid his claim by survey before the commissioners; but they refusing to allow the validity of surveys under a company, gave the preference to prior settlers, in consequence of which, he was obliged to claim as for a prior settlement, or lose his land. At the time that these claims were before the commissioners, the claims of the loyal

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***Patent for Land—Fraud in Procurement—Legal Title.**—In French v. Loyal Company, 5 Leigh 654, the court said that the principal case proves that a patent, although fraudulently obtained, and founded partly on a land office treasury warrant, conveys the legal title, even against a person having a valid claim, under settlement and pre-emption rights, established by the first statute of May, 1779.

The principal case is cited in Jackson v. M'Gavock, 5 Rand. 524. See Hamilton v. Maze, 4 Call 196, *note*.

Same—Actual Fraud—Equity Jurisdiction.—In M'Clung v. Hughes, 5 Rand. 489, the court said: "The jurisdiction of equity, after the issuing of the patent, in a case of actual fraud, is affirmed in the cases of Wilcox v. Calloway (1 Wash. 38); *Reid v. Burnsides* (2 *Wash.* 43) (in which cases the patents were issued pending a caveat by the other party); in Johnson v. Buffington (2 Wash. 116), and White v. Jones (1 Wash. 116) (in which cases the jurisdiction was affirmed, although no caveat was filed, and no reason assigned for the failure); and such were the cases of Preston v. M'Kinney (not reported); Christian v. Christian (6 Munf. 541)." See the principal case cited on page 481 of M'Clung v. Hughes. See Burnsides v. Reid, Wythe 150.

Same—Location—Land Office Treasury Warrants.—The principal case is cited in French v. Loyal Company, 5 Leigh 653, as authority for the proposition that lands covered by claims declared valid by the statute for settling claims to unpatented lands, are not less liable to location on land office treasury warrants, than lands covered by valid claims acquired under the general land law.

company (amongst others) were pending in the court of appeals, and in 1783, the surveys made under the companies were established and declared valid, where legally made.

In October 1784, Reid, as attorney for Culbertson, entered a caveat in the General Court against a grant issuing to Burnsides, stating in his petition, that at the trial before the commissioners, he was prevented by unavoidable accidents from producing testimony in support of his claim, which but for those causes, it was in his power to have furnished, and praying for a reconsideration of the case.

The General Court granted a hearing, and after the examination of witnesses and of the circumstance of the cases, Culbertson's claim was sustained, the sentence of the commissioners set aside, and 400 acres for settlement, and 600 acres pre-emption were adjudged to him.

To prevent a grant from issuing in consequence of this adjudication, and to compel Thomas Walker the agent of the company to yield his consent to a grant to the said James Burnsides of the land in question, Burnsides filed his bill in the High Court of Chancery. The bill amongst other grounds of equity states, that the plaintiff was precluded in the General Court, from bringing forward his claim by purchase from the company, because the determination of the commissioners had been given on a claim for prior settlement, and because the plaintiff's survey was in possession of the defendant Walker, and could not be produced. The injunction prayed for by this bill was granted till further order.

Pending this suit, and before answers were put in, Burnsides having in the year 1786 procured a survey to be made of 1200 acres of land including the land in controversy, and having obtained a certificate thereof, paid to the said Thomas Walker the purchase money, and procured an order to the register for a patent, which 45 *actually issued, founded on the judgment of the commissioners for 1000 acres, (though it had been set aside by the General Court) and 200 acres by virtue of a land office treasury warrant. To obtain a repeal of this patent, Reid filed a cross bill against Burnsides.

Both causes coming on together, the judge of the Court of Chancery pronounced the following opinion and decree viz: "The court is of opinion that Burnsides, after obtaining an injunction to stay execution of a judgment by the General Court against him, having procured a survey to be made, and a grant to himself to pass the seal, of land, to which land the title of Samuel Culbertson was asserted by that judgment, and which according to the judgment would have been secured to him by a grant, if Burnsides had not prevented it, was guilty of a fraud, because the register of the land office, if he had known such a judgment to have been rendered, by which he was ordered to issue a grant of that land to the said Samuel Culbertson, ought not to have issued, and therefore probably would not have issued the grant to Burnsides. And the court is also of opinion that Reid, on whom the right of Samuel Culbertson hath devolved, is not barred of relief against Burnsides, by the decree and order of the Court of Appeals, on hearing the claims of Walker and Nelson, not only because a claim under the survey for Farlow, which Burnsides in his bill suggests to be the foundation of his title, doth not appear to have been established by the decree and order of the Court of Appeals, and could not be legally established, so as to bind the right of any who were not parties in that proceeding, but, because the grant to Burnsides was founded, not on that survey but, on a survey certified to have been made for himself, in January 1786, by virtue partly of an entry, on a certificate from the commissioners for the district of Washington and Montgomery counties, for 400 acres, dated the 10th of September, 1782, which certificate of the commissioners, with their adjudication affirming the right of Burnsides, was annulled by the General Courts judgment aforementioned. And now the court would have pronounced such a decree as in its opinion, if what followeth had not happened, ought to be made—a decree nearly like that which was pronounced in the case between James Maze, plaintiff, and Andrew Hamilton & William Hamilton defendants; but that decree hath been reversed by the Court of Appeals; & this court, from that reversal, supposeth, perhaps erroneously, the opinion of that honorable court to have been, that, by the order of 46 council, granting *leave to the Greenbrier company to take up 100,000 acres of land, lying on Greenbrier river, northwest and west of the Cow-pasture and Newfoundland, all lands within those limits, if they must be called limits, were appropriated, so that the company or their agent had power to survey and sell any parcel, which they should chose, of such land, although another man had settled on the parcel before the surveying and selling, and although the act of General Assembly, passed in the year 1779, had declared to be just, that those who had settled on the western waters, upon waste and unappropriated lands, for which they had by several causes been prevented from suing out grants, under such circumstances, should have some reasonable allowance for the charge and risk they had incurred, and that the property so acquired should be secured to them; the honorable court seeming to have understood that, by the terms waste and unappropriated lands, to which no other person hath any legal right or claim, the act intended lands which the company had not chosen to survey, after, as well as before, they had been settled; whereas some, who have observed that the surveys made by orders of council, and confirmed by the act, are surveys of waste and unappropriated lands likewise, think the application of the term, unappropriated, in the case of lands surveyed by orders of council, to lands not settled before the surveys, would be sound criticism; especially the act having dignified the settlement with the emphatical appellation of property, property acquired, and acquired at charge and risk means of acquirement generally esteemed meritorious; and think

the words lands, to which no other person hath any legal right or claim, more restrictive than the words lands unappropriated, which comprehend lands to which no other person hath any right or claim, whether legal or equitable; and the honorable court seeming to have understood that the act, by the terms upon lands surveyed for sundry companies &c. people have settled, &c. In the seventh section, designed to include lands surveyed as well after, as before, the settlements; whereas some commentators conceive that the interpretation, which confineth the words to surveys prior to the settlement, is not inconsistent with the rules of grammar, with the intention of the legislature, or with the principles of natural justice. And this court supposeth the opinion of the honorable court to have been, that where a settler of land, surveyed after his settlement by virtue of the company's order of council, had obtained a grant of the land, including an additional quantity in right of pre-emption, one, who was a prior settler, recovering
47 *the settlement from the grantee on that principle, shall not recover with it the pre-emption lands; whereas others think that he, who recovereth in right of priority, ought to be in the condition in which he would have been, and consequently ought to have the pre-emption, to which he would have been intitled, if the posterior settler had not obtained the grant. And this court also supposeth the rights of the loyal company, under whom Burnsides in the principal case claimeth, and the territorial limits of whose order of council are not more definite than those of the other company, to be no less extensive, and not less to be preferred to the rights of setters, than the rights of that other company; on these suppositions, this court, in order to such a final decree as at this time is believed to be congruous with the sentiments of the Court of Appeals, doth direct that a survey be made of the 400 acres of land, for the settlement by Andrew Culbertson, which may be laid down as either party shall desire, to enable the court to decide between them on the propriety or reasonableness of the location; that the patent of James Burnsides be also surveyed and laid down, to shew how much it includeth of the 400 acres; and when this shall be adjusted, the court doth adjudge, order and decree, that Burnsides do convey to Reid the inheritance of so much of the 400 acres as shall be found to lie within the bounds of the said patent, with warranty against himself, and all claiming under him, and deliver possession thereof, upon Reid's paying to him, at the rate of three pounds per hundred acres, for the quantity so to be conveyed, that as to those 400 acres the bill of Burnsides be dismissed; and, as to the residue of the land contained in the patent, that the bill of Reid be dismissed; but Reid is nevertheless to be at liberty to proceed to survey the 600 acres of land for his pre-emption, if he can find land to satisfy the same, without interfering with the said patent, or any other prior claim."

From this decree both parties appealed, each from so much of it as partially dismissed his bill.

CARRINGTON J. delivered the opinion of the court.

The act of 1779 gives a preference to original settlers, and so did the loyal company. The act grants to such settlers 400 acres including their settlement, and a pre-emption of 600 acres adjoining, if such lands can be found, to which no other person has a legal right. The Chancellor is mistaken when he likens this to the case of Maze and Hamilton.* If the cases were alike, as he states them to be, this court would have established the present decree without a dissenting voice; and notwithstanding
48 the criticisms *that have been passed upon that decision, this court upon a revision of that case consider it to have been determined in strict conformity with the law, and agreeably to the principles of equity. But how was the case of Maze and Hamilton? Maze's settlement was in 1764; Hamilton's not until 1770. Maze constantly asserted his claim of settlement right. In June 1775, Hamilton surveyed 1100 acres including Maze's settlement, and pending the dispute got out his patent. The act of 1779 established the right of prior settlers, and give pre-emption when vacant lands are to be found adjoining. Though in that case the settlement was Maze's, yet the adjoining lands which would otherwise have been for pre-emption, were not vacant, having been surveyed by Hamilton under the authority of the Greenbrier company, anterior to the act of 1779. This court therefore considered that Maze had a right to his settlement, & Hamilton, having a right prior to that, under the law of 1779, was entitled to the remainder of his patent, and so determined it, with liberty to Maze to survey his pre-emption wheresoever else he could find vacant land, and reversed the decree. What is this case? Culbertson proves his prior settlement incontestably, in which is included Farlow's survey. Burnsides, not till 1786, (long after the determination in favor of Reid in the General Court,) made his survey, and fraudulently obtained his patent for the settlement, and for pre-emption in the vacant lands adjoining. Until then, we hear of no title in the adjoining lands in any body. Therefore his patent was founded upon a rotten foundation, (so far as it included the settlement and pre-emption,) it being upon the judgment of the commissioners, which was declared void by the General Court. An attention to dates will point out the distinction between the two cases. In the case at bar, the pre-emption of Samuel Culbertson is made to yield to the patent of Burnsides, altho' the lands adjacent to Culbertson's prior settlement were vacant at the time of the judgment of the General Court in 1784, establishing Culbertson's settlement and pre-emption. Burnside's survey was not made, nor his patent obtained till 1786, and that by fraud, imposing on the agent of the loyal company the commissioners certificate in 1781, which had been vacated by the General Court.

The decree of the High Court of Chancery is therefore erroneous in this, that

*See Appendix.

after setting aside Burnside's patent for fraud, so far as it comprehended the lands adjudged by the General Court in 1784 to Samuel Culbertson for his settlement right, it makes the pre-emption claim of the
49 said Culbertson, founded on *the said judgment, yield to the patent of the said Burnsides, which was not obtained until 1786, upon a survey made in that year.

The decree is to be reversed, and it is now decreed that a survey be made of 400 acres for Culbertson's settlement right, and 600 acres adjoining, which may be laid down as either party may require, to enable the Court of Chancery to determine as to the reasonableness of the location; that the patent to Burnsides be also surveyed and laid down to shew how much it includes of the 1000 acres. And when this shall be adjusted, the court doth adjudge &c. that Burnsides do convey to the said A. Reid the inheritance of so much of the 1000 acres as shall be found to lie within the bounds of Burnside's patent, with warranty against himself and all claiming under him, and deliver possession thereof upon his paying to the said Burnsides at the rate of £3 per hundred acres, for the quantity so to be conveyed: That as to those 1000 acres, the bill of Burnsides be dismissed, and as to the residue of the lands contained in the patent, that the bill of Reid be dismissed, and that Burnsides pay costs in each suit in the High Court of Chancery.

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50 *APRIL TERM, 1795.

James Hendricks & Jesse Taylor v. John Dundass.

April Term, 1795.

Execution of Process—Power of Court over.*—Every Court has a power to watch over the execution of its process, and where it hath been irregularly, or fraudulently executed, to quash it.

Replevy Bond—When Quashed.—If the Commissioners who take a replevy bond act improperly, the Court will on motion, quash the bond.

In consequence of the opinion of this court (see ante Vol. I. p. 92) Dundass moved the County Court of Fairfax to quash the first execution and replevy bond, principally, because the former issued without his order, or permission, and was unfairly executed. The County Court quashed the execution and replevy bond, from which an appeal was entered by Taylor, after having stated the grounds of it in a bill of exceptions, made part of the record. The substantial parts of the bill are, that it appeared in evidence to the court, that Dundass was in Philadelphia at the time the execution issued. That it was done at the request of Taylor, but in the presence of, and with the assent of Mr. Lee, (who had been attorney for Dundass, in a suit in chancery brought to injoin the judgment obtained at law by Dundass, but who was not his attorney in that cause,) and that of Mr. Hepburn, the partner & father in law of Dundass; but that the debt in question belonged exclusively to Dundass, having been due to him before either of the above connections took place with Hepburn, who had no authority from Dundass to transact this business. That after Dundass returned from Philadelphia, he gave notice to Taylor, and to the attorney of Hendricks, that he should appeal to the County Court of Fairfax from the opinion of the commissioners who took the replevy bond, and should move the
51 *court, to adjudge the security taken by them insufficient, and further to do whatever the law should authorise in that behalf, to the end, that the said debt and costs might be satisfied. But that no motion was made, or other proceedings had under that notice. That the agent of Taylor who pursued Hendricks into the county of Cumberland, informed the commissioners, that James and John Hendricks had left Alexandria greatly in debt, and were considered as bankrupts, but did not inform them that he was the agent of Taylor.

The District Court of Dumfries affirmed the judgment of the County Court, after examining witnesses, whose testimony is also made part of the record. The amount of the evidence is, that the person, who was sent into Cumberland County by Taylor with the execution, went with the permission of Hepburn, and that Hepburn and Dundass never intermeddled in the separate business of each other.

Campbell for the appellants. I doubt the power of any court to set aside a replevy bond, on account of the insufficiency of the security, unless the mode of proceeding, by an appeal from the opinion of the commissioners, which is specially authorised by the act of Assembly, be pursued.

At all events I contend, that a bond taken

***Execution of Process—Power of Court over.**—Every court has a perfect right to watch over the execution of its judgments, and where its process has been irregularly or fraudulently executed, to quash it, as being the best and speediest mode of doing justice. To this point, see the principal case cited in Snavely v. Harkrader, 30 Gratt. 492; Steele v. Boyd, 6 Leigh 553, 29 Am. Dec. 220.

In Windrum v. Parker, 2 Leigh 367, the court said: "The cases of Taylor v. Dundass, 1 Wash. 94, *Hendricks v. Dundass*, 2 *Wash.* 50, Downman v. Chinn, 2 Wash. 303, suffice to show, that it has been the constant and approved practice of our courts, to exercise the power of quashing process which has irregularly issued, or been abused in the execution of it, on motion."

Execution—Quashing after Return Day—Motion of Plaintiff.—The principal case is cited in Reinhard v. Baker, 13 W. Va. 809, 810, as authority for the proposition that an execution may be quashed after the return day, and on the motion of the plaintiff in the execution. The court said further, that this practice, of quashing an execution after return day, is incidentally recognized and impliedly approved in Claiborne v. Gross, 7 Leigh 344, and in Beale v. Botetourt Justices, 10 Gratt. 282.

Same—Quashing—Necessity of Notice.—And that a party may, without any previous notice, move the court to direct an execution to be issued (where the clerk refuses to issue one) as well as he can move the court to quash an execution, without notice, see the principal case, and Taylor v. Dundass, 1 Wash. 93, cited in Com. v. Hewitt, 2 Hen. & M. 185.

Same—Bond—Right of Creditor to Quash.—As to the point that a creditor cannot, without good cause, quash the bond which has supplied the place of a levy, and so be remitted to his original judgment, see the principal case cited in Garland v. Lynch, 1 Rob. 562. In this case the court said: "Nor has it been decided that the creditor has no right to quash except for apparent defects. The contrary may be implied from the case of *Hendricks v. Dundass*, above cited. There the motion was made and sustained upon proof that the execution issued without authority." The principal case is the sequel to Taylor v. Dundass, 1 Wash. 92.

See monographic *note* on "Executions" appended to Paine, Surv., etc., v. Tutwiler, 27 Gratt. 440.

under the direction, and with the approbation of those who by the law are constituted Judges for this purpose, will be considered as valid until the contrary appear. No presumption can lie against the acts of persons thus constituted, and if a court undertake to annul them, the reasons ought plainly to appear.

This record exhibits but a single ground, and therefore it will be supposed, that none other was urged, or proved; it is, that the execution issued without authority.

This is a mere dispute about a fact, and therefore the court must decide according to the ordinary rules of evidence. The mind cannot, after a view of the testimony stated in the record, withhold its assent from this truth. That the execution was ordered by persons having special, or general authority from Dundass to act as they did. The Attorney, and the father in law and partner, in the absence of the plaintiff, place themselves in his stead; from the relative situation of the parties, such a power is fairly to be presumed. But that which confirms this presumption to the satisfaction of the most incredulous mind is, that after Dundass returned home, instead of disavowing the act as unauthorized, he recognizes it, and takes steps, not to avoid the proceedings, but to affirm the execution, and to obtain better 52 *security under the act of 1787.* Now if the original act was not his, he should not have taken it up where he found it, but should have protested against it from the beginning. This solemn recognition does completely conclude him now from denying the authority of those whose act he has ratified.

Washington for the appellee. An inferior court ought always to be considered as having decided right, unless the contrary appear upon the record to the appellate court. This is a principle universally admitted. The County and District Courts have quashed the replevy bond; and the appellant complains that they have erred. It becomes him then to point out the error, and to prove it by the record. He attempts it, by presuming that Mr. Lee as the attorney, and Mr. Hepburn as the partner and father in law of the appellee, were cloathed with authority; he does not pretend that it is proved, nor does it follow as a necessary consequence from the connexion with the appellee. Even if the attorney who obtains the judgment, may order the execution, (of which I much doubt) yet surely one not concerned in the action at law, can have no authority to do it. Neither can a father in law, or partner, dispose of the property belonging exclusively to his son in law, or partner. It is contended that presumptions are inadmissible to defeat a forthcoming bond. This is very true, and with less reason ought they to be received against a judgment which is a more sacred thing. But it is said, that Dundass has ratified the act. If by mistaking his right; if by misconceiving the law, he supposed that the remedy first contemplated was the best, or perhaps the only one, is he therefore to be concluded, tho' upon better advice he determined not to proceed in that, but in some other mode? Unquestionably not. The court of Fairfax was satisfied upon this point, or else they would not have given the judgment they did. It does not appear that all the evidence which 53 was given, was *spread upon the record. Presuming therefore in favor of the judgment, as is always done in favor of a general verdict, (which would not have been found unless the essential facts had been proved,) this court must affirm the judgment, so far as it depends upon the weight of evidence.

The court were not bound to state the reasons of their judgment. The party objecting to it, was bound to furnish an appellate court with the same lights to decide by, as the inferior court had, and therefore should have stated the whole evidence. The consequence of his not having done it is, that if this court were to reverse the judgment, they would do it in the dark, because the inferior court may have quashed the bond for fraud in taking it, and this court might say they did right, if they had the same evidence before them that that court had.

Campbell in reply. I do not say that any one fact in this cause proves the authority by which this execution issued. But as the whole question turns upon the weight of evidence and the conviction it brings to the mind, it is fair to contend as I have done, that the relative situation of Lee and Hepburn with Dundass, supported by his after recognition, is conclusive to prove that they acted by authority.

LYONS J. It is unnecessary to decide, whether the execution in this case issued by sufficient authority or not, the opinion of the court being with the appellee upon another point. It may suffice to observe, that the permission obtained from Mr. Hepburn and Mr. Lee, was merely intended as a favor to Taylor, and ought not to have turned to the disadvantage of the person on whose account they acted. This tho' not expressed, must have been understood.

The facts stated upon this record certainly exhibit as strong a case as can be imagined, to warrant the interposition of the court, whose justice was so glaringly attempted to be eluded and abused. The execution is carried by the agent of Taylor into a distant county in pursuit of Hendricks, who, with his property, was removing from the reach of his creditors. It is there levied upon his property, and the commissioners are informed that both James and John Hendricks had left Alexandria greatly in debt; were there considered as bankrupts, and were clandestinely removing from thence. Notwithstanding this caution,

*Ch. 7, § 5. "In any case where the creditor, his agent or attorney shall be dissatisfied with the insufficiency of the security admitted by such valuers, it shall be lawful for such creditor to appeal to the next court to be held for the county or corporation, thereupon giving notice thereof to the debtor or his attorney; and if such court shall be of opinion that the security so admitted was insufficient, the execution upon which such security was admitted shall be deemed and taken as a lien upon the goods and chattels of such debtor, and shall not be discharged but upon payment of the debt and costs, or render of other sufficient security satisfactory to the court, and moreover the bond and security given by such debtor shall remain valid until such counter security be given."—Note in Original Edition.

they restore the debtor his property upon his giving a twelve-months bond, and accept his brother as security who was then absconding with his property, and as well as the principal was considered as being insolvent. Such conduct in the com-
54 missioners, if it deserve *not the epithet of fraud, was certainly highly improper and unjustifiable. Tho' they might have been made liable, yet a shorter and more effectual method was, for the court, whose process had been thus abused, to quash the execution. That such a right belonged to that court, cannot be questioned. Were it otherwise, it would be in vain for courts of justice to render their judgments. If this charge against the commissioners were unfounded, the appellant has had time enough to justify their conduct. The insolvency of the security was suggested by the appellee, yet no attempt has been made to disprove it. Upon the whole, we are clearly of opinion, that every court hath a perfect right to watch over the execution of its judgments, and where its process hath been irregularly, or fraudulently executed, to quash it, as being the best and speediest mode of doing justice, and that in this case, the court had sufficient ground to afford this summary interposition.

Judgment affirmed.

James Ferguson and Two Others v. Moore.

April Term, 1795.

Replevy Bond—Distress for Rent—Return of Bond—Execution of Bond.—A bond taken upon replevying property distrained for rent, must be returned to the Court to which the officer levying the distress belongs, or to the Court of that county in which the land lies. Such a bond is good if executed by the original lessee, though he be not the tenant in actual possession, nor the owner of the property distrained, if he hath assigned his lease to a third person, without the privity, or assent of the lessor.

Distress for Rent—Sale.*—Property restrained for rent can be sold only by an officer duly qualified as such: as by a Sheriff, or Constable.

The appellee directed a distress to be made upon the property of M'Rae his tenant, for the rent of a house, situate in the town of Petersburg, by the serjeant of the Court of Hustings of the said town, which being replevied for three months, a bond was executed by the appellants, and was returned into the County Court of Dinwiddie, and on motion of the landlord, judgment was rendered thereon in the same court. The defendants below, filed exceptions to the judgment, and assigned the following objections to it. 1st, That the bond was not executed by M'Rae, the tenant in possession, nor by the owner of the goods distrained,—2d, That the court had no jurisdiction over the cause, it appearing from the face of the bond that it was taken by the serjeant of the corporation of Petersburg.—3d, That James Ferguson one of the obligors, was the original lessee of the premises, and assigned his interest in the term to John M'Rae the present tenant in possession, without the privity or consent of the lessor.

*The principal case is cited with approval in Smith v. Ambler, 1 Munf. 598, 599.

Upon an appeal to the District Court, of Petersburg the judgment was there affirmed. To this judgment, a supersedeas was awarded by this court.

Marshall for the appellant. It is a principle founded in much reason, and has often been approved in this court,
55 that *where a statute authorises a summary remedy unknown to the common law, the provision of such a statute must be literally and strictly pursued. The act of Assembly (see the old body of laws p. 202) directs the bond to be given by the tenant or owner of the goods, and where that is the case, a judgment may be obtained upon such bond, by motion. But the bond in question is stated to have been executed by persons not coming within this description, and is therefore not entitled to the benefit of this law.

As to the question about jurisdiction, there is more difficulty. The law requires the bond to be returned, but does not point out the court to which the return is to be made. Upon the reason of the case, I should suppose, that it ought to be made to that court, to which the officer taking the distress belongs, because if it might in this case be made to Dinwiddie County Court, it might be made to any court in Virginia. Such a construction is too unreasonable and absurd to be admitted for a moment. Upon this record, the court cannot judicially know that Petersburgh is in the county of Dinwiddie, and therefore the argument ab inconvenienti is as strong, as if in truth the bond had been returned to Monongalia Court, and the judgment rendered there. But if the court can properly take notice, that Petersburgh is in the county of Dinwiddie, I should then contend, either that the bond should have been taken by the officer of Dinwiddie County Court, or as the case has happened, that it should have been returned to the corporation court of Petersburgh. There can be no doubt, but that this latter court had jurisdiction of the case under the act of 1787, if the parties lived within the limits of the corporation.

Wickham for the appellee. I admit, that if this were a common law right taken away by the act of Assembly, the principle laid down by Mr. Marshall in discussing his first point, might be correct. Such is the case of a security, who is permitted by particular law of this state to obtain a judgment upon motion against the principal obligor, for money which he has been obliged to pay for him. In such a case, the principal is deprived of a trial according to the forms of the common law, and may therefore with propriety insist upon a strict adherence to the law, affording this summary remedy.

But in the case now under consideration, the bond given upon repleving property distrained, has its origin in the act of Assembly, and is provided for the benefit of the tenant. Without such legislative interposition, the property would have been subject to an immediate sale.

56 *The second objection is to the jurisdiction of the court where the judgment was rendered. The act of Assembly does not require that a distress

should be made by an officer, much less by the officer of a particular court. The landlord may personally, or by his bailiff take a distress as well under the act of 22, Geo. II, C. 10, as he might have done if that law had never been made.

A constable is not the officer of a court, and yet no one will doubt, but that he may levy a distress for rent. Why is the bond to be returned to one court more than another? The property may be distrained in a county remote from that in which the land lies, as where it is fraudulently removed for the purpose of defeating the landlord's remedy. Would it be contended in such a case, that the officer must return the bond to the court of the county in which the goods were found, because he belonged to that court? But the motion could not be made in that court, because it is local in its nature, of course it could be made no where. The act of 22, Geo. II, C. 10, which authorises the taking of a distress in such a case out of the county in which the land lies, does not speak of an officer at all, but authorises any person (for that purpose empowered by the landlord) to seize and sell the property.

The serjeant in this case may have been the special bailiff of the landlord for any thing that this court can know.

It is not necessary in order to enable the tenant to replevy, that the distress should have been made by an officer. If indeed a sale had been made, it might perhaps have required the aid of the sheriff.

It is observable, that the remedy by motion upon bonds of this kind, is not given by the act of 1748, which authorises the taking of them, but by that of 1769, C. 4, § 5; and in this law, the officer is not required to return the bond at all. But if this were otherwise, yet process may be returned by a sheriff to a court, of which he is not the officer.

It is objected that the bond was not executed by the tenant in possession, nor by the owner of the goods distrained. I do not find that this is necessary. The law authorises the replevy, upon the tenant giving good security to the officer. This he may do without executing the bond himself. Suppose an infant to be the tenant. He could not give a bond, which could bind him; it would be void by law, and yet if he did not do, what the law would declare to be invalid if done, he would be deprived of the benefit of replevying, unless 57 he were permitted to give *other security. So too, the tenant might be absent when the distress was taken, and yet a friend might be willing to relieve his property by becoming his security. But if it were necessary that the bond should be executed by the tenant in possession, the assignment having been made without the privity of the landlord, M'Rae cannot be considered as the tenant in possession.

Mr. Ronold on the same side, observed, that the act making use of a common law term, it must be construed according to the understanding of the common law; and if so, a bailiff is an officer in a case like the present.

Marshall in reply. If a distress had been made at common law, and a bond given similar to the present, no motion could have been made to recover the amount of it, though at common law the landlord might have immediately sold the property. But the remedy which the party has pursued, is merely statutary, and being a summary one, the law must be strictly pursued.

It is true that the act of 1769 gives the remedy by motion on bonds of this sort, but it was the act of 1748 which authorised the taking of them, and that law directs them to be returned. The original lessee, by the assignment, departed with all his interest, and his assignee became the tenant in possession, and could alone give the bond.

LYONS J. The first objection made by the appellant's counsel to the judgment in this case is, that the bond was not executed by the tenant in possession, nor by the owner of the property distrained. The court are of opinion that M'Rae cannot be considered as the tenant in possession, the assignment having been made to him without the privity or assent of the lessor. The lessor is not bound thereby, but may still consider the original lessee as his tenant, and therefore it is sufficient under the law, that the bond was executed by him.

The second objection is to the jurisdiction of the County Court of Dinwiddie. It is true, that at common law, a distress might be levied by any private person authorised by the landlord for that purpose, but it is equally true, that such person so appointed, had no right to sell the property destrained, or to take a replevy bond. The power of selling is given by statutes in England, and by an act of Assembly in this state, and can only be done by an officer; that is, by one duly qualified as such. And whether that officer be a sheriff, or a constable, they are both appointed by the court, are considered as being persons of credit and of good character, and by such a person, the bond so taken is to be returned. But then the question is, to 58 what court is the *bond to be returned? The answer is an obvious one, and results from the nature of the case. It should be to that court to which the officer belongs, of which he is the representative, and whose orders and process he is bound to obey and execute, or to the court of that county, in which the land lies. This must be a general rule, unless in some special case where the law hath otherwise directed, and which on that account will form an exception. This case comes properly within that rule, tho' no precept issues from any court.

Consider what would be the situation of both parties, were the law otherwise. If the sheriff may return the bond to a court whose officer he is not, he may return it to any court in the commonwealth, which might prove as inconvenient to the landlord, as to the tenant. If the bond be delivered to the party, the same reason requires that the motion should be made in the same court which would have had jurisdiction, in case the sheriff had returned it according to the rule before mentioned.

The above observations are intended to shew the necessity of confining the return to some particular court, and is a com-

plete answer to the supposed case of a distress made in a different county, from that in which the land lies, in which case, the bond should be returned either to the court of the county in which the land lies, or to that to which the officer belongs.

Judgment reversed.

Currie v. Donald.

April Term, 1795.

Deed—Indenting—Recordation—Validity between Parties *—A deed, though neither indented, nor recorded, is valid between the parties, under the Act of 1748, and is sufficient to pass an estate.

Deed Indented.—A deed beginning "This Indenture," is a deed indented to every legal purpose.

Deed—Delivery—Evidence.†—Witnesses attesting the delivery of a deed, shall not afterwards be admitted to disprove it.

Same—Same—Escrow.‡—If a deed be intended to be delivered as an escrow, it ought to be so stated.

In an ejectment brought by the lessee of the appellant against the appellee, in the Court of Hustings of the city of Richmond, the appellee at the trial, to shew that the title was out of the appellant, offered in evidence a deed from the appellant to Hunter Banks & Co. whereby he conveyed to them in fee simple the demised premises.

The deed being objected to, and the objections over-ruled by the court, a bill of exceptions was filed, stating that the deed was neither indented, nor had it been recorded; also, that no proof of its delivery was given except the following, to wit: one of the subscribing witnesses did not recollect that it was delivered, but was sure that he should not have attested it unless he had seen the appellant sign and seal it, or heard him acknowledge that he had done so. Another of the subscribing wit-
59 nesses did not *recollect the delivery, but is sure that he should not have attested it, unless he had heard the appellant acknowledge it as his act and deed, for the purposes therein mentioned, as it was his constant custom to require such acknowledgment. The third subscribing witness was out of the country, and the fourth interested, but their hand writing was proved. A witness who had not attested the deed, deposed, that the deed was delivered to him by some person to examine, but whether by Currie or Hunter he could not remember, and he being of opinion that there were inaccuracies in it, retained it (for the purpose of drawing a new deed) until it was brought into court at the trial—the bill states that this was all the evidence given respecting the delivery of the deed.

The jury found a verdict for the defendant, and upon an application to the District Court of Richmond for a supersedeas, the motion was refused, from which an appeal was prayed to this court.

Campbell for the appellant. The deed was improperly admitted as evidence to prove the title to be out of the appellant for three reasons. 1st, That it was not recorded. 2d, That it was not indented—and lastly because it was not delivered.

The first objection, as well as the second depends upon the construction of the act of 1745, C. 1. The first section declares "that no estate of inheritance, or of freehold, shall pass, alter, or change from one person to another, unless by deed in writing, indented, sealed and recorded, in manner therein after mentioned." The manner is, that it should be proved by three witnesses, or acknowledged within a certain time in the General Court, or Court of the County wherein the land lies. The 4th section declares all deeds not recorded according to the directions of this law, void as to subsequent purchasers and creditors, but that the same shall be good between the parties, tho' not recorded according to the directions of the act. Now, where the law annexes certain qualities to a thing, they are a part of the thing itself. A deed of feoffment at common law passed no interest without livery of seisin; but when livery was made, it related back to the feoffment. So recording, which hath been substituted in the room of livery, is essential to pass the estate out of the grantor, and without it no estate is vested in the grantee. The two sections of the law must be so construed as to avoid contradiction. To say that the first, renders all deeds ineffectual which are not indented and recorded, and that the 4th makes them valid, tho' those requisites are not observed, is a construction which unnecessarily produces indecent
60 *hostility between the two sections.

It is the business of the court then, to give such a construction, as to reconcile the various parts with each other. By the first section, no estate passes without recording; by the 4th, the deed if not recorded within the time prescribed, is void as to purchasers and creditors, but not as between the parties, if recorded at all, tho' not within the time. Yet until it be recorded, no estate passes. The cases determined under the statute of 27 H. 8 C. 16, which is substantially the same as the law in question, are in point. Until inrollment, no estate passes, Shep. Touch. 220. So the same book proves, that unless the deed of bargain and sale be indented, nay written on parchment, nothing passes, because the statute requires those things. As an evidence that the legislature meant what I contend they have expressed, the 12th section of this very law gives validity to deeds, which before that time had not been indented and recorded in pursuance of the act of the 9th of Ann, C. 13, which was in

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***Unrecorded Deed.**—That a deed put upon the record, without the proof and authentication required by law, is to all intents and purposes an unrecorded deed, see Doswell v. Buchanan, 3 Leigh 378, citing Turner v. Stip, 1 Wash. 319; *Currie v. Donald*, 2 *Wash.* 59, 64. The principal case is cited with approval in Johnston v. Slater, 11 Gratt. 325.

Same—Validity between Parties.—The principal case is cited in McCandlish v. Keen, 13 Gratt. 630, to the point that a deed of trust, though unrecorded, is yet good and valid as between the parties. See Turner v. Stip, 1 Wash. 319.

†**Acknowledgment of Deed—Evidence of Delivery.**—In Roanes v. Archer, 4 Leigh 565, the court said that it was inferrible from the principal case that the acknowledgment of a deed before witnesses is sufficient evidence of delivery.

‡**Escrow—Delivery to Obligee.**—The principal case is cited in Miller v. Fletcher, 27 Gratt. 411, and Lyttle v. Cozad, 21 W. Va. 200, to the point that a deed or bond cannot be delivered to the obligee as an escrow, and if it is, the condition will be regarded as invalid and the deed or bond as absolute. The principal case is cited in American Button-Hole, etc., Co. v. Burlack, 35 W. Va. 653, 14 S. E. Rep. 320. See *foot-note* to Hicks v. Goode, 12 Leigh 479.

See monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564, and monographic *note* on "Acknowledgments" appended to Tallaferro v. Pryor, 12 Gratt. 277.

the very words of this law as to those requisites.

The next objection is, that the deed was not delivered. The whole evidence being stated upon the record, the validity of the deed becomes a question of law. Delivery is sometimes a question of fact, sometimes a question of law. If it be delivered to a third person to examine, or as an escrow, there is in fact a delivery, but in law no estate passes thereby. Now in this case, a delivery was not proved by the evidence stated in the bill of exceptions, and it appears that that was all the evidence on that point.

Ronold for the appellee. The objection as to the deed not having been recorded, is fully settled as I conceive by the case of Turner v. Stip, (ante Vol. I, P. 319,) in which the court determined, that a deed was valid between the parties, tho' improperly admitted to record, or not recorded at all.

The next objection is, that the deed was not indented. But this is not necessary to pass an estate, 2 Blac. Com. 300. Nay it is not even necessary in order to produce an estoppel, for a deed poll will answer the purpose, 1 Morg. Ess. 169. The inconvenience, of the novel doctrine now contended for would be infinite. If strictly pursued, it would defeat the effect of almost every conveyance made in this country. For if indenting be necessary, we must refer to the common law for the mode, and we shall there find, that it was performed by cutting through letters, 2 Blac. Com. 299, a practice which has never been pursued in this country. We are to consider the in-
61 tention of *the deed, and even if the appellant's counsel be right in his construction of this law, so that the deed in question cannot take effect as a deed of bargain and sale, yet it may operate as a covenant to stand seized, ut res magis valeat quam pereat. Or the deed may operate as an estoppel to the claim of the appellant.

The third point is, that the deed was not delivered. A delivery may be made either by words, or by acts, Shep. Touch. 55. It will be valid if made to a stranger for the use of the grantee, Ibid. 56. Now the evidence in this case seems to be compleat. One witness has declared, that unless the grantor had acknowledged the deed to be his act for the purposes therein mentioned, he would not have attested it, because it was his constant practice to require this solemnity. But what I consider as conclusive, is the attestation. All the witnesses have there declared that the deed was signed, sealed and delivered, in their presence. I contend that those witnesses ought not to be permitted to contradict their attestation, even if their evidence went to that. It would be extremely mischievous, if a witness, after giving authenticity to a paper by his signature, were permitted to deny the fact which he has thus authenticated.

Marshall on the same side. As to indenting, it is certainly unnecessary at common law to pass an estate, and tho' spoken of in the first section of the act of Assembly, it is dispensed with by the fair construction of the 4th; which declares the deed valid between the parties, though it want this solemnity. This is the more evident, by connecting this with the 3d section of the law which speaks of deeds poll. There are deeds spoken of in the 4th section which most certainly need not be indented, and then it is said, "but the same as between the parties shall be valid." What same? the answer is, deeds poll as well as deeds indented.

As to the delivery, it is a mere question of fact. The court cannot say, what weight of evidence shall be sufficient to prove it. If the deed be antient, slighter evidence will satisfy a jury of the fact, than if it be a recent one. It cannot be expected that a man shall preserve his testimony to any indefinite period of time, when he may be called upon to prove this fact. It is only necessary for him to satisfy a jury of the fact, and in this case the jury was satisfied.

I shall say nothing upon the subject of recording, since that point has been already settled in this court, by the case of Turner and Stip.

62 *Washington in reply. It is evident that there is no way to reconcile the apparent inconsistencies of the act of 1748, but by giving to it this construction, viz: the deed must be recorded at some time or other, in order to pass an estate of freehold: but as to creditors and subsequent purchasers, it must not only be recorded, but it must also be recorded according to the directions of the act; but as between the parties, it need not be recorded according to the directions of the act, but then it must be recorded. By this construction, the act is rendered consistent, and each clause and sentence of the law will have an effective meaning. Upon this distinction, the present case differs from that of Turner and Stip; in that, the deed was recorded though not agreeably to the directions of the act; in this, it was not recorded at all.

As to the indenting:—It is true, that at common law, this piece of solemnity is not necessary to pass an estate; but this is no answer to the objection. The statute positively requires it, by declaring that no freehold estate shall pass but by deed indented. Is there any case which proves, that a solemnity thus imperiously required by statute can be dispensed with? On the contrary, do not the cases cited by Mr. Campbell, decided upon the statute of inrollments, clearly prove, that a solemnity thus required, must be performed in order to give efficacy to the deed? As to the argument, that it is good as a covenant to stand seized, though it should not take effect as a deed of bargain and sale, there is certainly nothing in it, because the deed itself is void, and being so, it can under no name pass an estate.

The 4th section does not dispense with indenting, tho' it does with recording in the manner prescribed by the 1st section as between the parties to the deed. To repeal the express declarations of the first, by any implication growing out of the 4th section, would be repugnant to every rule of construction.

Upon the point of delivery, the arguments on the other side prove too much. They would go to establish what no professional

man would directly avow; and that is, that a delivery is not necessary at all. I admit that in this, as in all other cases, the best evidence is to be given which the nature of the case will admit. It was so in this case. But then certain questions of law arise upon that evidence. Is the acknowledging of a deed equal to a delivery of it? Let it be that the former is sufficiently proved; but is that enough? Most clearly it is not. —Again, was the delivery to the witness to examine it, such a delivery as would pass the estate? Certainly not, but the contrary. Yet all these points were decided by the court, and as we say improperly.

63 *LYONS J. delivered the opinion of the court.

The first objection which I shall notice is the want of indenting. It is contended that the first section of the law requires this solemnity, and that the 4th does not dispense with it even between the parties. But the answer is, that the 4th section would be nugatory if all these and the other requisites were necessary, for if the deed be void for the want of them by the first section, it was unnecessary to declare it void in the fourth.

What is it, that shall be binding between the parties? The answer is, all conveyances without restriction. The apparent object of the law was to secure creditors and subsequent purchasers, and not to affect the parties. This is more particularly proved by the 10th section of the law, which requires memorials of all recorded deeds to be transmitted to the secretary's office to be there registered.

But suppose indenting were necessary, this deed begins "This indenture." It is signed, sealed and acknowledged as a deed indented, and the grantor cannot afterwards deny it. It is to be taken most strongly against him. What would be the consequence, if proof of indenting were always necessary? The originals cannot always be produced, and in the copy it cannot appear. The most trifling degree of indenting would be sufficient, and this might be worn out, so as not to be perceived. In the strictest pleadings they are called deeds of Indenture, not deeds indented. The cases all prove, that indenting is unnecessary. Judge Blackstone in his commentaries says, that it is now of little other use than to give a name to the deed. This case in principle may be compared to that of Jones & Temple v. Logwood, (See ante Vol. 1. P. 42) where this court determined, that a scroll was equivalent to a seal of wax, or of any thing capable of impression, and impressed. This decision was founded upon the real justice of the case and the custom of the country; that the scroll being adopted by the party, and acknowledged to be his seal, made it his seal in fact. So here, the party having acknowledged that this was an indenture, he has made it so as to every legal purpose. A deed beginning "This indenture," tho' not in fact indented, may be given in evidence. Morg. Ess. 169.

The second objection is to the proof respecting the delivery. The parties have declared it to be sealed and delivered, and this is attested by the signature of 4 witnesses who could not afterwards have been permitted to disprove it. This delivery we must consider as absolute, because if

64 it had been intended as an *escrow, it ought to have been so stated. Neither is there any proof that it was so intended, but the contrary is strongly to be inferred from the evidence. It would have been sufficient to have entitled the deed to be recorded, if it had been offered.

The last objection is, that it was not recorded. The case of Turner and Stip is conclusive upon this point, for tho' that deed was admitted to record, yet it was improperly admitted, and was consequently in the same situation as if it had not been recorded at all.

The cases cited by the appellant's counsel upon this point do not apply, because there is nothing in the statute of inrollments similar to the provisions contained in the 4th section of our act of Assembly.

Order of the District Court affirmed.

Shelton v. Barbour.

April Term, 1795.

Verdict—When Conclusive Evidence.*—In an action for freedom, a former verdict which found the mother of the plaintiff to be free, or a slave, is conclusive evidence, the defendant in this action claiming under the defendant in the former suit.

This was an appeal from the District Court of Charlottesville. It was an action of trespass, assault and battery & false imprisonment, brought by the appellee, who had been held by the appellant as a slave, in order to try his right to freedom. The pleadings having put this point in issue, the appellant the master, offered in evidence a transcript of a verdict and judgment in the former General Court, between the mother of the appellee and Robert Har-

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***Judgments—Res Adjudicata.**—The principal case is cited in C. & O. R. R. Co. v. Rison, 99 Va. 32, 37 S. E. Rep. 324, for the proposition that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision.

In Pegram v. Isabell, 2 Hen. & M. 204, the court, citing the principal case, said: "That although liberty is to be favored, the court cannot, on that or any other favored subject, infringe the settled rules of law. In that case," meaning the principal case, "it was held, in conformity to this principle, that a verdict between parties and privies, finding the mother of the plaintiff to be a slave, was conclusive evidence against him, as much as a verdict finding her to be free would have operated in his favour. This decision" (*i. e.* the decision in the principal case), "therefore, shuts out the pretence that we can, in this case, take a greater latitude in relation to the rules of evidence, than in any other."

In this connection, the principal case is cited with approval in Preston v. Harvey, 2 Hen. & M. 64, 67; Pegram v. Isabell, 2 Hen. & M. 210; Gregory v. Baugh, 4 Rand. 615.

See monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

Slaves—Issue—Construction of Statute.—As to the effect of the statute, declaring that all children shall be bond or free according to the condition of their mothers, see the principal case cited in Fulton v. Shaw, 4 Rand. 599.

Same—Construction of Statute.—And as to the effect of the repealing clause of the act of 1705, concerning servants and slaves, see the principal case cited in Gregory v. Baugh, 2 Leigh 685.

In Gregory v. Baugh, 2 Leigh 687, it was said that Jenkins v. Tom, 1 Wash. 123, was approved in the principal case.

ris, under whom the appellant claims, by which verdict it was found, "that the plaintiff was the slave of the defendant." The appellant's counsel offered this as conclusive evidence of his title, but the court being divided in opinion sent the verdict to the jury as circumstantial evidence only, and in no other manner. To this opinion the appellant excepted and the verdict being against him, he appealed.

Marshall for the appellant. There is no rule better established than this, that a verdict may be given in evidence between the same parties, or between those, who are privies to the verdict, and where the matter in issue in both suits were the same. Bull. Ni. Pri. 232, 233. In this case, both the appellant and the appellee were privies to the verdict found in the general court, the former, claiming in right of his mother, and the latter, claiming such title as the defendant in the former suit could convey to him. Freedom or slavery was the substantial matter in issue in both suits. This point was once
65 decided in the former *General Court, and the principal was there laid down, that a verdict finding the mother to be free, should be conclusive evidence of the freedom of the child, in an action brought by the child, against one claiming under the defendant in the first suit.

Ronold for the appellee. If the court had decided that the verdict was not conclusive evidence, they would have done right, 1st, because the whole record in the former suit was not produced, but only the verdict and judgment, from which it could not certainly appear to the court, what was the essential matter in dispute upon the former trial; and 2dly, because from the very nature and reason of the thing, it would have been unjust to effect the appellee's title by verdict, to which he was not a party. For he might have had it in his power to produce better evidence of his right to freedom than his mother could, which indeed it appears he did, from the verdict being in his favor. Upon a trial touching a right of common, it is clear that a verdict against one commoner, would not be evidence in an action brought against another, for the second may have some other, or better title than the former. So in this case, the mother might have been a slave, and yet the son might be free, for he might have been liberated, and the record not stating the whole evidence, it does not appear that the son relied upon the same title that his mother did.

But I contend, that the court did not decide whether the verdict should be considered as conclusive evidence or not. The judges were divided upon that point, and therefore the court has not erred, even if the verdict were conclusive evidence.

Copland on the same side. In addition to the arguments used by Mr. Ronold, I would ask whether a verdict ought not to be as conclusive against the master as against the slave?

Warden on the same side, insisted that the case of Tom and Jenkins decided in this court (See ante Vol. 1, P. 123) if looked into, would be found in a great measure to decide this question.

Washington in reply. The principle of law laid down by Mr. Marshall has not been controverted otherwise, than as being an unreasonable rule. I shall therefore confine my observations to the objections made to the rule upon that ground. The reason, why persons who were parties to the former trial, or who claim under them, are bound by a verdict rendered upon the same question, is, that there may be an end put to law suits; for it would be inconvenient if men's titles once decided,
66 should *be always at sea, and subject to the hazard of many trials, when loss of testimony or other casualties might happen.

But it is objected, 1st, that the son might nave it in his power to produce better evidence than the mother. This would apply with equal force in all other actions where the plaintiff or defendant had miscarried in a former suit, and would furnish an apology for endless litigation upon the same subject, however frequently it may have been decided.

2d. The son might have had a title which his mother had not. If the fact were so, then the case would have been out of the rule contended for, which is, that a verdict can be given in evidence only between such as are parties or privies to it, and where the trial was had upon the same point; but if the plaintiff had another title, why did he not shew it? He may yet shew it, tho' the judgment should be reversed.

Lastly, it is said that the court did not decide, that the verdict was not conclusive evidence. The record itself will best explain the decision of the court. It states, that "the court suffered the said record of a trial to go to the jury as circumstantial testimony only, and in no other manner," which was certainly deciding, that the jury were not to consider the verdict as conclusive, but only as circumstantial evidence: and to this opinion, the exception was taken.

Campbell for the appellee. The case cited from Buller 232, does not support the rule of law contended for. It declares that the verdict may be given in evidence but does not assert that it is to be considered as conclusive. The reasoning of the author proves, that such was not his meaning, for he says "the verdict in such a case is a very persuading evidence." In this case the verdict was given in evidence, and therefore the very thing was done which the authority requires.

The record not stating that the appellee's title was the same with his mother's, this court will not presume it, for the purpose of rendering the judgment below erroneous. It is true, that the question in both suits was the same, but it no more follows that the title was the same, than that every question which respects the same parcel of land must be the same.

Since the law, as well as the best feelings of the human heart favor liberty, the rule contended for ought rather to be moderated than extended in the present case.

67 *The PRESIDENT delivered the opinion of the court.

To discharge this case of Tom & Jenkins

cited at the bar, let it be observed, that the only question there was, whether the court did right in admitting the hearsay evidence of old people then dead, to prove that the plaintiff's ancestors were Indians; this court approved the opinion of the District Court. In that record there is a paper which seems to want a name, & appears merely to contain the arguments of one of the counsel, and the opinion of one of the judges upon a point which this court has since sanctioned; to wit, that there was a time when the law of this country authorised the making slaves of Indians taking in war within the then colony; that under that law, many Indians were made slaves, and their descendants have continued in bondage. But that some time after, that law was repealed, from which time, no American Indian could be made a slave. But this court took no notice of that paper, as it did not come up as an exception to the opinion of the court, but was permitted (at the importunity of the counsel) to be made part of the record.

In that case too, this court thought that the deposition of Mr. Belfield, to prove that a verdict had been given in another suit between Richard Vena and William Hammond was inadmissible, since the record itself ought to have been produced.

It has been contended in this case that liberty is to be favored. This is true, but the court cannot on that, or on any favored subject infringe the settled rules of law.

It was also objected, that the plaintiff might have had it in his power to produce better testimony than his mother did. In the first place, it is not presumable that he knew more than his mother did respecting her title to freedom, and in the next, the law indisputably supports the rule contended for, that between parties and privies to the former suit, the verdict is conclusive evidence. The reason of the rule had additional strength in this case; for since the act of Assembly declaring that children shall be bond or free according to the condition of the mother, the verdict, which found the mother a slave, was conclusive evidence to prove that the son was so. The case mentioned by the appellant's counsel in the General Court was like the present.

It was argued, that the appellee might have been manumitted. If so, he certainly ought not to be precluded from proving it, nor will the opinion which this court will give preclude him. The judgment must be reversed for error in the court's not admitting the record as conclusive evidence, to prove the plaintiff a slave. The cause is to be sent back for a new
68 trial *with a direction to this effect, unless the plaintiff can shew that he or his mother were manumitted subsequent to the first verdict.

Brock and Others v. Philips.

April Term, 1795.

Executors—Authority—Sale of Real Property.*—A man devises that so much of his lands should be sold as would be sufficient to pay his debts. To his wife he gives a moiety of his lands remaining after his debts are paid, and the residue of his estate, with the reversion of the land given to his wife, to go to his children. The executor, by selling the reversion of the moiety given to the wife, exceeds his authority, and Equity will set aside the sale upon the suit of the children.

The case was—John L. Lewis by his will devised, that as much of his land should be sold as would be sufficient to pay his debts, and he empowered his executors thereafter named, to sell and make conveyances for the same. He also devised to his wife one half of his land remaining after his debts paid, and the residue of his estate, and the reversion of the land given to his wife, to go to his children. The appellant Brock and two others were named executors, the former of whom alone qualified. The executor sold a tract of land for payment of the debts, and supposing that the amount of the sale would be sufficient for that purpose, he delivered to the widow a moiety of the remaining land. Afterwards finding it necessary to sell more land for payment of further debts, he disposed of the reversion of the land allotted to the widow, by public sale, which was purchased by George Stubblefield another of the appellants, and he selling to Beverley Stubblefield the other appellant, a conveyance was made by Brock to B. Stubblefield.

The prayer of the bill is to set aside the conveyance, and for a division of the land according to the will, which was decreed by the High Court of Chancery, from which this appeal was prayed.

Washington for the appellant. There are but two questions, worthy of consideration; for the charge of fraud in the bill being denied in the answer, and supported only by one deposition without corroborating circumstances, it will not be considered as true. They are 1st, Whether one of the executors alone could sell? 2d, Whether the executor acted properly in selling the reversion?

It is true, that a power given to two, cannot be executed by one. The distinction is between a power devised to three by name, to be exercised by them in their individual capacities, and one which is given to them in their official capacities. In the former, all must join in executing the power, because a fewer number than those appointed will not answer the description. But in the latter case, if two only qualify, they are still the executors, and answer the description. In this case, the power is given to the executors virtute officii.
69 *2d, The widow, was not bound to take a moiety of the remainder under the will. She was entitled to, and might claim a third of the whole. It does not

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***Executors—Sale of Real Property—Caveat Emptor.**—The principal case is cited in Deneale v. Morgan, 5 Call 417, as authority for the proposition that a purchaser of lands from an executor, is bound to look for, and to understand the extent of his power, the doctrine *caveat emptor* strictly applying in such a case. See Snider v. Snider, 3 W. Va. 200.

Same—Sale of Personal Property.—But in Sale v. Roy, 2 Hen. & M. 78, the principal case is cited for the proposition that although the principle *caveat emptor* applies to lands devised to be sold for the payment of debts, it is otherwise as to slaves and personal estate; and a purchaser of slaves sold at public auction by an executor, for the payment of debts, cannot be disturbed. The principal case is cited in Sale v. Roy, 2 Hen. & M. 76. For a full discussion of this subject, see monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

appear to the court, that the part allotted to her was more than a third, and consequently, the executor, who had a right under the will to sell for payment of debts, could not do otherwise than sell the reversion, the widow being lawfully entitled to retain the possession during her life. It does not appear that there was any other land to sell except this reversion.

Marshall. If I thought there were any doubt respecting the want of authority in the executor to sell the reversion of this land, I should question the right of one executor to sell at all. But considering the other point as being too clear to admit of doubt, I shall confine myself to it.

The executor was bound to pursue the power delegated to him. The widow, was entitled under the will only to a moiety of the land not disposed of in payment of debts. She did not demand her dower, but accepted of a moiety of the land which remained after the first sale had been made. She cannot therefore claim under, and against the will. The executor, instead of selling the reversion of the moiety allotted to her, should have sold the other moiety, and even if it were necessary to sell this, or a part of it, the absolute right and present interest should have been sold, since the widow was entitled to no part under the will, till after the debts were paid. The consequence of what has happened is, that the children have been extremely injured by having their property sold under an incumbrance, and on that account at an under value.

Washington in reply. If the executor ought to have sold other land, it may be a reason to charge him with misconduct, but the purchaser ought not on that account to suffer. An executor by law ought not to sell slaves whilst there is personal estate; but yet if he were to do it, the title of the vendee could not be impeached, any more than if he had purchased from the executor a specific legacy, whilst there were other assets sufficient to pay the debts. Mead v. Lord Orrery &c. 3 Atk. 235.

LYONS J. delivered the opinion of the court.

It is unnecessary to decide the first point made in this cause, since the court feel no difficulty in affirming the decree upon the second. There can be no doubt, but that the executor has exceeded his power in selling the reversion of the land in question. The case of a person purchasing slaves, or a specific legacy from
70 *an executor whilst he has other assets to pay debts, is not like the present. The executor by law has a right to the possession of slaves, and of personal estate, and a right to sell them. But he has no right to sell lands, unless under a special authority. A purchaser therefore of land, from an executor, is bound to look for, and to understand the extent of that power, and consequently the principal caveat emptor strictly applies in such a case. It is otherwise as to personal estate. The executor instead of selling the reversion of this land ought to have sold the other moiety which was unincumbered.

Decree affirmed.

Turner v. Moffett.

April Term, 1795.

Arbitration and Award—Date of Order—Misrecital.*—If an award, made under an order of reference, mis-recite the date of the order, the judgment entered upon the award is erroneous.

This was an appeal from the District Court of Dumfries. Moffett sued out a capias against Turner and Chilton which was served upon Turner. The declaration was upon an assumpsit against Chilton only. Turner and Moffett by consent referred the cause to arbitration under a rule of court, and agreed that the award should be made the judgment of the court. An award was made in favor of the appellee for £132: 5: 9, for which judgment was entered, and also for the costs.

Marshall for the appellant. Contended, that the judgment was erroneous for two reasons, 1st, because it is against Turner, when by the appellee's own shewing it appears, that Chilton, and not Turner was the debtor. The declaration is against Chilton only, and there is no charge against Turner. In the case of Picket & Clayborne, this court determined, that a confession of judgment cured the want of a declaration. But he knew of no case where the reference of a suit and an award made thereupon, had been considered as sufficient to cure the want of a declaration, much less to cure a defective one as this is.

2dly, The judgment does not pursue the award, for the former gives costs, which the latter does not.

Washington for the appellee. In answer to the first point relied upon the case of Leftwich and Stoval (ante vol. 1, p. 30) which seemed to conclude all discussion upon the question.

As to the 2d point, the judgment is for the very sum awarded by the arbitrators, and the costs are given by the court, as the necessary consequence of the judgment.

71 *Marshall. The costs, are not the necessary consequence of the judgment's being for the appellee; for suppose the arbitrators had awarded that the appellee should pay the costs; the judgment must in this respect have pursued the award although the judgment for the debt was in his favour.

The Court gave no opinion upon any of the above points, observing, that the award is stated to be made in pursuance of an order of reference, the date of which is misrecited, and that the judgment upon the award is therefore erroneous. Whereupon Washington moved for and obtained a certiorari, upon a suggestion of diminution.

The judgment was reversed at the succeeding term for this error.

Turberville v. Self.†

April Term, 1795.

Jeofails and Amendments‡—Want of Similiter.—After

*The principal case is distinguished in Ross v. Overton, 3 Call 317.

See monographic *note* on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

†The principal case is reported and annotated in 4 Call 580 (Va. Rep. Anno.).

‡**Jeofails and Amendments.**—See monographic *note* on "Amendments" appended to Snead v. Coleman, 7 Gratt. 300.

verdict and judgment, the want of a similiter will not be considered as error.

Replevin—Plea of Nil Debet—Discount—Award.—In replevin, the plaintiff, upon the plea of nil debet, may give in evidence an award made since the distress taken (but respecting pre-existing accounts), in order to show that nothing was due the avowant.

Set-Off—Assigned Bond.—In what case an assigned bond will not be allowed as a set off.

Replevin, in the County Court of Westmoreland brought by Self the defendant in error. Avowry for rent arrear. Plea nil debet, and concludes as usual to the country, but the issue is not joined by a similiter. At the trial, the defendant gave in evidence an award of arbitrators made since the distress was taken, but respecting accounts subsisting between the parties, prior thereto, in order to shew, that he did not owe any thing to the avowant. This being objected to as improper evidence, and being admitted by the court, a bill of exceptions was filed. The avowant offered in evidence to destroy this demand of the plaintiff's, a bond of his for 50001b of tobacco, which had been assigned to him as appeared from the endorsement, sometime in 1785, long before the distress was taken, but he did not prove notice of the assignment to the plaintiff, nor did he otherwise than by the endorsement, prove the precise time when the assignment was made. The court rejected this evidence, to which an exception was taken. Verdict for Self the defendant in error. This judgment was affirmed in the District Court of Northumberland, to which judgment a supersedeas was awarded by one of the judges of this court.

The objections made to the judgment by Washington for the plaintiff in error were 1st, That no issue was joined in the cause.

2d, That the plaintiff ought to have set forth the award specially in his plea, that the avowant might have it in his 72 power *to impeach it, and that for this reason it was improper to give it in evidence on the general issue.

3d, That the court ought to have admitted an off-sett against the award, the bond of the defendant in error which had been assigned to the plaintiff.

Marshall for the defendant, In answer to the first point, relied upon the case of Brewer v. Tarpley (ante vol. 1, p. 363) as conclusive.

The second objection if a good one for the reason assigned, would equally prevent one bond from being offsett against another, which (it cannot be denied) may be done under the general expressions of the act of Assembly respecting discounts. Though the award is made posterior to the taking of the distress, the debt was created long prior to it. The award does not create a debt, but only ascertains one already existing—it was therefore proper evidence.

The answer to the third objection is, that the time of the assignment not being proved, it might have been made subsequent to the distress, and if so, was improper evidence to justify an act which was originally tortious. For if nothing were due (which there was not, since the debt due from the avowant exceeded the rent due to him,) when the distress was taken, the seizure was unwarrantable, and could not be rendered lawful by a subsequent act tending to destroy the offsett of the tenant against the demand of rent. The date of the assignment endorsed on the bond, is no proof of the real time when that assignment was made.

The court affirmed the judgment.

Brydie v. Langham.

April Term, 1795.

Ca. Sa.—Service of Writ Out of County.*—Judgment in the County Court of F. where the defendant resided; a capias ad satisfaciendum cannot be issued to the Sheriff of the county of H., and be there served, the defendant happening to be found in that county when the writ was served, but it not appearing that he had removed his property out of the county of F.

The appellant having recovered 4 judgments in the County Court of Fluvanna against the appellee, sued out 4 several writs of ca. sa. against his body, directed to the sheriff of Henrico county, where he was taken and committed to jail. The court upon motion, quashed these executions with costs including an attorney's fee, assigning the following reason for their opinion: "That the said writs were illegal, because Langham was a resident of Fluvanna county, and the said executions were levied upon him in the county of Henrico, whither he had gone at the time the said writs of execution were 73 levied, and it not appearing, *that he had removed his property out of the county of Fluvanna."

The appellant excepted to the opinion of the court, because the following evidence was determined to be sufficient to prove that notice was given of this motion. A notice in writing was proved to have been delivered to the appellant, stating that a motion would be made on a certain day of the next court, to quash four executions issued from the clerk's office of Fluvanna court, against him the said Langham, to satisfy Alexander Brydie, assignee of William Galt & Co. and one other execution issued from the same office, to satisfy Alexander Brydie & Co. which executions issued on the 6th of August, and were made returnable to the succeeding October term, all of which executions were contrary to law.

The appellee also proved by a witness, that he had heard a collector of the appellant's say, that he had understood that motions were to be made at this court to quash the above executions.

The judgment of the County Court was affirmed in the District Court of Charlottesville, where it was carried by appeal. From this judgment, an appeal was granted to this court.

Copland for the appellant. Until the act of 1748. C. 8, no writ of execution could issue from one County Court directed to the sheriff of another County. By this law § 20, it is enacted, that where judgment is

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***Ca. Sa.—Service of Writ Out of County.**—The principal case is cited in Branch v. Webb, 7 Leigh 380, for the proposition that no *ca. sa.* could issue against the defendant except to the county where he was sued, unless he had actually removed the bulk of his effects out of the county.

rendered in any County or inferior court, for debt, or damages, and the defendant shall remove himself and his effects, or shall reside out of the limits of the jurisdiction of such court, the clerk is authorised to issue any writ of fi. fa. or ca. sa. directed to the sheriff of any county, where the defendant, or debtor, or his goods shall be found. Now it is evident, that the fair construction of this law is, that if the defendant remove himself or his effects, execution may go into any county where his person or effects are to be found. If it were otherwise, the defendant might easily evade the provisions of the law, by removing himself, and leaving effects of small value behind him. Besides, it does not appear in this case, that the appellee had any effects at all, in Fluvanna, and the court cannot presume he had. The record states, that it did not appear he had removed his effects. But it should have been proved that he had not removed them. If the law be taken literally, it would follow, that if the defendant has effects in any other county than that, in which he resides, a fi. fa. may issue to that county.

74 *Marshall for the appellee. There can be little doubt about the true construction of this law. The removal contemplated by the legislature was a permanent one; it must be a compleat abandonment of the county in which the defendant resided. The evidence of such a removal, is the carrying with him the bulk of his property. The leaving of a small part behind, would be considered as a mere evasion, and would not avail the party. The enquiry in such a case must always be, whether the removal was a substantial one or a mere going out of the county with an intention of returning; and upon the evidence of the one, or of the other, the propriety, or impropriety of issuing the process to a different county, must always depend.

The record leaves no room for doubt in this case, that the defendant had not removed himself with a view to abandon the county of Fluvanna.

The Court affirmed the judgment.

Goodwin v. Taylor Executor of Williamson.

April Term, 1795.

Will—Construction*— Case at Bar.—Devise to E. C., the testator's daughter, of the interest of 4000l. government securities, during her life, and at her death, the interest of the said 4000l. to go to his four grand-daughters equally, and at their decease, the principal and interest to be disposed of by them to their heirs. E. C. released to the husband of one of the grand-daughters all her right to the interest of 1000l. of the said securities. The grand-daughter dying in the life-time of E. C., her husband, as her administrator, filed a bill to recover the said 1000l., which was decreed accordingly.

Thomas Williamson by his will dated in 1787, devised as follows, viz. "I give to my daughter Elizabeth Clements the interest of £4000 in government funds during her life, and at her death, I give the interest of the above money, one fourth to each of my grand-children S. Cocke, Elizabeth Clements, Frances Clements and John Clements, and at their decease, the principal and interest to be disposed of by them to their heirs, in such proportions, as they by their wills respectively may direct, and in case of the death of my grand-daughter Sarah Cocke without issue, I give her part to my grand-daughter Elizabeth Clements."

Elizabeth Clements the daughter of the testator, by deed duly executed, released to the plaintiff Goodwin and to his wife Elizabeth Clements her daughter, and the grand-daughter of the testator, all her right and title in and to the interest of £1000 of the said certificates. The grand-daughter died in the life-time of her mother intestate, and the plaintiff as her administrator filed his bill in the County Court of Southampton, to recover possession of £1000 of the said certificates.

75 *The court decreed the defendant to pay and deliver to the plaintiff £1000 of the certificates in the public funds, bequeathed by Thomas Williamson to Elizabeth the late wife of the plaintiff.

From this decree an appeal was prayed to the High Court of Chancery, where it was reversed and the bill dismissed; from which an appeal was taken to this court, where the decree of the High Court of Chancery was reversed, and that of the County Court affirmed.

OCTOBER TERM, 1795.

Collins v. Lowry & Co.

October Term, 1795.

Deposition—Absence of Witness—Evidence.†—What proof of the inability of a witness to attend the

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***Executory Limitation — "Dying without Issue" — Chattels.**—That a limitation over of personal estate, after an indefinite failure of issue, is void, and the first devisee takes the whole, see the principal case cited and approved in Wilkins v. Taylor, 5 Call 152, 156, 157; Moore v. Brooks, 12 Gratt. 151; Newby v. Blakey, 3 Hen. & M. 60; Bradley v. Mosby, 3 Call 62.

See Higgenbotham v. Rucker, 2 Call 318, and *note*.

In Milhollen v. Rice, 13 W. Va. 531, the court said: "In the case of *Goodwin v. Taylor*, 4 Call 305, same case, 2 *Wash.* 74, the testator bequeathed the interest on £4,000 in government funds to his four grandchildren; and at their decease the principal and interest to be disposed of by them to their heirs, and such proportion as they by their wills respectively direct. The court basing its decision on Shermer v. Shermer's Ex'r, 1 Wash. 266, held, that a grand-daughter took, not a life estate, but an absolute property, in this one-fourth of this £4,000, she having died intestate. Upon her death she must be regarded by her intestacy, as having disposed of the property to her heirs, under the power conferred on her by the will; and then it was the same, as if the will had given her a life estate, remainder to her heirs; and under the rule in Shelley's case she took an absolute property, and not a mere life estate."

"JUDGE ALLEN, in delivering the opinion of the court in Moore v. Brooks, 12 Gratt. 151, refers to this case of *Goodwin v. Taylor*, 2 *Wash.* 74, as an instance of the application of the rule in Shelley's case.* It is therefore clear, that these two cases of Shermer v. Shermer's Ex'r, 1 Wash. 266, and *Goodwin v. Taylor*, 2 *Wash.* 74, 4 Call 305, were both decided, as they were, on this reasoning: if the powers conferred on the devisee had been executed, by devising or bequeathing the property to the heirs of the devisee or legatee (their suffering themselves to die intestate being regarded as the equivalent of this execution of the power) then, as a life estate would be regarded as given to the devisee or legatee, and a remainder to the heirs by the testator's will, and the rule in Shelley's case applying, the life estate given by the will became a fee simple estate or an absolute property."

The principal case is reported and annotated in 4 Call 305 (Va. Rep. Anno.).

†**Deposition—Absence of Deponent—Hearsay Evidence to Prove.**—In Lynch v. Thomas, 3 Leigh 685, the court said: "In *Collins v. Lowry*, 2 *Wash.* 75, it was decided

trial is necessary, when his deposition, taken de bene esse, is offered to be read.

Same—Notice of Taking.†—When a deposition is read at common law, or whether it was taken de bene esse, or in chief, it should appear in the record, upon an appeal, that notice of the time and place of taking it had beer given to the adverse party.

Appeal—Motion to Dismiss—Entering Appearance.‡—The counsel for the appellee may move to dismiss the appeal, for want of an appearance being entered for the appellant, before he opens the record, but not afterwards.

This was an action on the case brought by the appellees against the appellant in the District Court of Northumberland, and at the trial of the issue, the deposition of a witness was read by the plaintiff, to which the defendant objected, and being over-ruled by the court, he filed a bill of exceptions stating, that a witness proved, that he had shortly previous to the Term, seen a gentleman from Alexandria, (at which place the deposition was taken,) who informed him, that the deponent had not long before that, sailed for Europe, and had not returned, and that this was all the evidence in the cause. The record does not state, whether the deposition was taken de bene esse or in chief; or whether notice had been given to the defendant of the taking of it.

76 *Washington for the appellee contended, that the evidence of the witness accounting for the absence of the deponent, was the best which could have been obtained, and that in cases of this sort, it was the practice to admit hearsay evidence to account for the absence of the witness who had given a deposition.

The PRESIDENT. If the deposition were taken de bene esse, the evidence offered to excuse the absence of the witness was defective; if it were taken in chief, no proof upon the subject was necessary. But in either case, notice of the taking of it ought to have been given to the defendant, and as none is stated in the record, the judgment is for that reason erroneous and must be reversed, unless the appellee's counsel supposes he can shew that notice was given, and that the deposition was taken in chief, and prays a certiorari for the purpose, which if asked for, will be granted.

The appellee's counsel declined taking a certiorari, and the judgment was reversed.

Note; after the President had delivered the opinion of the court, Washington moved to dismiss the appeal, no appearance having been entered for the appellant.

By the Court. You might have dismissed the appeal before the record was opened, but it is now too late.

Bernard v. Brewer.

October Term, 1795.

Mills—Record—Notice—What is Waiver of.*—Upon an application for leave to build a mill, it should appear to the appellate Court by the record, that the party whose property is sought to be condemned, had ten days previous notice of the motion for a writ of ad quod damnum. This might be dispensed with, if the record shews that the proprietor appeared and contested the application, upon the merits; a general appearance will not be sufficient.

This was an appeal from a judgment of the District Court of Northumberland, affirming with costs an order of the County Court, giving leave to the appellee to build a mill upon a certain stream, the bed whereof belonged to himself, as well as the land on one side thereof.

Marshall for the appellant, stated the following errors in the record.

1st, That no notice appears to have been given to the appellant of the application to the court for the writ of ad quod damnum. The record states, that the acre sought to be condemned was the property of the appellant, and the act of Assembly expressly requires in such a case, that notice of the motion at least ten days previous to the making of it, should be given to the proprietor.

77 *This law, as well as all others, which takes away from individuals in a summary manner, any portion of their property, must be literally and strictly pursued.

2dly, The inquisition upon the writ of ad quod damnum was taken by the deputy instead of the high sheriff. This being a judicial and not a ministerial act, could not according to the principles of the common law be performed by a deputy. The act of Assembly requires the sheriff to do it, which must mean the high sheriff.

3dly, No notice appears to have been given to Bernard of the taking of the inquisition. The law requires the sheriff to give notice to the proprietor, or to his agent, (as in the case first mentioned) if neither of them were in court at the time the order was made, of the day appointed by the court for taking the inquisition. It is true, the return of the sheriff is "that in pursuance of the writ he had impanelled a jury and proceeded in all things as the said writ required," and that the writ commanded him

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(and very properly) that hearsay evidence that the deponent has left the country, and has not returned, is not sufficient to authorize the reading his deposition."

The principal case is cited on page 689 of Lynch v. Thomas, *supra*.

In 6 Enc. Pl. & Pr. p. 568, it is said: "Hearsay evidence alone that the witness has left the state is not sufficient. *Collins v. Lowry*, 2 *Wash*. 75. But hearsay evidence may be considered, in the discretion of the court, in connection with other proof and circumstances attending the case. Lynch v. Thomas, 3 Leigh 682."

†**Depositions—Notice of Time and Place of Taking—General and Special Objections to Reading of Depositions—Difference.**—The principal case is cited and distinguished in Steptoe v. Read, 19 Gratt. 8. See Jeter v. Taliaferro, 4 Munf. 80.

See monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

‡See monographic *note* on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

*Mills—Record—Notice—What Is Waiver of.—The principal case is approved in Muire v. Falconer, 10 Gratt. 16, but distinguished in Pitzer v. Williams, 2 Rob 251. See the principal case cited in this connection in Fisher v. Smith, 5 Leigh 613.

See monographic *note* on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

In Keystone Bridge Co. v. Summers, 13 W. Va. 504, the court said: "But when irregularities in proceedings to condemn lands have occurred, the Virginia court of appeals applied the same rules with reference to the waiving of irregularities, not affecting the jurisdiction of the court, which occurred in the case, as they apply in all other causes. *Bernard v. Brewer*, 2 *Wash*. 77."

Same—Right of Owners to Condemn Land.—The principal case is cited with approval in Varner v. Martin, 21 W. Va. 546.

to give notice; but in cases of this sort, nothing ought to be left to intendment. It should have been stated in express terms that the notice was given. The court should be unequivocally assured, that the party whose property is to be taken from him, had an opportunity of defending his right. From the literal exposition of the return made by the sheriff, it would seem, that he proceeded according to the command of the writ after he had impanelled the jury, whereas the giving of notice ought to have preceded it.

4th, The law requires the inquisition to be returned to the next succeeding court. Now this is returned to the June court, whereas the next succeeding court was in May.

Warden, for the appellee, admitted, that if the notice required to be given of the motion for the writ of ad quod damnum, could be in any manner useful to the proprietor of the land, the want of it would be error.

But this could not be the case, since the law directs the court to award the writ upon motion, and seems to consider the proper time for contestation to be at the return of the writ. So that if the appellant had had notice, he could not have opposed the issuing of the writ, if, as he had supposed, the court had no discretion to grant, or refuse it.

But admit that notice was important, the appellant has not stated the want of it upon the record, and therefore, the court will presume the judgment below to be right, unless the contrary appear.

78 *The second objection he said was more serious, as the law must be admitted to be as stated by Mr. Marshall. The only difficulty is to decide, whether in this case, the sheriff acts judicially or ministerially? He was inclined to think, that he acted in the latter capacity. His duty is pointed out by the law. The jury are to make the enquiry, and he is in no instance called upon to exercise the functions of a judge. Besides, by the act of Assembly, the sheriff is to execute all process to him directed, either himself, or by deputy. This writ may properly be called the process of a court within the meaning of the law.

In answer to the third objection, he relied, that it was then too late for the appellant to complain of want of notice, when the record states, that he appeared, and contested the writ and inquisition.

The fourth objection he said was founded upon a mistake respecting the times when the sessions of this county court are held.

FLEMING, J.—The first objection stated by the counsel is, that ten days previous notice of the motion for the writ of ad quod damnum does not appear to have been given to the appellant.

All laws, which interfere with private rights, and which authorise a mode of proceeding unknown to the common law, ought to be strictly complied with.

If the record stated that the appellant was present and made defence, the objection might be gotten over. But as this does not appear to have been the case, I am of opinion, that the first objection made to the order is sustainable. It will be unnecessary to give any opinion as to the other objections, if the court should agree with me in opinion upon this point.

LYONS, J.—I have always been of opinion, that the greatest strictness is required in proceedings, not warranted by the regular forms and principles of the common law. That in such cases, an exception from the rule, "that what is done in a court of record, shall be presumed to be rightly done," is proper. On the contrary, nothing is to be presumed, and it should plainly appear that the proceedings were regularly conducted. These, I say, have been the sentiments, which I have always entertained upon this subject. But I have been over ruled by the decisions of this court, where a different principle has obtained, and therefore, submitting to the authority of those decisions, I have been led to consider in this case, how far the principles which they establish, will apply to the first point made in this cause.

79 *It was argued by the counsel for the appellee, that the notice of the motion for a writ of ad quod damnum was not important, as it stood connected with the substantial justice of the case, since the granting of the writ, could not have been contested by the appellant; and that the record shewed, that the appellant afterwards appeared, and defended the motion. If I could discover that the appellant contested the merits of the subject in dispute, I should upon the authority of former decisions in this court, (which in this respect, admit no difference between cases of this sort and those carried on in the forms of the common law,) consider it as a waiver of all objections to the forms of proceeding, and of course, that the failure to give notice of the motion for the writ, could not afterwards be alledged by him as a cause for reversing the order. This court has decided, that after an appearance and defence made upon the merits of the case, the unsuccessful party shall not be permitted to object to any part of the proceedings, of which in an earlier stage of the cause, and before the trial upon the merits, he might have availed himself; as in the case where no issue has been made up. But in this case, it does not appear that the appellant contested the motion of the appellee upon the merits, but only the writ and inquisition. This is what he now contests; what he then had a right to contest, separate from the merits. And therefore nothing can thereby be presumed to be waived.

I do not think that there is any weight in the last objection. The conduct of the sheriff in returning, or in not returning the writ and inquisition to the proper court, ought not to affect the parties. If there had been negative words in the law making the inquisition void unless returned by a particular time, the direction must have been strictly pursued; but this not being the case it was merely directory to him.

I am also of opinion, that the court had no right to award costs in this case, and that in this respect there is error.

The PRESIDENT. I agree in opinion with the other Judges who have gone before me, that if we could be satisfied from

the record, that the appellant appeared, and contested the motion upon the merits of the case, he could not afterwards avail himself of the want of notice in the first instance, to defeat the order. A defence made upon the merits would, I think have amounted to a waiver of all objections to the form of proceeding. But the appearance after the inquisition was returned, and contesting merely the writ and inquisition, does not cure the error which the want of notice of the motion in the first instance had occasioned.

Judgment and order reversed.

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80 *Philip M'Rae v. Richard Woods.

October Term, 1795.

Chancery Practice—Excessive Verdict.*—If the plaintiff at Law, recover more than he is in conscience entitled to, and there is no standard by which a Court of Equity can ascertain the amount of the excess unrighteously recovered, that Court will set aside the verdict in toto.

This was an appeal from the High Court of Chancery, in a suit instituted there, by the appellee against the appellant. The bill states, that the plaintiff in the year 1769 had a lottery, the highest prize in which was some improved lots in Charlottesville and a tract of land, which property, in the scheme of the lottery was estimated at £440. That Roderick M'Rae purchased two tickets, Henry Mullens one, to which the plaintiff added another, the whole forming a joint property, in which Roderick M'Rae owned one half. That one of the partnership tickets (No. 69) drew the highest prize, and was therefore entitled to the property above mentioned. But the ticket so soon as its good fortune was known, was forcibly taken from the said Roderick M'Rae by the defendant Philip M'Rae, who claimed the entire benefit of the prize. That the plaintiff and Mullens having sold their interest in the prize to Roderick M'Rae, the plaintiff conveyed the whole property to the assignee of Roderick. That about fifteen years after this, the defendant commenced a suit against the plaintiff at law, and in the absence of the plaintiff's witnesses, who could have proved the tortious manner in which the plaintiff acquired the possession of the ticket, a verdict was rendered against him for £451: 18: 4 damages, for the whole value of the ticket. The bill prays an injunction to the judgment at law.

The answer states, that half of the ticket in question was purchased by Roderick M'Rae for the defendant, the day before the drawing, and that after it was known to have been fortunate, it was delivered to the defendant by the said Roderick. That the defendant never claimed more than one half of the prize drawn by this ticket.

The evidence, as to the right of Philip M'Rae and the manner of his obtaining possession of the ticket is extremely contradictory.

The subject of dispute was submitted to arbitration by the two M'Rea's (as appears by the testimony of some of the arbitrators), and a decision was given in favor of Philip M'Rea's title to one half of Roderick's interest in the prize. One of the jurymen who tried the cause de-
81 poses that his intention was to *give damages for the whole value of the ticket. Another juryman deposes, that the jury gave to the appellant Philip M'Rae, damages, for the interest which Roderick M'Rae held in the ticket. The declaration filed in the action at law claims the whole ticket, and the verdict is general, "that the defendant did assume upon himself as the plaintiff hath declared against him and assess the damages to £451: 18: 4."

The CHANCELLOR upon the hearing of this cause, directed the issue between the parties in the action at common law, to be tried again; from which decree the defendant appealed.

Marshall for the appellant. I shall object 1st, to the decree in toto; or if I am wrong in that, then 2dly, to so much of it, as directs a trial of the right of the appellant to any part of the ticket in dispute.

Upon the first point I contend, that the bill ought to have been dismissed. The equity stated is, that the appellant was entitled to no part of the ticket, but having obtained the possession of it tortiously, he thereby acquired prima facie an evidence of right, which on account of the appellee's want of testimony at the trial, he was unable to controvert. The equity now set up, (namely, that the appellant was only entitled to a fourth of the ticket,) not being stated in the bill, he had no opportunity given him of controverting it by his answer, nor was it necessary for him to do so; and therefore, whatever proof the appellee might produce as to the extent of the appellant's interest, it was improper for the Chancellor to decide upon it. The appellee might have amended so as to put in issue the point for which he now contends; but not having done so, he is confined to the equity stated in the bill.

The court are not now at liberty to say, that the verdict is wrong so far as it gives to the appellant the value of a moiety of the ticket. All the testimony in the cause proves the right of Philip M'Rea to a moiety, unless it be the award, which is made upon the principles of accommodation, and to which the appellee having objected, it would be improper to allow it any weight in the cause, by considering it as evidence of the rights of the parties.

The Chancellor therefore erred as I conceive in setting aside the verdict. The trial before the jury was a fair one. The appellee does not even charge in his bill that he was surprized, otherwise than by a general assertion, that he was unprovided with testimony, without setting forth who were the witnesses, the benefit of whose testimony he wanted, or what they
82 *could have proved. It does not appear that there was any evidence before the Court of Chancery which was not given to the jury, and they having decided upon the right, the verdict ought not to have been set aside.

***Practice—Excessive Verdict—Remittitur—New Trial.**—The principal case is cited with approval in Vinal v. Core, 18 W. Va. 61; Unfried v. B. & O. R. R. Co., 34 W. Va. 260, 12 S. E. Rep. 512.

M'Rae v. Woods, 1 Hen. & M. 548, is the sequel to the principal case.

But admit the court should be satisfied that the appellant was only entitled to a fourth of the tickets, then I insist secondly, that the Chancellor ought not to have set aside the verdict, but should have injoined one half of it.

In cases where a verdict is vicious in all its parts, or where no standard is furnished by which to modify it, I admit it ought to be set aside in the whole. As in cases where it is unfairly obtained, or where the action is merely founded in damages, as in trespass and the like. But in this case, if Philip M'Rae was entitled to only one fourth, instead of one half of the ticket, then he is as certainly entitled to one half of the amount of the verdict, as in the other instance he would have been to the whole.

As to the part of the ticket for which the jury gave him damages, there is no sort of uncertainty. The whole testimony in the cause proves, that the appellant claimed only one moiety of the ticket. One of the jurymen proves that the damages given, were for that part. A single juryman deposes, that he intended the damages for the whole ticket. Consider what a dangerous precedent it would establish, if in any instance, a single juryman, or even two, should be permitted after a fair trial to set aside the verdict, by saying, that he intended to find in this, or in that way. Such a decision would be in direct opposition to that laid down in the case of Cochran v. Street (ante vol. 1, p. 79,) where the court went entirely upon the evidence of a large majority of the jurors, which proved that they decided upon a mistake.

In opposition to this solitary juryman, is not only the evidence of another juryman, as well as that of many other witnesses, but the amount of the damages assessed, plainly proves, that the verdict was for a moiety only of the value of the property, with interest from the time it was withheld from the appellant.

The right of the appellant to interest, cannot I presume be contested. If the appellee had not wrongfully conveyed the property to Roderick M'Rea, and the appellant had resorted to a court of Chancery to compel a conveyance of the part belonging to him, the mesne profits would have been decreed, and it would have been error to have refused. Having sued
83 for damages, *he was upon the same principle entitled to interest in lieu of the profits. And if the jury ought to have given interest, the court will presume they did do so, and not that they gave damages for the whole value of the ticket, which the appellant did not claim.

Why then shall the verdict be set aside, and the appellant put to sea again to establish his title, which has once been fairly ascertained? If he be entitled only to a fourth, his right to a fourth ought not again to be put in jeopardy, since the jury, having given damages for a half, have furnished this court with a rule to go by, in ascertaining the excess which ought in equity to be injoined.

But if it were necessary for the court to direct an issue at all, it ought to have been one to ascertain the value of the fourth part, and not one, which was to bring the appellants right to any thing, again into question.

Campbell for the appellee. A short attention to the history of this transaction, will furnish a sufficient answer to the first point.

In the suit instituted at law by Philip M'Rae against Woods, he claimed the whole of the ticket, and recovered a judgment for the whole, in damages. Woods applied to the Court of Chancery, setting forth, that tho' Philip M'Rae was in possession of the ticket, yet he obtained it tortiously, and had no title whatever to it. Philip M'Rae, in his answer, admits himself entitled only to one half of the ticket, and upon these proceedings it necessarily and properly became a question with the Chancellor, whether Philip M'Rae was entitled to any, and to what part of the ticket?

There appears to be two subjects of enquiry now before the court. 1st, Can the verdict already found be established? And if not, then 2dly, How ought the court to proceed after setting it aside?

1st, That the verdict cannot stand as it is, is what I confidently insist upon. If it were intended to give the appellant damages for half the ticket, it is unwarranted by the testimony in the cause, which goes completely to prove, that if he were entitled to any thing, it could only be to a fourth.

If damages for the whole ticket were intended, then the appellant's counsel does not attempt to maintain it. Yet one of the jurymen has deposed, that he intended the damages for the whole of the property. This testimony is objected to by Mr. Marshall, who seems to consider a juryman in such a case, as an incompetent witness. Let me ask, if a bye stander
84 had proved misbehavior *would the court who tried the cause, or a court of equity have hesitated to set aside the verdict? It is admitted, that if many jurymen had concurred in proving the same fact, that their evidence would have deserved weight. But let me ask, can the influence of truth depend upon numbers? Or can testimony coming from a juryman be less worthy of credit, than if given by a stranger? If he had been himself mistaken, or if he knew of a mistake in any of his brethren, it was his duty to expose it, that the error might be corrected.

2d, If then the verdict is to be set aside, what is the court to do? It is entire, and cannot be set aside in part and confirmed in part. It is either for the whole, or for half of the ticket. Both are wrong. But whether it be for the one, or the other, this court can at most only conjecture. One juryman says the first, the other the last. Where then is the standard which Mr. Marshall speaks of, by which the court can divide the verdict?

The court must decree either upon the evidence, or upon the verdict. Not upon the last, because that is avowedly wrong. If that be given up, and the court suppose they can with propriety look into the evidence and decide upon that, I am ready to go into it. There is a case in Morgan's Essays, of an action upon a bill of exchange. There were two counts in the dec-

laration, upon one of which, the jury found for the plaintiff; upon the other, there was an improper finding for the defendant. The plaintiff desired to set aside the second finding, and to retain the first. But the court refused, as the verdict was entire. It is argued that the jury are to be presumed to have given interest, because they ought to have done so. But I do not think they ought. Philip M'Rae complains that Woods conveyed to Roderick M'Rae instead of himself. But this arose from the neglect of Philip M'Rae, who had improperly acquired the possession of the ticket, and without which no verdict could have been obtained. But Woods did right in conveying to Roderick M'Rae to whom he had sold the ticket. What considerations then prevailed with the jury in forming the verdict cannot certainly be known by the court.

As to the value fixed upon the property in the scheme of the lottery, it furnishes no standard by which the intention of the jury can be explained.

Marshall in reply. That a verdict is entire at law cannot be denied. But that a court of equity may, when there is a guide to go by, set it aside in part only, 85 is every day's practice. *If the verdict be improper in the whole, as if the trial be unfair, or the whole finding be inequitable, or if it be wrong in part, but the court has no standard by which to distinguish the good from the bad, in such cases the whole verdict ought to be set aside. But if, as in the case of a bond, the plaintiff has recovered too much at law, what does a court of equity do? Not set aside the whole verdict, but injoin so much of it as the obligee in conscience is not entitled to. If it be necessary to direct an issue, the court does so as to the part disputed, but never sets aside the verdict which in the first instance is presumed to be right.

There is a great difference between evidence to prove misbehavior in the jury, and the evidence of a juryman given long after the trial, as to his secret intentions at the time of giving his verdict. The former might be seen or heard, and with respect to which, compleat evidence might be adduced. The latter is concealed from all the world but the juror himself. No other person can know what were the secret workings of his mind. If the juryman in question went upon a mistake, it does not appear that he disclosed it to any person at that time. To permit him now, when impressions have been made upon his mind by one of the parties, to set aside the verdict, would be to establish a most dangerous principle, and such as must prove fatal to the purity of the jury trial.

I still insist, that the jury were right in giving interest, since it was the duty of the appellee to make the deed to the person who had possession of the ticket; he acted improperly in conveying to Roderick, and by taking upon himself to decide the rights of the parties, he is liable to the appellant for the mesne profits, or for interest in lieu of them.

FLEMING, J.—In this case there is a great contrariety of evidence. The arbitrators gave Roderick M'Rae half of the ticket, and Philip M'Rae avers, that he claimed no more. But the declaration demands the whole, and it is probable that the verdict was for the whole, since the amount of the damages very little exceeds the price affixed to the property by the scheme of the lottery. To explain the principles by which the jury were governed, two of that body have been examined, and they differ from each other upon the main point. Objections were made to the examinations of the jurors; but it is not only usual, but I think proper to admit such evidence for the purpose of discovering errors which the jury may have committed. In this case, I should not feel an inclination to be over scrupulous 86 in *admitting testimony, when I reflect, that the appellant acquiesced for fifteen years without asserting his right to the property in question, until better evidence might be lost. I am well satisfied that Philip M'Rae, is entitled only to one fourth of the ticket, independantly of the award and evidence of the juror. He has recovered one half if not the whole, and as I can discover no standard by which to decree him what he is really intitled to, there seems to be no way left, but the one adopted by the Chancellor to do essential justice to the parties. I am therefore of opinion that the decree is right.

LYONS, J.—I think this case has come up too early. The Chancellor does not set aside the former verdict, but only directs an issue to be tried to satisfy his conscience. The question tried and decided by the jury was the right of the appellant to the ticket. The possession was considered, and certainly was at law prima facie evidence of title. But the question is, did the jury give a verdict for the whole of the ticket, or for a part and, for what part? How was the Chancellor to ascertain this with certainty? It is admitted, that the appellant was not entitled to the whole. No way remained, but to direct an issue to try the question for the information of his conscience.

But before the issue is tried, and before it is known what would be the decree of the Chancellor, the party appeals. Ought the Chancellor to be restrained from directing issues to inform him whether a fact be one way or the other? Surely not, and therefore the appeal in this case is certainly premature. The inquiry is merely as to the extent of Philip M'Rae's right. It is nothing to the court of equity how Philip M'Rae came by the ticket; but it is essential to know to what part he is entitled, and the value of it. At present it is impossible for the court to ascertain that point. I therefore think the decree right.

The PRESIDENT.—As I am of opinion that the appellant had no ground to come here at all, I shall not inquire whether he has done it too early, or not. Amidst the clashing testimony in the cause, it is evident to me, that Philip M'Rae had not a right to more than a fourth. As soon as the lottery was drawn, the two M'Rae's began to dispute respecting this ticket. My own impressions are, that Philip M'Rae has no right at all; but I would not for this reason award a new trial, since the ver-

dict which has been fairly found, is in his favor: But the extent of his right is not ascertained.

If then Philip M'Rae was entitled to no more than a fourth, the verdict which gives him much more ought to be corrected.

87 We *were anxious to do this if we could without disturbing the verdict. But we could discover no certain standard by which the court could make the correction. We looked for it in vain in the value affixed to the property in the scheme of the lottery. We then looked for it in the sales, with no better success. The next chance was the verdict; but that appears to be for the whole, because the declaration claims the whole. We next referred to the testimony of the jurors; but they differ upon the subject. The appellant attempted to account for the sum found by the verdict by supposing, that the jury had allowed interest upon the claim, because they ought to have done so, but this is equally unsatisfactory. It is entirely discretionary with a jury, whether they will give interest or not. And whether they meant to give it or not, is perfectly uncertain. My own opinion is, that in this case, interest ought not to have been allowed. Woods gave notice to Philip M'Rae that he would not convey to him, but having together with Mullins sold their interest to Roderick M'Rae, he made a conveyance to him. In 1771, the land is sold as the property of Roderick; it is advertised in the neighbourhood of Philip, and the property is passed from hand to hand; in 1769, Philip having received notice from Woods, seems to have abandoned all intention of recourse against him and applies to Roderick. They agree to a reference, and in 1784, Philip M'Rae for the first time shews an intention to resort to Woods, having no prospect of recovering any thing against Roderick. Woods in consequence of this unreasonable delay has now no chance to recover against Roderick, and therefore ought not to pay interest.

Another mode was thought of by the court, and that was, to direct the jury to value a fourth of the ticket; but against this a considerable difficulty occurred on the subject of interest, in which we thought we had no right to controul the jury.

Upon the whole, I concur with the other judges in approving the decree.

Decree affirmed.

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88 *Newell v. The Commonwealth.

October Term, 1795.

Bribery at Elections — Information — What It Must State.*—In an information against a Justice of the Peace for bribery in the election of a Clerk, it ought to be stated with certainty, that an election was holden, and that, at that election, the vote was given.

A rule was made by the District Court of Washington, that the appellant should be summoned to the next court to shew cause, why an information should not be filed against him for bribery and corruption in his office of justice of the peace, for the county of Wythe, in voting for a clerk of the said county. The defendant appeared in his proper person, and failing to shew sufficient cause to discharge the rule, the information was ordered to be filed. The caption of the information is thus "District of Wythe, Washington and Russel." It states, "that the office of clerk of the peace in each county, is an office of great trust and confidence touching the administration of justice, &c. and that the said office in case of vacancies, is in the disposal of the justices of the peace for the same county. That by an act of Assembly entitled an act &c. the county of Wythe was formed, and it was among other things enacted that the justices of peace to be commissioned for the said county, should meet at the house of James M'Gavock in the said county, upon the first court day after the same should take place, and having taken the oaths prescribed by law, should proceed to appoint and qualify a clerk, provided that such appointment should not be made, unless a majority of the justices were present.

"That upon the first court day after the said county had taken place, viz. on the 25th of May 1790, at the house of James M'Gavock in the said county, a majority of the justices were present, and the said James Newell was then a justice of the peace for the said county, and was then and there present, and did then and there take the oaths of a justice of peace prescribed by law, and a certain W. Crocket and a certain Robert Crocket were then and there candidates for the office of clerk of the peace in the said county. That the said Newell not regarding the oaths of a justice of peace so by him taken &c. upon the day and year aforesaid, at the house of James M'Gavock in the county aforesaid, did unlawfully, wickedly and corruptly accept, receive, and take from the said W. Crocket a corrupt promise that if he the said James Newell, would then and

89 there give his vote in favor *of him the said W. Crocket to be clerk of the peace in the said county, and if he the said W. Crocket were elected, then, he the said James Newell should as a reward for his vote, have from him the said W. Crocket one half of the profits that might accrue to him by virtue of the said office; and that he the said James Newell did then and there, acting in the capacity of a justice of peace, unlawfully, corruptly, and wickedly give his vote in favor of the said W. Crocket to be clerk of the peace in the said county, in consideration of the said corrupt promise, so as aforesaid made by the said W. Crocket, and accepted by the said James Newell, to the great dishonor of the office of justice of the peace, against the form of the statute in such case made and provided, in open violation of the laws, and against the peace," &c.

On the plea of not guilty the jury found the defendant guilty, and amerced him in the sum of £50. The defendant moved in arrest of judgment, and assigned as cause thereof, that the information concludes, that the offence was contrary to the form of the statute in that case made and provided, and in open violation of the laws, and the information cannot be maintained on either the statute, or common law of England, as the assembly of Virginia on the 19th day of December 1788, passed an act,—

*See monographic *note* on "Elections" appended to West v. Ferguson, 16 Gratt. 270.

"entitled an act, to punish bribery and extortion" and that in the act last mentioned, only a qui tam information could be maintained. The errors being over-ruled, judgment was entered for the £50, for the use of the commonwealth, and the costs, from which judgment, the defendant appealed.

Campbell for the appellant. The first exception which I shall take to the proceedings is, that it does not appear the appellant was summoned to shew cause against filing the information, in the manner required by the act of Assembly.

This mode of proceeding, by which the party accused is deprived of a trial by the grand inquest of his country, ought to be so guarded, as to diminish as much as possible the injury which he may experience, from loosing the chance of an acquital by that tribunal. In criminal cases, it is not only necessary that the court should do right, but it should appear in the record of their proceedings that they have done so. Nothing is to be intended. It is not enough then, that the court directed the party to be summoned, but it should appear that he was actually summoned. It is true, the appellant is stated to have appeared, and failed to shew cause against filing the information; but he might have been
90 accidentally in court, and to this *circumstance, may fairly be attributed his inability to shew cause against the prosecution. It has never been decided that an appearance in criminal cases, could cure any error whatever.

2d, This is a prosecution for bribery and corruption in the election of a clerk. I contend that the information ought to have stated, that an election was holden. If a man be arraigned for misconduct in his official capacity, it ought to be charged, that he officially acted. Only one magistrate is stated to have qualified, and it does not even appear that a court was convened.

3d, The offence is not laid to have been committed "within the jurisdiction of the court." I admit, that if there be tantamount words, they will supply the want of those above mentioned. The caption of the information does not more necessarily mean the names of three counties, than it does the names of three persons. But if it do, there is no way by which to infer that the offence was committed within the jurisdiction of the court, but by connecting the caption with the sentence which charges the offence to have been committed at the house of James M'Gavock in the county aforesaid, which is nonsense. We cannot hunt over the intermediate parts of the information, so as to connect the above clause with the caption. There is no precedent where the want of laying a jurisdiction has been considered as fatal, in which an industrious court might not from the whole information have collected enough to remove the objection.

Lastly, I contend that upon the merits of the case the judgment is erroneous.

The offence charged, is either bribery, or the sale of an office. It cannot be the first, because that can be committed only by a person in a judicial capacity. 3. Inst. 145. 147. Extortion may be committed by him who acts ministerially, but bribery cannot. The election of a clerk, though committed by the law to the judges, is a ministerial, and not a judicial act. The legislature might authorize the judges to do an act of a ministerial nature; but it would not therefore change its nature, and become a judicial act.

The information then must be supported, as an offence in the sale of an office.

The act of Assembly against the sales of offices, was passed in October 1792, and this prosecution was instituted in May 1791, so that the appellant cannot be convicted under that act. The statute of Edw. 6. then must be resorted to; and if so, it is liable to the following objection.

91 *1st, The appellant is ordered to be cited to shew cause why an information should not be filed against him for bribery and corruption; instead of which, he is charged with an offence of a different sort. If it be necessary that the party accused should be cited at all, I contend that it is the more necessary, the citation should truly state the nature of the accusation; for otherwise, it would rather serve to entrap than to benefit him. The information cannot be filed without the leave of the court: but the leave granted in this case, authorised an information for one offence, and an information for a different offence is filed; it was therefore filed without leave.

2dly. It is determined in Salk. 411, that the stat. Edw. 6. does not extend to the colonies.

Marshall for the appellee. The first objection is, that the appellant does not appear to have been summoned. But to this, the record seems to have furnished a compleat answer. He is stated to have appeared, which must mean a legal appearance which it could not be unless he were summoned.

The second objection is, that it does not appear that an election took place. It is stated that the appellant received the bribe, and voted for the clerk, which makes the offence compleat, tho' the election from any cause whatever did not take place. The information states that he accepted a corrupt promise, &c. and acting as a justice of the peace did give his vote. He must then have been in court acting in his official capacity.

The third objection is, that no jurisdiction is laid. It is contended that the names of the counties mentioned in the caption, may as well mean men, as counties. But three men cannot make a district; this would be absurd. The information charges, that by law, the justices were to meet at the house of James M'Gavock in the county of Wythe; that they did meet at that house in the said county of Wythe, and that then and there the appellant committed the offence. It follows, that the house was in the county of Wythe, and Wythe is said to be one of the counties composing the district. The offence then must necessarily have been committed within the jurisdiction of the court. Besides, if this be error, it is cured by the act of Jeofails. In England it is determined, that the statutes of Jeofails do not extend to criminal cases, because the first statute being confined to civil cases, the judges construed all those

which followed, in the same manner. It is otherwise with respect to our act of Jeofails, which is not confined to civil cases by any expressions which the legislature have used.

92 *Upon the last objection I would observe, that whatever may have been the English decisions concerning the operation of the statute of Edw. VI. in the colonies, the convention in this state, by an ordinance passed in the year 1776, adopted all the English statutes prior to the 4th James I. not of a local nature. This is certainly not local, since it applies to offices which are as well known here as in England; and if the act of selling them be criminal there, it is equally criminal here.

Campbell in reply. I have contended that it should appear that the appellant was cited. 2 Haw. P. C. 263, may be mentioned against me. To this I answer, that the recognizance there spoken of, was not essential to the defence of the accused; a notice of the intended prosecution was.—The same answer may be given to what is said in the same book .page 270; the oath was required for greater solemnity, but was not necessary to the defence of the accused.

2d point. 2 Hawk. P. C. 225, shews the certainty necessary in an information. The information states that a majority of the justices were present, but not that they held a court, and unless they did so, the justices might have been present on other business, and not in their official capacities.

3d point. The caption is no part of the indictment, 2 Hawk. P. C. 165 to 169. It cannot therefore be referred to, to shew the place at which the offence was committed, tho' it may be, for the purpose of shewing, that the court was holden within the extent of the commission.

4th point. If the stat. of Edw. VI. were adopted by the ordinance of Convention, yet that ordinance was repealed by the act passed in December 1782, which declares, that no English statute or act of parliament shall have any force in this commonwealth.

ROANE, J.—Several objections were made at the bar tq the information and proceedings in this case. As there is one which I deem substantial, it will be unnecessary to take notice of the others. It is not alleged in the information that an election was holden, or that at that election, the vote was given. The prosecution, as appears by the order for a summons, and from the whole tenor of the proceedings, was for bribery in the election of a clerk. But is the offence properly set forth? Though I am well satisfied that an election took place, and that upon such election a corrupt vote was given, yet as implications can never without danger be admitted in criminal prosecutions, whether they be by information or indictment, I

93 *cannot judicially know the fact unless it be certainly alleged.

It is not certainly stated that the other judges were sworn, that an election was holden, or that the vote was given at that election. If the information had been sufficiently particular in these respects, the validity of the election would have been immaterial. But the vote, from all that appears in this information, might have been a solitary one by Newell, and not social with his companions; and I hold it to be exceedingly clear, that wherever an election depends upon the votes of a particular body composed of many individuals, it should as plainly appear that an election was holden by that body, as that the individual accused voted at it, for the statute against the sale of offices will not in such a case apply to an individual exercise of the power of appointing. If the appellant gave a solitary vote, it was not an offence within the meaning, because it could not be within the mischief of the statute, for such a vote could not confer even a colorable title to the office. Neither do I conceive that the case would in this respect be different at common law, supposing that a promise of a reward would constitute the offence at common law. I am therefore of opinion that the offence is not sufficiently set out in this information, to authorise a judgment either under the statute, or at the common law. The judgment I think, ought to be reversed.

CARRINGTON J.—I am clear that the information wants that precision necessary in all criminal prosecutions. We can presume nothing, and since it was essential that an election should have been holden, and the vote then given, it ought to have been clearly alleged, and cannot be intended. I agree with my brother Roane, that the information is insufficient, and ought to be quashed.

LYONS J.—I concur in opinion with the other judges, that the information has not certainty enough in describing the offence. It ought to appear that the offence existed otherwise than in intention: and that it was actually carried into execution, which could only be, by an election having been holden, and the corrupt vote then given.

The PRESIDENT.—We all agree that there is not sufficient certainty in the information in describing the offence. It is not sufficiently alleged that a majority of justices qualified; that a court was holden, tnat an election took place, and that the vote was then given.

Judgment reversed with costs, and the information quashed.

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94 *White v. Atkinson.

October Term, 1795.

[1 Am. Dec. 470.]

Specific Performance—Contract during Existence of Paper Money.*—An agreement was made to sell land, during the existence of paper money, part of the money to be paid in June 1780, when a conveyance was to be made, and the residue in twelve months thereafter. The money was not paid, or

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***Specific Performance — Vendee — Depreciated Currency.**—The principal case is cited in Lohman v. Crouch, 19 Gratt. 352, as authority for the proposition that when a contract for the purchase of land is made in a currency which is already greatly depreciated, and which is constantly undergoing still further depreciation, specific execution will not be decreed in favor of a vendee who is in default, upon his merely paying the purchase money and interest according to the contract.

See monographic *note* on "Specific Performance" appended to Hanna v. Wilson, 3 Gratt. 243.

Equity Court—Condition of Relief—Imposing Terms.—In Booten v. Scheffer, 21 Gratt. 493, the court said:

tendered at the day, nor was a conveyance made. Upon a bill by the vendee for a specific performance, he was, under the circumstances of the case, decreed a conveyance, upon his paying the value of the land at the time of the contract, instead of the value of the purchase money agreed upon, according to the scale of depreciation.

This was an appeal from a decree of the High Court of Chancery in a suit instituted there, by White against Atkinson, for the conveyance of a tract of land, sold by Coleman, the agent of Atkinson, to the appellant.

In November 1779, Coleman, the agent of the appellee, contracted with the appellant to sell him a certain tract of land belonging to the appellee, according to certain metes and bounds, for the price of £6 per acre, the quantity to be afterwards ascertained by a survey. Two thirds of the purchase money was to be paid in the months of May, or June following, when a title was to be made, and a bond was to be given by the appellant for the balance of the purchase money, payable in twelve months thereafter, and to carry interest from the date. The survey was accordingly made in March 1780, and the quantity ascertained, at which time a memorandum in writing was signed by Coleman and delivered to the appellant, expressive of the contract before mentioned, except as to the time of payment of the two thirds of the purchase money which is stated in the memorandum to be when the deed should be acknowledged by the appellee.

The bill charges, that a tender of the money was made to Atkinson in specie, according to the scale of depreciation, but there is no proof of it, nor that even a demand of a deed was made and an offer to pay, until long after paper money had ceased to circulate.

The defendant Coleman admits in his answer, that a deed was neither made, nor tendered by Atkinson, but that he agreed late in the year 1781, that White should have a conveyance, if he would then pay the money. No deed was ever executed, nor was any part of the purchase money paid, except £18 paid by White to M'Craw, a creditor of Atkinson's, and for which he had credit with the said M'Craw. It also appears, that long after the contract was made, White was willing to make payment, if he could have obtained a conveyance, but the parties differing about the value of the money, nothing was done.

Upon a hearing of this cause, the High Court of Chancery decreed, that the defendant should convey the land in question to the plaintiff, upon his tendering, or paying to the defendant so much money, as with £18, was equal to the value of the land, on the last day of June 1780, to be established by a jury on an issue to be tried for that purpose.

95 *The verdict upon this issue being certified, it was decreed that the plaintiff should over and above the sum found by the jury, pay to the defendant the interest thereof, to be computed from the last day of June 1780, and the costs expended by Atkinson, as well on the trial of the issue, as in the said Court of Chancery, upon Atkinson's executing a sufficient conveyance of the land in question to White and to his heirs, and delivering the same, or (if refused by him) depositing it with the clerk of the court.

From this decree White appealed.

Campbell for the appellant. I admit that he who applies to a Court of Chancery for equity is bound to do equity. But the question is, what is that equity which the contract in question required the appellant to do? The court cannot possess an arbitrary power of deciding what the party shall do who applies for equity, but must be governed by general rules and principles which bind that court. What then was the contract sought to be specifically executed? That Atkinson should convey the tract of land to White, and should receive payment at the rate of £6 per acre, two thirds at the time the conveyance should be made, and the residue in twelve months thereafter, for which a bond was given. This is proved by the written paper delivered by Coleman to White.

The argument of hardship drawn from a depreciation of the paper money, is repelled, by considering that it was in the power of Atkinson at any time to coerce the payment of two thirds of the money by tendering a conveyance.

But I ask, could the depreciation of the money furnish a sufficient reason for the decree given in this cause? Suppose the money had appreciated, and Atkinson, who had it in his power to enforce payment of the money, had sued at law for the purchase money, or had applied to a court of equity for a specific performance; could either court have protected him from the payment of the money at its encreased value? surely not. Ought not the same principle then to exist where the purchaser seeks a specific performance? The tobacco contracts made during the war have uniformly been enforced, and they were not less oppressive upon the debtors. The court is called upon to carry a contract into effect; instead of which, a new one is made for the parties,

"The rule sought to be enforced here, is the very reverse of that established in *White v. Atkinson*, 2 *Wash.* 94. In that case the sale was made in 1779, during the existence of paper currency. The purchaser was in default in the payment of the purchase money. The court, as a condition of relief, decreed that he should pay the fair value of the land at the time of the sale, instead of the value of the currency agreed on." The principal case is cited in this connection in Carter v. Ragland, 21 Gratt. 577; Taliaferro v. Minor, 1 Call 532; Lohman v. Crouch, 19 Gratt. 345, 353; Hughes v. Caldwell, 11 Leigh 352.

In Lohman v. Crouch, 19 Gratt. 342, the court, in reference to the principal case, said: "The reasoning of all the judges in that case shews that if it had been a specie contract, performance of it would have been decreed upon the payment of the purchase money, as agreed, with interest; but in view of the fact that it was made on the fluctuating basis of a depreciating currency, it was held that the purchaser under such circumstances should be required by the court of equity, whose aid he was seeking, to do equity, which was deemed to be, in that case, to pay the value of the land at the time of the contract, instead of the value of the money agreed upon. There the purchaser did not punctually pay, nor offer to pay, the purchase money according to his undertaking. Here, however, the facts are quite different."

Paper Money Contracts—Scale of Depreciation.—The principal case is cited with approval in Dearing v. Rucker, 18 Gratt. 468; Bierne v. Brown, 10 W. Va. 761; Gilkeson v. Smith, 15 W. Va. 60.

See report of the principal case in 2 Call 376.

and the purchaser is decreed to pay according to the value of the land, instead of the value of the money at the time of the contract.

It appears that White had the money ready to pay for the land, though he did not legally tender it, nor demand a conveyance. But I contend it was not necessary for him to do either. *It was the duty of Atkinson first to acknowledge the deed, or to inform White that he was ready to do so. But he did neither, and to permit him now to demand the money at the value stated in the decree, is to suffer him to avail himself of his own wrong. Besides; if the legislature of a country shall declare iron, leather, or any other thing to be money, and shall give to it a certain value, I cannot understand how any court can establish a different standard of value.

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Marshall for the appellee. This is a case where precedents cannot be expected. Men differed as much in their opinions respecting the value of paper money, as upon any subject whatever. The legislative declaration respecting depreciation, could not regulate the various opinions of men as to the value which they annexed to the money at the time they were forming their contracts.

Suppose in this case, the appellant had brought his suit at law for damages; the jury would not have been bound by the arbitrary value put upon the money by the legislature, but would have given such damages as they thought the party in justice entitled to. But if he prefer an application to this court for a peculiar relief, which no other tribunal could afford him, he must submit to the rule of this court, which requires him to do equity, in return for the equity he seeks. Upon this principle it is, that a mortgagor coming here to redeem his estate which is forfeited at law, must do equity by paying other debts due to the mortgagee, tho' not secured by the mortgage. The court lay him under these terms, not because the parties have agreed to it, but because it is equity. Might not all the arguments used by Mr. Campbell in this case, apply with equal weight to the one just mentioned?

I do not agree that the contract is as stated by Mr. Campbell. The bill describes the agreement agreeably to the memorandum given to White by Coleman. This is denied in the answer, and Coleman states, that the money was to be paid in the June following and then the conveyance was to be made. The appellant then has been the cause that the agreement has not been executed, and yet seeks to gain an advantage by his own wrong.

Campbell in reply. In cases where the specific execution of an agreement is asked for, the court may refuse to interfere if the contract be inconsistent with the principles of equal justice & good conscience, but if it do interfere, the terms of the contract must be pursued. But this decree cannot upon any principle be right. The most which the court could have required of the appellant, was to convey according to the value of the paper money at the time it ought to have been paid, and not

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*the value of the land; this would be to take from the appellant a good bargain which he may have made, and which, having made fairly, he was entitled to enjoy. The case of an application by the mortgagor to redeem, is not apposite. There, the court goes upon an implied agreement of the mortgagor, that the subsequent loan should be secured by the mortgaged property; for as to debts contracted prior to the mortgage, the principle does not apply.

ROANE, J.—This is a bill praying for the specific execution of an agreement, whereby, the agent of the appellee contracted to sell to the appellant a tract of land, for the consideration in the bill mentioned. The appellant alleges this contract to have been made on the 18th of March 1780, but as the memorandum then given, and on which he seems to rely, is consistent with the declaration of Coleman the agent, in his answer, that the contract was really made in the November, or December preceeding; and as Barkesdale a witness in the cause, states his belief, that this land was sold prior to the year 1780, I shall consider this contract as really made in one of the said months of November or December; and as Coleman the agent of the appellee admits, it might have been in the month of December, (which admission is to be taken most strongly against the party who makes it) I shall fix upon the month of December 1779, as the time of the contract. This contract was a general one, by which the agent of the appellee, agreed to sell the land in question to the appellant for £6 current money per acre; whereof two thirds was to be paid in the months of May or June following, when a deed was also to be executed, and for the balance the appellant was to have a longer credit. The appellant did not punctually pay the money according to his undertaking, and although he afterwards shewed a willingness to do so, it was refused by the appellee, because of its depreciation. The appellee also refused to give a conveyance of the land, unless the appellant would make such a settlement and payment, as would be satisfactory to his agent, Coleman. Thus matters rested untill after the abolition of paper money, when White exhibited his bill.

This case is not as I conceive distinguishable from the common one of a bill for the execution of an agreement, after a failure of payment on the part of the purchaser, except so far as a distinction may arise from the situation of this country at the time of the transaction, in respect to its circulating medium. *I will therefore consider this case 1st, as independent of that circumstance: and 2dly, as affected by it.

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It will not, I presume, be denied, but that in the case of a general agreement, made in times when the currency is permanent, and unattended with any peculiar circumstances, a court of equity would decree a conveyance upon payment of the principal money contracted for, and legal interest. It would make such principal money the measure of that which the purchaser is to pay, on one of two grounds; 1st, as being

a fulfillment of the very agreement made on the part of the vendee, and consented to by the vendor. Or 2dly, if it should be proper on the ground of there having been a forfeiture, to consider what is a just compensation, it could fix upon no criterion whereby to estimate this compensation so proper as the contract of the parties themselves.

There is no doubt, but that if the real value of the property sold is to be regarded, it ought to be ascertained as at the time of the contract; and the opinion of both parties as to such value at that time, ought to be conclusive upon both.

That is however the case of a contract in currency of a fixed value, and for the non-payment at the time it became due, the law has settled the equivalent, namely, 5 per centum per annum. But the case now under consideration is that of a contract made in a depreciated and depreciating currency. We will therefore consider how it is affected by that circumstance. I very readily admit, that where a party against whom a bill is brought for the specific execution of an agreement, shews that such would be unconscionable, and prays that it may not be decreed but upon such terms as are just, a court of equity may impose such terms upon the plaintiff, and if he will not submit to them, may dismiss his bill. But to decide what are, and what are not such equitable terms as the court ought to impose, will depend upon the circumstances of every case, and upon the exercise of a sound discretion by the court. I say of a sound discretion, because it ought not to be an arbitrary one, and in particular, it should respect the laws of the country, and so far as may be, the agreement of the parties themselves. The act of 1781,—establishing a scale of depreciation, and declaring that out standing current money contracts should be regulated by such scale as at the date of such contracts,—appears to me, in effect, to have converted such current money contracts into specie contracts; for it declares that such shall now be discharged by as much specie, as shall appear, by the application of the scale, to
99 have been *then (viz. at the date of such contracts) the value of the current money. In the case of specie contracts generally (as is above supposed,) upon payment of the sum contracted for, and interest, a specific execution would be decreed. But the case is not different in substance where the contract was for paper money: to value of that paper money, and not the numerical sum, is what the vendee is bound to pay, and the vendor entitled to receive. If the scale forms a just rule for ascertaining the value of paper money in specie, by the application of it to the current money contract of the parties, we can find the value in specie of that which was contracted to be paid, not less truly, than if the contract had been for specie itself. And the seller can no more complain of receiving such a sum with interest, as being less than he contracted to receive, than he could complain of receiving principal and interest in case of a specie contract. The legislature have established this scale as a just rule, whereby to settle paper money contracts in specie. It was no doubt made after the deliveration, and upon good information. It has been generally acquiesced in by the people of this Commonwealth, and has prevented much litigation. It affords, I suppose the best rule for ascertaining the value of the paper money, having been made by those, who represented every part of the state, and had the best opportunity of judging. The opinion of the Court of Appeals in the case of Hill v. Southerland's executors (ante vol. 1, p. 128) does not preclude me from considering this scale as affording a just rule or estimating the value of paper money, as it respects the years posterior to 1778. Perhaps, that case impliedly admits the scale to afford a just rule, except as to the years 1777, & 1778. At any rate, I have no data whereby I am justified in saying that as to the contract in question, the scale does not afford a just rule. But the appellee alleges, that he had immediate use for the money, and that he sustained an injury by the want of punctuality in the payment. If he had shewn to the court the amount and particulars of the injury, and moreover, that he had apprized the appellant that his situation was so peculiar as to render punctually in the payment important to him, I will not say, but a court of equity would lay hold of those circumstances to vary the decision, which I think ought now to be given. But it seems to me, that without such data, we ought not to go into the consideration, how far the seller may have sustained a loss by the non-payment of the money when due. Neither ought the purchase to be affected by a loss resulting to the seller on account of any peculiarity in his situation, when such situation was not made known to him.

100 *In fact, the pretension which I am now considering, would as well apply to a specie, as to a paper money contract; with this additional circumstance attending the latter, that the money if paid, might have been refused by the appellee's creditor, and in that event, or if he were not himself a debtor, it might and probably would have died in his hands by the abolition of that currency. I might here add, that such was the peculiar situation of this country during the existence of paper money, that many, if not most creditors were ruined by a punctual performance of contracts made on credit; whereas it was by the virtuous and honourable conduct of some debtors in withholding payments, that many creditors were sheltered from destruction.

The 5th section of the act of 1781, establishing a scale of depreciation, gives to the court a power to depart from such scale, where circumstances shall arise, which in their opinion would render a determination according to it unjust. Such a power I have already admitted is exerciseable by a court of equity, upon an application like the present, independent of this section, where the circumstances will justify it. What those circumstances are, which are contemplated in this section, I will not undertake to say; but it would seem to me that they must be such as are peculiar to that very case, and not such as are common to every

case. The one now under consideration appears to exhibit no circumstances which may not reasonably be supposed to attend every paper money contract, which was not punctually complied with. But it is said, that the court ought in this case to depart from the scale, because otherwise, the appellee will not get the value of his land. The counsel for the appellee candidly acknowledged that he did not place his hopes of setting aside the contract in the present case, upon the equality of the sum produced by the scale, compared with the real value of the land. Indeed a contrary doctrine would involve the court in a difficulty, where to draw the line, if every (even the minutest) inequality, should not be deemed sufficient to justify a departure from the scale; but before we can say that a given sum is unequal to the value of the subject, that value itself must be ascertained.

In the present case, the value of the land at the time of the contract, is not ascertained, otherwise than by the original contract of the parties. There are two witnesses who say they think the land was worth fifty pounds of tobacco per acre; but what was the value of the tobacco in specie at that time, or whether these witnesses are credible, this court cannot undertake to
101 say. *A jury has also said the land was worth six shilling per acre. But the time to which their valuation has reference, was six months posterior to the time of the contract, within which period, the land might for any thing known to the court, have considerably risen in value.

Upon the whole, as by the application of the scale of depreciation, (which in this instance in presumed to afford a just, as well as a legal rule of liquidation,) to the current money contract of the parties, we can precisely ascertain the value in specie which was contracted to be given for the land, at the time the purchase was made, such application ought to have formed the criterion by which the Chancellor should have estimated the compensation to be paid by the appellant, and by this rule, the appellee will receive more in value than he would, if the money had been punctually paid, in consequence of its progressive and rapid depreciation.

I am of opinion therefore, that the decree should be reversed, and modelled as to the compensation, according to the ideas above stated.

FLEMING, J.—It is a rule at law, that the breach of one covenant, cannot be pleaded in bar to another. The appellant might have brought his action at law, and if he had, he must have proved performance on his part. Instead of resorting to a court of law, he has applied to a Court of Chancery for an equitable relief, and therefore, he must submit to the rules of the court which require him to do equity. This, is certainly very different from common cases. The agreement was made at a time when money was much depreciated, and was every day still farther depreciating. This condition of the circulating currency was known to both parties, and therefore punctuality was more necessary than it would have been, if the value of the money had been stationary. Since therefore, the appellant made the first breach in the contract, which operated to the injury of the other party, he is not entitled to the relief he asks for, but upon the terms of his doing equity: and this consists in his paying the real value of the land at the time of the contract. This was properly preferred by the Chancellor to a dismission of the bill, since the appellant had paid part of the money, and very probably had made some improvements. I am for affirming the decree.

CARRINGTON J.—When this cause was first brought on, I was struck with the impropriety of interfering with the contracts of parties. But upon fuller consider-
102 ation of the circumstances *of this case, I think that justice cannot otherwise be done. The real value of paper money was very little known to any person. There were few, who were not deceived by it. A want of punctuality never failed to produce a loss, and the longer payment was delayed, the more the loss was accumulated. The parties in this case certainly had depreciation in view, and Atkinson, may have calculated upon the use of the money, if punctually paid at the time agreed upon. Beyond that time no calculation could have been made. As to the payment of the money, it ought to have preceded the conveyance, and it is evident that White himself thought so from his conduct. Yet it does not appear that he tendered the money, or had it to pay. It is clear that White forfeited all his rights under the contract, at law, and then the question is, in what situation does he stand in a Court of Equity. The Chancellor instead of dismissing the plaintiff's bill, more properly decreed a conveyance upon the equitable terms of his making compensation; the standard of which compensation he very rightly considered to be the value of the land, as ascertained by a jury. I am of opinion that the period to which the valuation should have related ought to have been that, when the contract was made, and not that, when the first payment was to be made. The difference in this case is not important, but if either party requests an issue to try the value at the date of the agreement, I have no objection to indulging him. As to the danger of a precedent like this, I think that all such cases must depend upon their particular circumstances, and that the opinion now given will not apply in a case precisely like the present.

LYONS, J.—The general rule in executory contracts respecting personal things is, that if the purchaser does not pay and take away the property in convenient time, the seller is not bound, and may dispose of it again. If earnest be given, the vendor must request payment of the consideration, after which he is absolved from the bargain if it be not paid. In cases of sales of real property, the rule of equity is; that though a forfeiture take place at law by a failure on either side, yet if it be a case lying in compensation, a Court of Chancery will relieve against it. But if that court do interfere, it must be in cases perfectly fair, equal and just. Another rule in a court of equity is, that he who would receive the benefit must sustain the loss. Here then occurs the difficulty of the case. The legislature

have established a scale, by which to
103 ascertain the sum in *specie which
should be paid in discharge of contracts entered into at particular periods, whilst paper money was in circulation. This law was very properly passed, for otherwise the value in each particular case must have been ascertained by a jury, in the same manner as in actions for foreign money. This would have produced infinite trouble and litigation, which this law, (affording I believe the best general rule) is wisely calculated to prevent. It is of more consequence that the law should be fixed and known, than that it should always be strictly just. The debtor is to pay according to the scale at the date of the contract, because, as the payment was not punctually made, by which the debtor had the benefit of the money, and deprived the creditor of the use of it, the debtor ought to bear the loss by depreciation. This rule would have been enforced, if the creditor had brought his suit to coerce payment. This furnished an equitable course of reasoning with the Chancellor to depart from the scale, when he was applied to for equity. On the other hand if the creditor refuse the money when tendered, or if there be other circumstances to warrant a departure from the scale, it may be made; in no other case, can a smaller sum be allowed; in none more.

The scale is binding where the creditor sues. But where the debtor applies for equity, the rules which govern courts of equity may properly be applied to him. The case of Wilson and M'Rae v. Keeling, (ante vol. 1, p. 194,) went upon the principle, that he who would have sustained the loss shall have the benefit. So here, if the money had been paid, a specie debt might have been discharged with it, or it might have been applied to other valuable uses. I agree, that the time when the contract was made, was the proper period for fixing the valuation of the land, and that in this respect the Chancellor was wrong.

The PRESIDENT.—To view this case as a general one, unaffected by the particular circumstances which attend it, the appellant has wholly failed in performing his part of the agreement. It does not appear that he was ready to do so during the whole year. If White had brought his action at law he could not have succeeded, without averring and proving performance on his part, or that he was ready to perform. The agreement therefore was entirely forfeited at law, and how does he stand in a Court of Equity? He has paid part of the purchase money, and has perhaps made improvements upon the land. This being a case where compensation can be made, a Court of Chancery will relieve, but upon
what terms? If the contract
104 *had been made in specie, the value
fixed by the parties would have furnished the just measure of retribution. But even in cases of specie contracts, I will not say that this measure would in all cases be resorted to. Suppose a man sells at half price upon condition of punctual payment, calculating upon an ability which he might thence derive of making a beneficial investiture of the money. Suppose it should appear that he had lost this advantage by want of punctuality. The court I think would properly depart from this rule, and might refuse to relieve but upon payment of the full value of the land. However this might be, it is certain, that in a case of a contract made in paper money where the scale furnishes no just rule for fixing the value of the money, the rule above mentioned ought to be departed from. No juror can say what were the ideas of the parties as to the value of the money at the time of the agreement.

The act of 1781, furnishes a good general rule for scaling paper money contracts; perhaps the best which could have been made. But it is certainly not just in all cases. What is the objection to the measure of compensation adopted by the Chancellor? Because the appellant had got an advantageous bargain, it is supposed hard to deprive him of it. But why is he deprived of it? Why did he not perform those acts which entitled him to retain the advantage? This court does not deprive him of it; he has been himself the cause of its being lost.

I agree with the other judges, that the period to be fixed for ascertaining the value of the land was that, at which the contract was entered into. The difference in specie is not considerable, but if either party wishes an inquiry (at his own expence) according to this opinion he may be gratified.

The opinion and decree as entered, is as follows, viz:

"That there is no error in the principle of the said decree, so far as it subjects the appellant, to the payment of the specie value of the land, as a condition upon which the land is to be conveyed to him; and although the value at the time of the contract should have been enquired of, instead of the value at the day of payment, yet as the difference is probably trivial, and not equal to the expence and trouble which would be incurred by a new trial of the issue for that purpose, the verdict of the jury ought to stand as the valuation, unless either party shall choose at his own expence to have such new enquiry made in which case a new issue ought to be made up, and tried by a jury, to ascertain what was the specie value of the land at the time of the contract; and
that there is error in the decree
105 *in this, that the appellant is decreed
at all events to pay the money and take a conveyance of the land, instead of allowing him the option of abandoning his claim, and losing the money he has paid. Therefore it is decreed and ordered that the said decree be reversed and annulled, and that the appellant pay to the appellee Roger Atkinson, as the party substantially prevailing in this court, his costs by him about his defence in this behalf expended. And this court proceeding to make such decree as the said High Court of Chancery should have pronounced, is of opinion, that the appellant having failed to perform on his part the agreement sought to be carried into execution, had forfeited all claim to the aid of this court for that purpose, but having paid part of the purchase money, and probably made improvements on the land, he ought to be relieved against that

forfeiture upon making the appellee Roger Atkinson just compensation, the rule of which ought to be the value of the land at the time of the contract; and altho' that value usually is, and ought to be in such cases considered as fixed by the contract when specie of stable value is the medium of payment; yet in this case, where that medium was to be in paper depreciated and rapidly depreciating at the time, the contract affords no just rule for ascertaining the specie value of the land, which was therefore properly enquired of and settled by the verdict of a jury, and ought to stand as the rule of compensation; therefore, it is further decreed and ordered, that upon the appellant's paying or tendering to the appellee Roger Atkinson, within three months from the time of his being served with a copy of the final decree in the High Court of Chancery the sum of one hundred and twenty eight pounds, two shillings, with interest thereon at the rate of five per cent. per annum from the last day of June 1780, till payment, and the costs of this suit, the said appellee shall execute a good and sufficient deed or deeds for conveying to the appellant the land in the proceedings mentioned in fee simple with a general warranty, but if the appellant shall fail to make such payment or tender, within the time aforesaid, that his bill in that case shall stand dismissed with costs. But if either party shall upon this decree being certified to the High Court of Chancery apply to that court and desire a new enquiry to be made by a jury at his expence, what was the specie value of the land on the last day of December 1779, an issue shall be made up, and directed to be tried by a jury to ascertain such value at that period;
106 *which being tried and certified to the satisfaction of the said High Court of Chancery, shall stand as the rule of compensation instead of the former valuation, and with the interest thereon from the said last day of December 1779, after deducting the eighteen pounds paid, be paid or tendered to the appellee Roger Atkinson, within such reasonable time as shall then be allowed by the said court to entitle him to the conveyance in the above decree mentioned, or subject him to the consequence therein stated in case of this default."

Martin & William Picket v. James Dowdall.

October Term, 1795.

Northern Neck*—Forfeiture of Land—Noncompliance with Rules of Office.—Lord Fairfax had a right to establish rules of office for granting lands within the Northern Neck; and in case of forfeiture incurred by non-compliance with those rules, he was at liberty to grant the same lands to other persons. The issuing of a warrant to a second applicant, was a sufficient evidence of his intention to take advantage of the forfeiture.

Same—Same—Entry for Forfeiture.—An entry by lord Fairfax for a forfeiture was not necessary, except where a grant had been made to the person incurring the forfeiture.

Same—Knowledge of Rules of Office Presumed.—Persons taking up lands in the Northern Neck, are to be presumed conversant of the rules of the office.

Owner of Survey — Laches — Forfeiture — Notice.†—Where the owner of a survey has forfeited his right, by not obtaining a grant within the time prescribed, notice to a subsequent applicant will not affect his title, unless the original claimant was prevented by fraud from perfecting his title.

Grants—Relation.‡—A grant relates back to the warrant, which is the inception of title; but not if it would work an injury to others, by destroying intervening rights fairly and legally acquired.

Legal and Equitable Rights—How Divested.‖—Legal rights, once vested, must be legally divested; but equitable rights may be lost by abandonment.

This was an appeal from the High Court of Chancery, in a suit brought by the appellee against the appellants for the conveyance of two tracts of land. The case was as follows: James Crap, in the year 1741, obtained a warrant from the office of lord Fairfax for surveying a certain parcel of land lying in the Northern Neck. The survey was made and returned in the same year, but no further steps were taken towards obtaining a grant by Crap, who died in 1773. His son, assigned all his right in the said land to the appellee, not considering it worth the expence of obtaining a grant. It appears by the deposition of one witness, that the plaintiff applied at the office for the papers, (but at what time is not stated,) and that they could not be

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*Northern Neck—Title of Lord Fairfax.—Lord Fairfax had a good title in fee to the soil of the Northern Neck, as admitted by the act of 1736, 1 Rev. Code, ch. 89, and recognized in adjudged cases by this court. Stephen v. Swann, 9 Leigh 404, 414, citing Hite v. Fairfax, 4 Call 42; Picket v. Dowdall, 2 Wash. 106; Johnson v. Buffington, 2 Wash. 116; Curry v. Burn, 2 Wash. 121; Marshall v. Conrad, 5 Call 364; Fairfax v. Hunter, 7 Cranch 603.

Same—Same.—In Fairfax v. Hunter, 7 Cranch 603, 619, it was held that Lord Fairfax, at the time of his death, had the absolute property of the soil of the waste and unappropriated lands in the Northern Neck, and the acts of ownership exercised by him over that land vested in him a complete seizin and possession thereof. The court said: "On this point we have the satisfaction to find that our view of the title of Lord Fairfax seems incidentally confirmed by the opinion of the court of appeals of Virginia, in *Picket v. Dowdall*, 2 *Wash.* 106; Johnson v. Buffington, 2 Wash. 116; Curry v. Burns, 2 Wash. 121."

Same—Equitable Title to Land in.—In Norman v. Cunningham, 5 Gratt. 77, JUDGE BALDWIN said: "It is clear that James Tutt acquired a good equitable right to the tract of land in the record mentioned. His warrant from Lord Fairfax, his survey under that warrant, and his subsequent claim and possession, without any proceedings had for forfeiture, or any adverse claim whatever, gave him an unquestioned and unquestionable right to demand a patent from the lord proprietor, or from the commonwealth as his successor, upon payment of the office fees and commutation money. *Picket v. Dowdall*, 2 *Wash.* 106; Johnson v. Buffington, 2 Wash. 116; Curry v. Burns, 2 Wash. 121; Countz v. Geiger, 1 Call 190."

See the principal case cited in Noland v. Cromwell, 4 Munf. 168; Curry v. Burns, 2 Wash. 123, 125; Stephen v. Swann, 9 Leigh 420; Nelson v. Suddarth, 1 Hen. & M 361; Johnson v. Buffington, 2 Wash. 120.

Same—Subsequent Grants—Recital of Prior Forfeiture.—In Alexander v. Greenup, 1 Munf. 142, 4 Am. Dec. 543, the court said: "In the case of *Picket v. Dowdall*, 2 *Wash.* 106, it was said by JUDGE PENDLETON that in subsequent grants the prior forfeiture of a former grant should be recited, and the reason of this was given by Mr. Marshall, one of the counsel: It is that, if the prior forfeiture were not recited, the former grant might prevail over the latter."

†**Owner of Survey—Laches—Forfeiture—Notice.**—The principal case is cited in M'Clung v. Hughes, 5 Rand. 483.

‡**Patents—Doctrine of Relation.**—That the patent, which is the consummation of the title, does, in equity, relate to the inception of the title, see Taylor v. Brown, 5 Cranch 234, and the principal case cited in Noland v. Cromwell, 4 Munf. 172. But see the principal case cited in M'Clung v. Hughes, 5 Rand. 478, in which the court disapproved this doctrine.

In M'Clung v. Hughes, 5 Rand. 480, the court said that the propositions laid down in Taylor v. Brown, 5 Cranch 234, in respect to the doctrine that the patent relates to the entry as the inception of the title, and that an entry made upon land not patented is invalid, are not supported by any decision of the Virginia court of appeals.

‖**Rights—Abandonment.**—As to the loss of rights by abandonment, see the principal case cited in Holmes v. Cleveland, etc., R. Co., 98 Fed. Rep. 107.

then found; but they were afterwards found in the year 1786, or in 1787. A grant of the land to Crap was made out and registered in the Proprietor's office, but it was never executed by lord Fairfax. In December 1788, the appellee applied for and obtained a grant for these lands from the Commonwealth's land office.

In 1762, the father of the appellants obtained a warrant, from the Proprietor's office, and surveyed 243 acres, part of the land surveyed by Crap, for which a grant was made by lord Fairfax to his son, Martin Picket, one of the appellants, in the year 1780. In 1779, the other appellant William Picket, also procured a warrant, and surveyed 420 acres adjoining the
107 above, which includes *the balance of the land claimed by the appellee, for which he obtained a grant from lord Fairfax in the year 1780.

The appellee charges in his bill, that the appellants and their father had notice of the title of Crap, before they surveyed the land in question, but this is denied by their answers, and no proof of it is made.

It appears that lord Fairfax established sundry rules in his office, respecting the terms on which lands might be acquired in the Northern Neck. Amongst others, the following was inserted in one of his entry books, which was begun in the year 1734, viz: "rules of the office. That the entries are not demandable after being made six months, or the warrants taken out to continue longer than six months in force, unless renewed or consented to by the Proprietor or agent." It is proved by sundry depositions, that at different periods from the year 1740, to the yearly 1764, notices were given by lord Fairfax in the public newspapers & else where, calling upon all persons entitled to entries and surveys, to come forward within a limited time, and pay the composition and office fees, and receive their grants, or that their rights would be considered as forfeited and revested in the Proprietor. There is also strong proof in the record of abandonment of the land in question both by old Crap and his son after his death, on account of the indifferent quality of the land, and the expence of obtaining a grant.

The High Court of Chancery, being of opinion, "that the grant to the plaintiff of the land to which he is entitled ought to have relation to the time of the warrant, by authority of which the said land was surveyed, so as to be prior in effect, to the title of the defendants, both of whom had notice of that warrant and survey before the grants under which they claim" decreed, that the defendants should convey to the plaintiff at his costs, with warranty against themselves and all persons claiming under them, their right and title in and to the land lying within certain bounds therein described, comprehended within the limits of Crap's survey, and deliver possession to the plaintiff of so much of the said land as they hold, and account with, and pay to him the rents and profits thereof, from the 10th day of August 1789; from which decree, an appeal was prayed.

Marshall for the appellants. The rule of lord Fairfax's office was, that those who did not within six months perfect their titles to lands for which entries had been made, could not afterwards demand a grant unless the same was consented
108 *to by the Proprietor. They were considered as having abandoned their right, and the estate revested in the Proprietor, who might grant the land to any other person. This rule is proved to have subsisted so early as the year 1734, of which the people in that District were constantly notified by advertisements inserted in the gazettes, and publicly posted up in the different counties. This rule being entered in the front of one of the entry books in the Proprietor's office, those who applied there to take up unappropriated lands, must be presumed to have had notice of it. The existence of the rule is further established by the depositions of many witnesses, and is further strengthened by a consideration of lord Fairfax's situation. Possessed of a very extensive territory, the value of which depended entirely upon its being parcelled out amongst those who as a retribution therefor were to pay him certain quit-rents, his revenue, as well as the means of supporting his office, depended upon the receipt of his fees, and of the stipulated rents, neither of which could be demanded, until after a grant had been made. It would have been highly unreasonable, that after a warrant had issued, the person owning it, should suffer it to lie dormant for many years, without going on to acquire the legal estate, and yet keeping off other applicants. I contend therefore, that Crap, by the rules of the office forfeited all rights to the land, and that the Proprietor, might legally make any other appropriation of it. But independently of this point, I consider that the right of Crap was lost by abandonment, and rely for evidence of his intention to abandon, not only upon his declarations, as proved in the cause, but upon the unreasonable length of time which elapsed between the issuing of the warrant to him, and that to the appellants, during which period he seems to have shewn no disposition to obtain a grant.

I should insist if it were necessary that the appellants were purchasers without notice; for though it is proved that they had heard that Crap had taken up land, yet it does not appear that they knew it to be the land in dispute.

But I do not wish to rely upon this, because I contend first, that the right of Crap was completely lost by forfeiture, and secondly, if not so lost, yet a Court of Equity will never set up this dormant right in favor of a man, who has been guilty of such inexcusable neglect, and who has lain by and permitted the appellants to take up and enjoy the land.

Campbell for the appellee. I shall consider the title of Dowdall.

1st, As it stands under the law.
109 *2dly, As affected by the acts of the parties.

And first, as it stands under the law. The rule laid down by the Chancellor is, that the grant has relation back to the warrant which is the inception of the title; gives authority to the public surveyor to lay off certain lands for a particular indi-

vidual, and is in short the first and best evidence of a title, acquired either with, or without consideration. The grant is only evidence of a pre-existing right. But the objection to this commencement of our title is, that a forfeiture had in the mean time incurred, and therefore, a relation to the warrant would be improper. The forfeiture was produced by a non-compliance with the rules of the office; but what were those rules? One witness speaks of them as having been written in one of the entry books in lord Fairfax's office, requiring persons to compleat their titles within six months. Another, speaks of an advertisement of the Proprietor's in 1765, requiring all persons having claims to grants, to come in before September 1766, pay the fees and composition, and receive their grants. Another witness, speaks of an advertisement between the years 1740 and 1746 to the like effect, but fixing no time within which the parties were required to compleat their titles. Another witness says, that even if all these requisites had been complied with, it was in the election of lord Fairfax to make the grant or not as he pleased. Thus we see, that the rules and customs of the office are so vaguely stated, that no reliance can be placed in them. But the legislature, by the act of 1786, ch. 3. has regulated all these surveys, and referring back to the warrants and surveys, confirms the titles. But let me ask whether lord Fairfax, who in this respect is to be considered as a private individual, had any right to establish rules of property oppressive in themselves, and not warranted by the municipal laws of the country. He was at liberty to sell upon what terms he pleased. But having sold, he was as much subject to those laws and rules which prevail in contracts between other individuals as any other citizen was. He could not set up rules of his own to produce forfeitures not sanctioned by the common or statute laws of the land. Neither could his particular situation warrant it. If a private individual should sell land, and stipulate for payment by a certain day under any conditions whatever, he is as much injured by a non-compliance with the contract on the part of the vendee as the Proprietor was. Yet if the purchaser within a reasonable time should offer to pay, a court of equity would relieve against the legal consequences of his breach of contract, and compel a conveyance.

110 *Secondly. How is the title of Dowdall affected by the acts of the parties?

The grants to the appellants, it is contended, destroys our right. But the loss of the papers which prevented Dowdall from caveating the appellants, was such an accident, as a court of equity ought to relieve against, and therefore the title of the appellants as opposed to that of the appellee, will be considered as if no grant had been made. It is evident that lord Fairfax did not suppose he was granting to the appellants lands claimed by the appellee, because it was his custom always to recite the forfeiture, where one had taken place.

But it is said that Crap abandoned his right. Suppose he did, does this give a right to the appellants? He once had a title which he has neither given nor sold to them. He has in short done nothing to divest himself, or to vest an interest in any other person. If he chose not to occupy it, did the appellants thereby gain a right to it? Surely not. As to notice to the appellants I consider it to be clearly proved.

Marshall in reply. It is not proved, (I conceive) that an application was made by the appellee for the papers before the transfer from Crap to Dowdall, and therefore, the argument of abandonment in Crap is not repelled.

It is true, that the grant relates back to the warrant, in cases unattended by circumstances which would render the relation improper; as if the sale be conditional, or relinquished, and a grant is made in the mean time to another, this relation to destroy the intermediate right could never be admitted.

As to the rule, it was entered in a book kept in the Proprietor's office, which was open to the inspection of all persons applying there to take up land. It is traced back to the year 1734 long before the date of Crap's warrant, and therefore, it was not as Mr. Campbell supposes, an arbitrary rule, made by the Proprietor for the purpose of forfeiting rights acquired under prior agreements with himself. But I ask, was not the rule a reasonable one? If dormant rights were permitted at any time to be revived, and to relate back to the warrant, no person could with safety have ventured to take up lands within that district, which would not only have been injurious to the Proprietor, but would have produced a great public mischief. If a grant had been made to Crap, he would have forfeited the land by non-payment of the quitrents for three years. Can he then be in a better situation by having violated his engagments; or ought he thus to gain a benefit to himself, and to impose an injury upon another

111 *by his own default? If the forfeiture were out of the question, yet I would rely upon these considerations as sufficient to deprive Dowdall of the equity he asks for, upon the supposition of an implied contract. It is said, the rule appears by the evidence to be very uncertain. This is not the case. The rule itself, as taken literally from the book in which it was entered, is an exhibit in the cause. The advertisements of lord Fairfax were not intended to establish a rule. He had a right to avail himself of the forfeiture without giving the parties an opportunity of preventing it. These advertisements were intended as an indulgence to those, who had not complied with the rules of office, by granting them a further time to come in and avoid the consequences of the forfeiture which had incurred. But they did not alter, or do away the rule.

The act of 1786 might be objected to, upon the ground, that the legislature could not grant away the property of lord Fairfax any more than it could that of any other individual. But it is unnecessary to stir that question. It is evident, that that law does not mean to authorise the register to issue a patent for lands, which had before been granted by the Proprietor.

The PRESIDENT. It is surely unnecessary to labour this point, as it is too plain to be argued. The act of 1786, is not to be construed to extend to cases, where a grant had been previously made by lord Fairfax.

Marshall. As to the forfeiture not being recited in the grant to the appellants, I am inclined to think that this was never done, but where prior grants had been made and forfeited, as for non-payment of quitrents, not seating and the like; and it was done in those cases, because, if the forfeiture were not recited, the former grant might prevail over the latter. But this was not done I believe where the forfeiture accrued in consequence of a non-compliance with the rules of office in the earlier stages towards a title.

But if an actual forfeiture had not taken place. yet I contend that the conduct of Crap and Dowdall has deprived them of all claim upon the equity of this court. This is not a contest between lord Fairfax and Crap, but between two purchasers under lord Fairfax. How is it, that a prior mortgagee standing by and permitting another to throw away his money upon the same security, without disclosing his mortgage, shall be postponed? The principle of that case applies to the present. For Crap, having notice (as is to be presumed) of the rule, and that many others might apply for a warrant to survey the same land,
112 *without a possibility of knowing what former appropriations had been made of it, he takes no step to perfect his title and to remove this difficulty out of the way of other applicants. Lord Fairfax could not have compelled those to receive grants who had obtained warrants, but the party might have abandoned the property if he pleased, and his refusing to abide by the rules of the office, was all he could do to evince his intended dereliction.

FLEMING, J.—When lord Fairfax established an office for the purpose of parcelling out the lands in that extensive territory, some rules were necessary, and as he differed from other individuals in the extent and nature of his property, those rules would of course be general. I think he had right to establish such rules as he pleased, if they were reasonable. The one in question was established so long ago as the year 1734, long antecedent to Crap's warrant. It was, I think, considering lord Fairfax's situation, a reasonable regulation, and it is to be presumed that it was known to all persons, who took up land within that district of country. The revenue of the Proprietor depended upon his quitrents, which not being demandable before a grant was made, it was proper, that the party should within a limited time place himself in such a situation, as to render the contract as obligatory upon himself, as it was upon lord Fairfax, or that he should leave the property open for subsequent appropriations. Crap, made his entry in 1741, and died in 1773, so that 32 years elapsed, during which time he took no step towards perfecting his title. If in his life-time he had obtained a grant, he would have forfeited his estate by the non-payment of quitrents for three years, and it is unreasonable that by his own neglect, he should better his situation, and subject the other party to the contract, to an inconvenience resulting from that neglect. More especially in this case, when that other party had notified his intention to avail himself of the forfeiture unless the indulgence then held out was accepted, and the terms of it complied with, within a reasonble time. I am therefore of opinion, that the right of Crap was lost by his neglect, and that lord Fairfax might legally grant the land to the appellants, or to any other person.

CARRINGTON, —J. I consider this case to be so extremely clear, that it cannot be made more so by argument. The appellee having forfeited any right which he ever had to the land in question, by the most unreasonable negligence, has no ground upon which to establish an equity, which can entitle him to the relief afforded him by the decree. I think the decree ought to be reversed.

113 *The PRESIDENT.—The appellants have obtained titles to the land in question, prior in time to that of Dowdall, and consequently have the law in their favor. Has Dowdall superior equity to them, which shall warrant this court in depriving them of their legal estate? What is it he asks? That the posterior title which he acquired by his patent should relate back to the warrant, which was the inception of that title, so as to destroy the intervening right of the appellants. There are such things as relations in law, but they are legal fictions, invented for the purposes of justice, and not to work an injury to innocent third persons, who in the mean time have fairly and legally acquired a title to the subject in controversy. But if the doctrire were applicable to this case, there can be no question, but that Dowdall might have availed himself of it at law, and could not require the interference of a Court of Equity.

This brings us to enquire into the conduct of the parties. Has Crap done all in his power to entitle himself to a grant, or has he so conducted himself as to have deprived himself of such a right? If he has done all that it was necessary for him to do; then, as to lord Fairfax, the court would consider Dowdall as standing in the same situation, as if a grant had actually been made to him. But so far from it, he has done nothing which by the conditions under which he purchased he ought to have performed, and therefore he has not even acquired an equitable right. It is objected, that the rules of the Proprietor's office were not only arbitrary and uncertain, but were locked up in secrecy. The answer given to this was compleat: they were made as public as they could be, and were reasonable in themselves. I have always been of opinion, that lord Fairfax was to be considered precisely in the same situation as any other citizen. That he held his lands under the grant made to him as other citizens did. But his situation in the mode of parcelling out his lands was very different. He was the Proprietor of an extensive country, and therefore he could not make particular agreements with the different individuals who desired to purchase portions of his lands. On this account he established an office, employed different officers to transact the

business of it, and laid down certain general rules defining the terms upon which he would grant his lands; and in forming those regulations, he appears to have assimilated them as nearly as possible to those established in the crown office with respect to lands lying in the other parts of Virginia. How can those rules be called secret, which were published in the entry books in
114 the office, *and which were open to the inspection of all persons applying for land. It is not unreasonable to say, that Crap must have known of the rule. He knew that the land was not to be given; he made no special contract with lord Fairfax respecting it; and it therefore became necessary for him to know, upon what terms he did purchase, and in procuring this information, he must have got notice of the rule in question. Besides, he proceeded some steps in conformity with the rule. He obtained a warrant, and procured it to be surveyed, tho' not in time. As to the reasonableness of the rule it is nothing to this court. Crap was at liberty to purchase under it, or to let it alone, if he did not like the terms. The parties were the proper, and the only judges of this. Crap having surveyed the land went no farther. He paid neither fees, nor composition, and consequently deprived lord Fairfax of such a portion of his revenue. How then can we consider him as standing in the same situation, as if he had actually obtained a grant? It was objected, that lord Fairfax should have made an entry to compleat the forfeiture, or should have done some act tantamount to an entry. This might have been necessary if he had made a grant to the appellee, and the forfeiture had incurred afterwards,—as for non-payment of quit-rents. It was not necessary, where the legal estate had never been out of him. But if it were, I think he did an act tantamount to an entry, by granting warrants to the two Pickets to survey the land for themselves. As to the custom of reciting in subsequent grants the prior forfeiture, I suppose it was similar to that which prevailed in the crown office, and there, it was never done, but in cases where there had been a prior grant.

Concerning the advertisements of lord Fairfax, I do not think he was in any manner obliged to give the notice for which they were intended. It was Crap's duty to perform the conditions which the rules of the office imposed, by paying the composition, and applying for his grant. This he was at least bound to do within a reasonable time, and before the land was re-granted. The advertisements held out an indulgence, which not having been accepted, nor the terms of it complied with, diminishes still more the claim of Dowdall to the relief of a Court of Equity. It is true, that the appellants did not strictly comply with the rules of the office, and of course they were liable to the legal effect of such conduct, if a warrant had been granted to another. But this was not done; lord Fairfax, exercising a power which belonged to him, waved the forfeiture, and as a proof that he had done so, executed grants to them.

115 *I think the abandonment by Crap is fully proved. It is true that legal rights once vested, must be legally divested; but equitable rights may be lost by derelictiou.

It is unnecessary to enquire if the Pickets had notice of Crap's title. Since if they had, it could not have affected them, unless Dowdall had been prevented by fraud from obtaining a legal title.

Upon the whole, I am of opinion that the appellants have superior equity on their side, especially against Dowdall, who seems to have come into the dispute as a volunteer, under an idea, that the act of 1786 had given him a chance. But it is too clear, that that act cannot apply to cases where grants had been made by the Proprietor.

The Opinion of the Court is, "that the appellee's grant in the year 1788, ought not to have relation to the time of the warrant, by authority of which the land was surveyed, dated in 1741, so as to be prior in effect to the intervening title of the appellants; because relation being a legal fiction adopted for the furtherance of justice, is not to be admitted in any case to produce wrong and injury to others, nor particularly in this case, where that relation comprehends a period of 47 years, and tends to establish a dormant claim in equity, never perfected by James Crap the elder, by paying the office fees and composition, so as to entitle himself to a grant of the land, but on the contrary forfeited and abandoned by him, and by his heir after his death, as being not worth the pursuit, in consequence of which the Proprietor might lawfully grant the lands to another, and accordingly did grant them to the appellants, whose conduct in obtaining their said grants and legal preference appears to have been fair and irreproachable so as to entitle them to more equity than the appellee, who became a volunteer for reviving this dormant and abandoned claim, some years after the date of the grants to the appellants, and that the said decree is erroneous."

Decree reversed with costs, and the bill dismissed with the costs of the Court of Chancery.

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116 *Johnson v. Buffington.

October Term, 1795.

Land—Quantity—Variance between Warrant and Survey.*—It is no objection to the title, that the survey contains more land than the quantity specified in the warrant.

Construction of Statute—Northern Neck.—The Act of 1785, c. 47, relates merely to the unappropriated lands within the Northern Neck, and therefore it does not authorize the granting of lands for

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***Land—Quantity—Variance between Warrant and Survey.**—The principal case is cited with approval in Taylor v. Brown, 5 Cranch 252, 254, 256.

Entry—When Notice to Subsequent Locator.—In M'Clung v. Hughes, 5 Rand. 479, the court said: "Upon examining all the cases decided in the court of appeals which are reported, and which touch these questions, I do not think that the proposition said in Bodley v. Taylor, to have been decided in Virginia, whilst Kentucky was a part of the state, that an entry was a notice to a subsequent locator, which tainted his legal title founded upon a prior patent, with fraud, was ever so decided in this court. The only case, which seems at first view to have established that proposition, is that of *Johnson v. Buffington*, 2 *Wash.* 116, which, as reported, seems to justify the proposition above stated. But, upon an examination of the original record, it will be found, that this report is entirely erroneous; and that the subsequent locator, who procured the first patent, had actual notice, and was guilty of gross fraud."

Equity Jurisdiction—Issuance of Patent—Actual

which warrants were issued by the Proprietor, although they were liable to forfeiture by the rules of the office, unless the Proprietor had shown an intention to take advantage of the forfeiture. Such titles were confirmed by the Act of 1786, c. 3. But this law does not authorise the Register to make grants in cases where warrants had been previously issued by lord Fairfax to other persons.

This was an appeal from the High Court of Chancery, affirming a decree of the County Court of Hampshire, wherein the appellee was plaintiff. The case was as follows: Peter Peters in the year 1753, obtained from the Lord Proprietor of the Northern Neck, a warrant to survey a tract of land within that District, which by his direction was surveyed for a certain Frederick Unrod, an indented servant of the said Peters's; but by the mistake of said surveyor, (as the bill charges,) he was called Vinegard instead of Unrod. No patent was obtained from the Proprietor in the lifetime of Unrod, who died many years ago, leaving a son Jacob, then an infant, who was by his mother sent into Pennsylvania, and there bound out an apprentice; he resided in that state always afterwards, and sold his right to Buffington in 1770.

Johnson made an entry with the surveyor, for 219 acres, part of this land, under the act of 1783, and having obtained a patent from the Register's office in 1789, brought an ejectment against Buffington, and recovered a judgment. The prayer of the bill was for an injunction, and for a conveyance, both of which were decreed by the County Court, from which an appeal was granted to the High Court of Chancery. That court being of opinion, that the equitable right of the appellee to the land in controversy, derived to him from the heir at law of the person for whom the land had been surveyed, was preserved by the acts of 1786, 1788, and 1790, and consequently was not subject to the entry and location of the appellant which was posterior to the survey, affirmed the decree of the County Court from which an appeal was prayed to this court.

Lee for the appellant. Whether in a case like the present, a Court of Equity will interfere, and take from Johnson his legal title is an important question. The decree seems bottomed upon an opinion, that the equitable right of Buffington was revived and preserved by the act of Assembly passed in 1786, Ch. 3, and the subsequent act continuing the operation of that law. But before I consider the operation of those laws, I will premise some objections against the interference of the Court of 117 *Chancery. In the first place, the warrant has not been so complied with as to entitle the party to claim a grant. The warrant was to survey 300 acres of land, instead of which, a plat for 450 acres was returned. Though this objection would have been done away, had lord Fairfax made a grant, it is now in full force where an application is made to this court to compel a conveyance. The warrant was not pursued in another instance; the length and breadth of the tract as delineated in the plat, do not bear that proportion to each other, which the warrant required. Neither are the names of the chain carriers inserted in the survey. These objections, when considered together with the neglect of Unrod and Buffington, in not perfecting this dormant title, are sufficient to deprive the appellee of the aid of a Court of Equity. It may also be seriously questioned, whether Vinegard in whose name the survey was made, is the same person as Unrod, and if so, there is an outstanding title in Unrod which Vinegard could not transfer to Buffington.

I come now to consider the acts of Assembly. The first which passed upon this subject was in 1785, Ch. 47. The 4th section, after reciting, that since the death of the Proprietor of the Northern Neck, no mode had been adopted to enable persons having made entries before or since his death to obtain titles for the same, declares, "that where any surveys have been heretofore made, or hereafter shall be made under entries made in the life of the said Proprietor, or under entries made with the survey or of any county, under the act of Assembly aforesaid,* and which have been returned to the said Proprietary office, or shall hereafter be returned to the Register's office, the Register shall make out grants therefor, to bear teste under the hand of the Governor and the seal of this Commonwealth, in the same manner as is by law directed in cases of other unappropriated lands; and the surveyors with whom such entries have been made, are hereby directed and empowered, to proceed to survey and record the same, and to make return of such surveys to the Register's office, in the same manner, and within the same time as is or shall be directed in cases of warrants issued for other unappropriated lands within this Commonwealth, and thereupon grants shall issue in the manner herein before directed."

This law is to be construed either in a general or in a restrained sense. I contend for the latter, because of the 118 inconvenience which *would arise, if it were considered as intended to set up obsolete claims not carried into grant, and which were forfeited by the rules of the Proprietor's office; but more especially, in cases, where such claims would by relation, destroy posterior grants. The inconvenience, which the preamble of that law states, is, that by the death of lord Fairfax, many persons who had made surveys upon warrants issued from the Proprietor's office, could not obtain grants. The intention of the legislature was to provide a remedy, not for those who had forfeited their titles by a non-compliance with the rules of the office, but for those, who by the death of lord Fairfax, had been prevented from obtaining grants, upon entries made with the surveyors, under

Fraud.—Equity has jurisdiction, *after* the issuing of the patent, in a case of actual fraud, although no caveat was filed, and no reason assigned for the failure. M'Clung v. Hughes, 5 Rand. 489, citing the principal case; White v. Jones, 1 Wash. 116.

The principal case is cited in Noland v. Cromwell, 4 Munf. 169, 172; M'Clung v. Hughes, 5 Rand. 481. See *foot-note* to Burnsides v. Reid, 2 Wash. 43.

Northern Neck—Title of Lord Fairfax.—The principal case is cited in *foot-note* to Picket v. Dowdall, 2 Wash. 106.

Same—Equitable Title to Land in.—The principal case is cited in *foot-note* to Picket v. Dowdall, 2 Wash. 106.

*October 1782, C. 33.

the act of 1782, Ch. 33, § 3, which enacts, "that all entries made with the surveyors of the counties within the Northern Neck, and returned to the office, formerly kept by the said Thomas Lord Fairfax, shall be held, deemed and taken as good and valid in law as those heretofore made under the direction of the said Thomas Lord Fairfax, until some mode shall be taken up and adopted by the General Assembly concerning the territory of the Northern Neck." The act of 1786, Ch. 3, relates entirely to surveys thereafter to be returned. The words of the law are, "that the owners of entries for lands within the District of the Northern Neck regularly made before the 17th day of October in the year of our lord 1785, shall proceed to survey the same, which surveys, together with those already made upon like entries, shall be returned into the register's office, on or before the 1st day of October 1788, and on failure, such entries are hereby declared void, and the lands liable to be located in the same manner, as other unappropriated lands within the said District."

If the legislature intended to give validity to claims which had been forfeited and entirely gone, so as to do away posterior rights fairly and legally acquired, I should question very much the validity of such a law. But the legislature is not to be presumed to have intended an act so fraught with iniquity, and therefore, to avoid such a conclusion, the court will give to the law the limited construction for which I contend.

Williams for the appellee.—Whatever exposition the court may incline to give to the different acts of Assembly, yet I contend that Johnson can derive no right under them. The question is between Johnson, whose title is acquired under the legislature of Virginia, and Buffington claim-
119 ing under the Proprietor. *Though lord Fairfax should be admitted to have possessed a right of availing himself of the supposed forfeiture cocasioned by Buffington's not complying with the rules of the office, yet as he never did any act evincing such an intention, (as by making a grant to some other person,) the argument respecting the forfeiture cannot avail the appellant. The legislature could not by any law dispose of the rights of lord Fairfax, any more than they could dispose of the rights of other individuals, and consequently, Johnson, not claiming under lord Fairfax, cannot set up a title to destroy one derived under him, and still subsisting. Again, admitting a right in the legislature to dispose of the property of lord Fairfax, the act of 1782, which is the source, from which the inceptive right of Johnson flows, does not warrant the title which he now sets up. That act, provides a mode by which a right to the unappropriated lands in the Northern Neck might be acquired. But the land in question had been previously appropriated by lord Fairfax, who, had a right to wave the forfeiture if he pleased. Indeed I do not think he could have availed himself of it, since Unrod was an infant at the death of his father, and always afterwards resided out of this state.

I admit that where the equity is equal, and one of the parties has also the law in his favor, he shall prevail. But if the legal title has been obtained by fraud, or, as in this case, by taking an advantage of one labouring under a legal disability, he will not have the benefit of this advantage.

As to the identity of Unrod, I consider it to be fully established by the evidence. The objection to the variance between the warrant and the survey could only be a question between lord Fairfax and Unrod, not between the appellant, who claims under the commonwealth, and the appellee claiming under lord Fairfax.

The construction given to the act of 1785 by Mr. Lee, seems to me to be a very unreasonable one. For if the legislature considered entries not surveyed as worthy of being saved from forfeiture, a fortiori, they would save title still nearer a state of perfection, namely, entries then actually surveyed.

Lee in reply. If it be true, that the appellant could derive no title under the legislature of Virginia, the application to a Court of Equity was unnecessary, since he might have effectually defended himself at law; and therefore the court should have dismissed the bill.

120 *The possession of Buffington, is by no means a continuation of Unrod's possession. He was an unauthorised occupant of the land, and being there he purchased up this obsolete claim of Unrod's, in order to bolster up a right founded merely in possession.

FLEMING, J.—After stating the case proceeded; the first objection made by the counsel for the appellant, was, that the survey did not pursue the warrant. But I think there is no weight in this, as the variance is only in the quantity. If the land had been imperfectly described, it might have been fatal.

The second objection was, that the act of 1785 only respected cases where surveys had not been made. I am clearly of opinion, that this act, notwithstanding the title of it, relates as well to entries as surveys, and comprehends the present case. Unrod (who I am satisfied is the same person as Vinegard) most certainly forfeited his right to a grant, if lord Fairfax had evinced an intention of availing himself of it, but not having done so, the land is to be considered as appropriated, and therefore, could not be regranted by the Commonwealth under the act of 1785.

CARRINGTON, J.—I have no doubt but that Unrod and Vinegard are the same persons, nor do I consider the variance between the warrant and survey, as to the quantity as being of any consequence. The title of Unrod was prior to that of Johnson, and since it was not defeated by any act of lord Fairfax in taking advantage of the forfeiture, the land could not be considered as unappropriated, and as such subject to be granted under the act of 1785.

The PRESIDENT.—I feel no difficulty about the variance in the name of Unrod, nor in the quantity of land. According to the decision in the case of Picket and Dowdall, it follows, that the right of Unrod was liable to forfeiture by the failure to apply for a grant within the time limited by the rules of the office, and by the nonpayment of the composition and office fees. But as lord Fairfax did no act manifesting

an intention to avail himself of the forfeiture, the title of Unrod rested upon his survey until 1786, and was confirmed by that act, which limited no time for the payment of the composition and fees. The act of 1786 relates, 1st, to entries; 2dly, to surveys not returned; and 3dly, to surveys returned, and ungranted. The act of 1788, Ch. 20, continues that of 1786, as to entries and surveys, and comprehends the three branches of the latter law.

121 *Mr. Lee contended that the construction of the act of 1786 might be either extended or narrowed, and supposed that the latter was most consistent with the justice of the case, and the intention of the legislature. My opinion is directly otherwise; and in this particular case, I should feel very little disposed to narrow the construction, when I consider that Unrod was an infant for many years after the death of his ancestor, and that he resided during that time and afterwards, out of this state. It is immaterial to decide whether the commonwealth did, or did not succeed to the rights of the Proprietor, in cases of ungranted lands. If she did, yet no advantage has been taken of the forfeiture by her. If she did not succeed to them, then, the land was legally appropriated by lord Fairfax, and consequently could not under the act of 1785 be granted to any other person.

Decree affirmed.

Curry v. Burns.

October Term, 1795.

Northern Neck—Laches of Grantee in Completing Title—Relief in Equity.*—In 1756, a warrant from the office of the proprietor of the Northern Neck issued to B. which was surveyed in 1757. In 1768 the same land was surveyed for C. by a special order of the proprietor. In 1770, and not before, B. tendered the composition and office fees, and demanded a grant, which was refused. A few months after this, a grant was made to C. Chancery cannot afford relief to B. after so unreasonable a delay in completing his title.

This was an appeal from the High Court of Chancery. The case was as follows: In the year 1756, Burns obtained a warrant from the Proprietor of the Northern Neck, and in 1757, after the expiration of six months from the date of the warrant, he had a survey made for 214 acres, (part of which is the land in controversy) which was returned to the Proprietor's office.

In the year 1768, by the direction of lord Fairfax, one of his surveyor's surveyed 140 acres, (part of Burns's 214 acres,) for Curry, who is at that time an infant. In September 1770, a grant issued to Curry, and in the month of May preceeding, Burns offered to pay the composition money to Bryant Martin the agent of the Proprietor, and demanded a grant; but Martin refused to receive the money, saying that Burns was too late. Burns obtained a patent in 1788 from the Governor of the Commonwealth, and being in possession, Curry brought an ejectment and recovered a judgment at law. Burns filed his bill in equity in the County Court of Berkeley praying for an injunction, and for a conveyance of Curry's legal

122 title. The County *Court decreed a perpetual injunction and a conveyance, which was affirmed by the High Court of Chancery upon an appeal.

Lee for the appellant. Burns having failed to comply with the rules of the Proprietor's office by not executing his warrant within the limited time, forfeited all the right to which the warrant entitled him, and the Proprietor, having taken advantage of the forfeiture by granting the same land to Curry, the title of the latter is good against all the world. The offer to pay the composition money in 1770, could not excuse the forfeiture which had taken place many years before, since lord Fairfax had in 1768, authorised a survey for Curry, which was made in that year, and in the grant executed to him, the survey of Burns, and the forfeiture incurred by him are recited. The Chancellor in this case, as in that of Johnson and Buffington, has supposed that the act of 1786, relates back to the warrant, and revives all those obsolete claims, which had not been carried into a grant, so as to defeat posterior rights. The patent to Burns was obtained from the Register's office in the year 1788, so that the construction of the act of 1788 is not a point in this cause.†

Williams for the appellee. If lord Fairfax from his peculiar situation, was entitled to no exclusive privileges or prerogatives, (which it must be admitted he was not,) he was equally bound with other individuals by those general rules and principles of law which prevail in cases of contracts for

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***Northern Neck—Laches of Grantee in Completing Title.**—In the principal case the court would not decide what ought to be considered as a reasonable time to indulge the owner of a survey in completing his title. Perhaps each case ought to stand upon its own particular circumstances. But it did decide that a delay of eleven years, unaccompanied with any exculpatory circumstances on the part of the grantee, is an unreasonable time. See opinion of JUDGE ROANE.

Same—Title of Lord Fairfax.—The principal case is cited in *foot-note* to Picket v. Dowdall, 2 Wash. 106.

Same—Equitable Title to Land In.—The principal case is cited in *foot-note* to Picket v. Dowdall, 2 Wash. 106.

Same—Rules of Office.—In Countz v. Geiger, 1 Call 192, the court said that the following general principles were established in the principal case, relating to the grant of lands in the Northern Neck, *i. e.* that Lord Fairfax had a right to establish such rules for issuing grants as he pleased, and those applying for grants were bound to conform to them. That having published those rules, by sticking them up in his public office, all applicants were bound to take notice of, and comply with them, without particular notice to each individual. So, that if the lands were forfeited, he might grant them to another; and if he did so, the grant would be good, provided there was no fraud or deception in the person obtaining the second grant. But, if before any proceeding towards a second grant, the first defaulter applied, and performed or offered to perform, what was required, he saved the forfeiture and had the right to the grant; agreeably to the spirit of the act, relative to petitions for lapsed land, which saves the forfeiture, if the condition is performed at any time before the petition, though not within that prescribed by law.

"†Sec. 1. Whereas the law authorizing the Register of the land office to receive into his office plats and certificates of surveys that have been or shall be made, will expire on the last day of December one thousand seven hundred and eighty eight, and it is represented to this General Assembly that many persons through unadvoidable accidents have been prevented from returning their plats and certificates aforesaid, to the Register of the land office, whereby their lands may be forfeited: for remedy whereof, Be it enacted by the General Assembly, that the further time of two years, after the passing of this act, shall be allowed for returning the same, within which time the Register of the land office, or his deputy, shall receive all plats and certificates of survey, although not returned within the time heretofore limited by law; and such lands shall not be considered as forfeited, or liable to forfeiture, on that account."—Note in Original Edition.

the sale of property. If one man agree to sell land to another, upon condition that payment be made by such a day; tho' the purchaser should not on that day pay the money, yet if in a reasonable time afterwards he is ready to comply, he may upon application to a Court of Equity compel the seller to make him a conveyance. In this case, lord Fairfax agreed to sell the
123 land in question to *Burns, and received the office fees which constituted part of the purchase money. His objection to perfecting the contract because certain rules were not complied with, ought not to avail him, any more than a breach of a conditional sale in the case stated, could avail the seller. It is objected, that the survey was not returned within the six months limited by the rules of the office. Let it be remembered that the surveyors in the Northern Neck were appointed by lord Fairfax himself, and consequently that in this part of the business they were his agents and representatives. If the survey was not made and returned in time, it was not the fault of the individual, but of a servant of the Proprietor. Lord Fairfax, after he had received a part of the purchase money, might have prevented any person he pleased from obtaining a grant, by directions given to his surveyors to delay making the surveys, or by issuing so many warrants, that they could not be surveyed and returned in time. The returning of the survey was no part of the contract, but was merely directory to the officer.

But what are those rules of office which are said to be violated? They do not appear in this record, so as for the court to take notice of them.

In this case Curry appears to be a mere volunteer, and to have obtained the land from lord Fairfax as a gift. Of course he is in no better situation than lord Fairfax would have been. If then the Proprietor ought not to have taken advantage of the forfeiture, (if any such existed,) so as to grant the land again to Curry, the act of 1786 revives and preserves the right of the appellee.

The PRESIDENT. In Picket and Dowdall, the court determined, that the act of 1786 did not apply to cases where there had been a grant from the Proprietor.

Lee in reply. Curry is said to be a volunteer, but there is no evidence in the record to support the assertion. The grant to him, is the same in form, with all the other grants of the Proprietor; it reserves the usual quitrents, and contains the same conditions. So that this case, is not on that account to be distinguished from the case of Picket and Dowdall.

ROANE, J.—The circumstances of this case are less strong against the relief which is asked for, than they were in the case of Picket and Dowdall. For 1st, The forbearance of Burns in coming forward to compleat his title has not been of so long a duration as in that case. 2dly, There is no evidence of an abandonment on the part of Burns of this right to the land. 3dly,
124 *There is no proof here, farther than what is contained in the grant to Curry, that an advertisement had been published by lord Fairfax between the time of Burns's survey, and that made for Curry, requiring all those who had surveys, to come forward, and compleat their title. This is recited in the grant, and the failure of Burns to comply with the terms of that advertisement, is stated as the cause of the forfeiture. 4thly, It does not appear that at the time Burns required a grant of the land, and offered to pay the composition and other fees of office, (which time I fix to be in or about May 1770,) Curry had paid his composition money, if indeed any was ever paid by him. The grant to Curry was not executed until the 10th of Sept. following. In this view of the case therefore, Burns may be considered as having stood upon better ground on account of his priority of survey, than Curry did, unless by his own neglect he has lost his right to demand the legal title. It appears by a memorandum of Richard Rigg, that he surveyed Curry's land by virtue of lord Fairfax's instructions, there being as I presume no warrant for that purpose.

This survey was made the 20th of August 1768, and must be considered as the commencement of Curry's claim. Between this period, at the time of the return of Burns's survey, (which tho' not stated, may be presumed to have been shortly after the survey was made, viz: in Sept. 1757, there had been a lapse of near 11 years, during which time, Burns had wholly neglected to come forward and compleat his title. The question then is, whether after this delay, and the consequent loss of quitrents to the Proprietor he had not a right to consider the claim of Burns as forfeited, and to grant the land to another? I will not undertake to saywhat ought to be considered as a reasonable time, to indulge the owner of a survey, in completing his title; perhaps every case ought to stand upon its own particular circumstances: but a delay of eleven years, unaccompanied with any exculpatory circumstances on the part of the grantee, is certainly an unreasonable time.

If a grant had been made to Burns, he would have forfeited his land by the non-payment of quitrents for the space of three years; by this delay, he avoids the payment of them altogether. It was in all cases important to the Proprietor that grants should be taken out within a reasonable time: It is presumable, that it was understood by applicants that this should be the case; and certainly, the spirit of equity does not dictate that a party, by not performing
125 his contract, shall be in a much *better situation, and the other contracting party consequently in a worse, than if the contract had been duly performed as understood by both parties. I put it upon the ground of an implied contract between the Proprietor and the individual applying for his lands, that the legal fees should not only be paid, but that a title should be obtained within a reasonable time. On the authority of the case of Picket and Dowdall, the survey for Curry is to be considered as an entry on the part of the Proprietor to take advantage of the forfeiture. This extinguished the interest of Burns, and of course the grant to Curry pursuant thereto cannot be impeached. The court however, will judge in every case, whether a forfeiture

had taken place, and if not, the entry and subsequent proceedings would be deemed invalid. The act of 1785 not having declared intermediate grants to be void, they must stand, unless they should be adjudged to be so on account of the particular circumstances attending them, and as there are none such in the grant to Curry, I am of opinion, that the decree should be reversed, and the bill dismissed.

FLEMING, J.—The warrant issued to Burns, bears date in 1756 and is surveyed in 1757, but not returned until 1770, at which time, and not before, he tendered the composition, and demanded his grant. But a survey had in the mean time, been made for Curry, who in September 1770, obtained a grant.

This case, tho' it differs in some points from that of Picket and Dowdall, is fully within the influence of the principles there laid down. Burns has certainly forfeited his right by an unreasonable delay in obtaining his grant, and Curry, having in the mean time obtained a legal title to the land, ought to retain it.

The PRESIDENT. The principles which decidedly govern this case, were so fully declared in that of Picket and Dowdall, that it will be unnecessary to repeat them. It is true, the two cases differ in some points, and that difference so far as it extends, is in favor of Burns. The laches of Burns in not compleating his title, is in point of time much less inexcusable than that of Crap. So too the tender of the composition, differs the case somewhat from that. Yet these points of difference, do not essentially affect the application of the principles laid down in that case. What may be considered as a reasonable time for the owner of a survey to
126 compleat his title, I will not *pretend to say; But I accord in opinion with the other judges, that eleven years unaccompanied with circumstances is too long.

Both decrees reversed, and the bill dismissed.

Wroe v. Harris.

October Term, 1795.

Mills—Application—Execution of Writ.—The writ of ad quod damnum, which issues upon an application to a Court for leave to build a mill, may be executed by the Deputy Sheriff.

Same—Same—Ownership of Bed of Stream.*—Where the person applying for leave to build a mill has land on one side only of the stream, it should be stated in the petition that the bed of the stream is in himself, or in the Commonwealth:—but this is not necessary, if he own the land on both sides.

Same—Inquisition—Injury to Land below.—It is not necessary that the inquisition should set forth the injury which the land below the dam may sustain.

Process—Execution by Deputy Sheriff.†—Process may in all cases be executed by a Deputy Sheriff unless the High Sheriff is expressly required to act in person.

This was an appeal from a judgment of the District Court of Northumberland, reversing an order of the County Court, giving leave to the appellant to build a mill. The land on both sides of the stream is stated to belong to him, but nothing is said respecting the Bed of the run. The District Court reversed the order because the writ of ad quod damnum was executed by the deputy, instead of the High Sheriff.

Washington for the appellant. It is wonderful that this opinion respecting the incapacity of a Deputy Sheriff to execute a writ of ad quod damnum, has so generally prevailed in this country. It is founded on a mistaken notion, that the Sheriff, in executing such a writ, acts judicially and not ministerially. It would puzzle any person I think, to state a case, in which the Sheriffs in this country act judicially. In England, they are to some purposes judges in every sense of the word, and whilst acting in that capacity they cannot delegate their authority; but in all other cases, the rule is, that they may act by deputy unless specially commanded to go in person. This is laid down in 4 Rep. 65. where a similar objection was made to a deputy's executing a writ of Elegit; but it was not sustained. In every instance where it has been determined that the High Sheriff must execute a writ in person, he is either required by statute to do so, as in an enquiry of waste, partition, accedas ad curiam, Redisseisin &c; or else he executes it in a judicial capacity, as in cases of admeasurement of dower and pasture which are vicontiel writs, and not returnable; consequently, the decision of the Sheriff is judicial and final, unless the case be removed by Pone before the Court of common Pleas. F. N. B. 148; Clay's case 1 Cro. El. 10. Dalt. Sb. 34. So in a writ de nativo habendo, if it go to the sheriff to hold plea of the mat-
127 ter, *he is judge and officer, and must therefore execute it in person; Otherwise it is, if directed to him, returnable into the King's Bench, for there he acts ministerially, 4 Bac. 441. In the case before the court, the writ is directed to the sheriff generally. He is to summon and impanel a jury and to charge them, and afterwards to return their inquisition to the court, to be there decided upon. All his acts are of a ministerial nature. He exercises no judicial function whatever in this case, more than he does in executing a writ of Elegit. By our law, (see Rev. Laws p. 129) all writs and other process whatsoever are to be executed by the Sheriff, or by his Deputies; now this is certainly a writ, and within the general expressions of the law.

Campbell on the same side. Wherever the legislature has thought proper to except particular cases out of the general law

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*Mills—Application—Ownership of Bed of Stream.—The principal case is cited in Mairs v. Gallahue, 9 Gratt. 97, for the proposition that where the applicant owns the land on both sides of the stream, the presumption is that the bed of it belongs to him also, and therefore it is unnecessary for him to set it forth in his application.

To this point, see the principal case cited in Mead v. Haynes, 3 Rand. 37.

See generally, monographic *note* on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

Mill Acts—Constitutionality of—Right of Mill Owners to Condemn Land.—The principal case is cited with approval in Varner v. Martin, 21 W. Va. 546. See *foot-note* to Mairs v. Gallahue, 9 Gratt. 94.

†Duties of Sheriff—Execution of by Deputy.—The principal case is cited in Chapman v. Bennett, 2 Leigh 333, as authority for the proposition that all ministerial duties of the sheriff may be executed by deputy, while his judicial duties can only be exercised in person, they being incapable of deputation.

See Noel v. Sale, 1 Call 495, and *note*.

authorising deputy Sheriffs to act, a particular provision has been made for the purpose. Two cases are at present recollected. The one is where an execution issues against the property of a former Sheriff; and the other, where lands are directed to be sold for the payment of taxes. In both instances the law requires the High Sheriff to attend, and by doing so it distinguishes between the High Sheriff in exclusion of the Deputy, and the Sheriff, which means as well the Deputy as the principal.

Warden for the appellee. There are two errors in the order of the County Court (which have not been noticed) sufficient I think to sustain the reversal of it in the District Court. 1st, The application to the County Court for leave to build the mill, does not state that the bed of the stream belonged to the appellant. The words of the law are, that "any person owning lands on one side of any water course, the bed whereof belongeth to himself or to the commonwealth, and desiring to build a water grist mill on such lands, and to erect a dam across the same for working the said mill, shall not himself have the fee simple property in the lands on the opposite side thereof, against which he would abut his dam, he shall make application for a writ of ad quod damnum" &c. (see Rev. laws p. 206).

Now, altho' the appellant in this case owned land on both sides of the stream, and therefore he is not literally within this clause of the law, yet the 4th section requires the same formalities where the person applying, owns the land on both sides, as if he were seeking to condemn an acre of ground on one side, as mentioned in the first section.

2d, The jury in their inquisition, say, "they have viewed the lands above and below, and are of opinion, that no per-
128 son *will be injured by the overflow of the water, the said Wroe owning the lands on both sides of the run above and below, his land above, running farther than the water will probably flow to."

Now the jury have said nothing about the lands below, which may be injured, as well by the breaking of the dam, as the lands above could be by the overflow of the water.

As to the principal question, I have more doubts respecting it. The administering of an oath seems to be a judicial act, or at all events one, which from its nature cannot be delegated. The sheriff is to perform this solemn act, and it would seem as if it were intended to be confided to the High Sheriff who is always a justice of the peace, and from his mode of appointment holds a more respectable station than deputies of his own choosing.

The court stopped Mr. Campbell, who was about to reply, saying it was unnecessary.

CARRINGTON, J.—There is no weight I think in the two objections started by the appellee's counsel. Where the person applying owns the land on both sides of the stream, the presumption is, that the bed of it belongs to him, and therefore it is unnecessary for him to set it forth in his application to the court. But if he own the land on one side only, and seeks to condemn an acre on the other side for an abutment, no such presumption exists, and therefore it is necessary to state to the court, that the property in the bed of the run is in the commonwealth, or in the party applying. The 4th section of the law refers to the proceedings subsequent to the ordering of the writ. The words are, "in like manner if the person proposing to build such mill and dam shall have the fee simple property in the lands on both sides of the stream, yet application shall be made to the court of the county wherein the mill house will stand, for a like writ which shall be directed, executed and returned as prescribed in the former case."

The second objection is, that the jury have said nothing as to the injury which the lands below the dam might sustain. They have gone as far as they could. It was impossible for them to value the damage which the owners of land below the mill might sustain by the breaking of the dam; it was an accident which perhaps might never happen. They have therefore very properly left it to be decided upon by another tribunal whenever the case should occur.

I come next to consider the point upon which the District Court reversed the judgment.

129 *The rule is laid down in 4 Bac. Ab. 440, 441, and the cases there cited, that the Deputy Sheriff may execute process in all cases where the High Sheriff is not specially required to go in person, or where the thing to be done is not of such a nature as to amount to a judicial act. Thus in an enquiry of waste, partition &c. the writs command the Sheriff to go in person, and consequently being commissions specially directed to himself, they cannot be executed by deputy. In two other cases which are mentioned viz. a writ of admeasurement of dower, and a writ de nativo habendo, the High Sheriff must act in person, because those writs being vicontiel and not returnable, he decides finally and in the capacity of a judge.

But in this case, every act of the sheriff is purely ministerial. The inquisition is the finding of the jury, not the judgment of the sheriff. It is returned to the court from whence the writ emanated, and it is there finally decided upon.

By the laws of this state, a general power is given to deputy sheriffs to execute all writs and process whatsoever, leaving it for particular acts to make exceptions from this general law when necessary. Consequently, we find that the legislature has thought proper to require the personal attendance of the High Sheriff, in cases of executions against a former Sheriff. Rev. laws p. 145.

Upon the whole, I am of opinion that the judgment of the District Court ought to be reversed, and the order of the County Court affirmed.

LYONS, J.—The general rule is, that whatever the sheriff may do personally, he may do by deputy. But from this there are exceptions. If the act be of a judicial nature, he cannot delegate it to another. The case of a writ of admeasurement of dower is an instance of this. So

if the High Sheriff be required to act in person, he must do so.

By our law, the sheriff is authorised generally to act by deputy unless in cases expressly excepted. The inconvenience might be very great, if the High Sheriff in cases of this sort were required to attend in person: as if two writs of ad quod damnum were to be executed on the same day.

This writ is directed to the Sheriff, which means as well the Deputy as the High Sheriff. It is a writ; and all writs may be executed by a Deputy Sheriff. It is not a judicial act; it is not a case excepted from the general authority given to Deputy Sheriffs, and therefore I can see no reason why he may not properly take the inquisition. It may not be improper also 130 ' *to remark, that the general practice of the country has favored this opinion. There is no weight in the other two objections stated at the bar. I am therefore of opinion that the judgment of the District Court is erroneous.

The PRESIDENT. The rule in England is, that where process is directed to the sheriff generally, and not by name, if the High Sheriff be not required by the command of the writ, or by some statute to go in person, he may act by deputy. The case of an Elegit is not distinguishable from the present, and tho' another reason seems to be given in Fulwood's case, 4 Rep. 65, why the deputy may act, yet a more satisfactory one is furnished by the rule above mentioned; namely, that the statute does not require the High Sheriff to go in person.

Our law upon this subject appears to be formed upon this rule. All process without exception is directed by the general law to be executed by the High Sheriff, or by his deputies, leaving particular cases in which it might be proper for the High Sheriff to act, for future laws to provide for. Accordingly, the legislature have thought proper in two cases which are recollected, to require the High Sheriff to act in person. As to the charging of the jury, those who make the objection ought to shew, that the High Sheriff can ex officio administer an oath, without a positive law to authorize it.

It was the common practice for the deputies to execute writs of ad quod damnum to dock intails, tho' I do not know that in any instance it was questioned.

Judgment of the District Court reversed and the order of the County Court affirmed.

Gordon v. Frazier & Cosbie.

October Term, 1795.

Clerical Errors—Amendment—Motion*—Writ of Error Coram Nobis.†—The Clerk having entered up a judgment by nil dicit, in the District Court, in debt on a bond for the payment of tobacco, without noticing a memorandum endorsed on the bond, this Court considered the mistake to be merely clerical and amendable upon motion, at a subsequent Term. But the injured party

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*Clerical Errors—Amendment—Motion.—As to what is a clerical error, amendable on motion in the court below, see the principal case cited in Bent v. Patten, 1 Rand. 29, 32, 33. On page 36 of the same case the court said: "Those only are clerical errors which are made by the clerk, which depend only upon a comparison and calculation to be made by him, and may be safely reformed by reference to other statements contained in the proceedings. That was the case, in *Gordon v. Frazier and Cosbie*, even in relation to the endorsements as to the Hobbshole tobacco."

See monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

In Com. v. Winstons, 5 Rand. 567, the court said: "The principle which I extract from the British decisions, and from *Gordon v. Frazier*, is that which, in its origin, was a mere misprision of the clerk, does not cease to be so, merely because the entry has been read in court, and signed by the judge; and that it will be amended as the misprision of the clerk, provided there is anything in the record, by which it may be safely amended."

Same—Amendment at Subsequent Term.—In *Gordon v. Frazier*, 2 *Wash.* 130, a judgment entered on the order book of one of the old district courts, and signed by the presiding judge, was amended by the same court at a subsequent term, and the amendment sanctioned by the court of appeals, on the ground that it was a misprision of the clerk, and that there was something to amend by.

In Com. v. Winstons, 5 Rand. 557, 565, 566, 567, JUDGES GREEN and CABELL followed this decision in preference to the decision in Vaughan v. Freeland in a note, 2 Hen. & M. 477; Cogbill v. Cogbill, 2 Hen. & M. 467; Halley v. Baird, 1 Hen. & M. 25. Both of the above named judges were of opinion that Vaughan v. Freeland was in conflict with the decision in the principal case, but they considered the latter the better authority. JUDGE CABELL, however, was of opinion that Halley v. Baird also conflicted with the decision in the principal case: he said on page 566: "I feel myself at liberty to choose between the conflicting decisions of *Gordon v. Frazier*, on the one hand, and Vaughan & Field v. Freeland, and Halley v. Baird, on the other: and I am constrained, by the best considerations I can give the subject, to prefer the authority of *Gordon v. Frazier*."

The principal case is cited in Wrenn v. Thompson, 4 Munf. 380. See *foot-note* to Price v. Com., 33 Gratt. 820.

It was held in Halley v. Baird, 1 Hen. & M. 25, following Vaughan v. Freeland, that the district court had no power to reverse, alter or amend the judgment given at a former term of the said court, which had been entered on the order book, and signed by the judge in open court. Both cases are in direct conflict with the principal case.

†**Writ of Error Coram Nobis—When It Lies.**—A writ of error *coram nobis* lies where some defect is alleged in the process or the execution thereof, or some misprision of the clerk, or some error in the proceedings arising from a fact not appearing on their face, as where judgment is rendered against a party after his death, or who is an infant or feme covert. Richardson v. Jones, 12 Gratt. 55, citing *Gordon v. Frazier*, 2 *Wash.* 130; Bent v. Patten, 1 Rand. 25; Tidd's P. F. 513.

The principal case is cited with approval in McKinsey v. Harding, 16 Fed. Cas. 226.

Same—Superseded by Motion.—Mere motion to the court of error has superseded in practice the writ of error *coram nobis*. In support of this statement, see the principal case cited in Fawkes v. Davison, 8 Leigh 560; Goolsby v. St. John, 25 Gratt. 157; Shuford v. Cain, 22 Fed. Cas., p. 49; 4 Min. Insts. (3d Ed.) p. 1055.

Thus, in a note to Alston v. Munford, 1 Fed. Cas., page 581, it is said that where the object is to correct clerical misprisions, the writ of error *coram vobis* (or *coram nobis*) has been superseded by the practice of giving notice to the adverse party, and amending upon motion; they cite 1 Rev. Code, 1819, p. 508, sec. 77, 1 Rev. Code, p. 512, sec. 88; Cogbill v. Cogbill, 2 Hen. & M. 477; Halley v. Baird, 1 Hen. & M. 25; Beatty v. Smith, 5 Munf. 41; Bent v. Patten, 1 Rand. 25; Burch v. White, 3 Rand. 104; Com. v. Winstons, 5 Rand. 546; Christian v. Miller 3 Leigh 78.

See Va. Code 1887, ch. 169, sec. 3447; W. Va. Code, ch. 134, sec. 1, p. 896.

Bonds—Endorsement on—When Part of Bond.—The general rule is well settled, that a memorandum endorsed on a bond at the time of its execution, operating in favor of the obligor and signed by the obligee, is to be considered as part of the condition of the bond. The principal case is cited with approval, to support this proposition in Smith v. Spiller, 10 Gratt. 323; Peyton v. Harman, 22 Gratt. 645; Price v. Kyle, 9 Gratt. 249, 251; Stone v. Hansbrough, 5 Leigh 424, 425; Smith v. Nicholas, 8 Leigh 356. The principal case is distinguished in Eib v. Pindall, 5 Leigh 117; Carter v. Noland, 86 Va. 571, 10 S. E. Rep. 605; Calwell v. Caperton, 27 W. Va. 412, 415, 417.

See *foot-note* to Price v. Kyle, 9 Gratt. 248, and Smith v. Spiller, 10 Gratt. 318. The principal case is further cited with approval in Argenbright v. Campbell, 3 Hen. & M. 175.

may if he please, proceed by writ of error coram nobis: although this latter case, he is not entitled to costs.

Writ of Error Coram Nobis—Plea in Nullo Est Erratum.—If the defendant in a writ of error coram nobis, plead in nullo est erratum, and conclude to the Court, the trial must be by the court.

Judgment—Error in—Correction.—An error in the judgment of a Court can never be corrected by the same Court.

The case was. The appellees brought an action of debt against the appellant in the District Court of Northumberland, upon a penal bill for the payment of 73,000lbs of sound merchantable tobacco, inspected in the year 1780, at Falmouth, Fredericksburg, or Port Royal. A memorandum
131 was endorsed *on the bill, signed by the appellees, in the following words, viz: "Tobacco passed at Hobs-hole inspection will be received in discharge of the above bond; tobacco passed at any time within the twelve months on these warehouses to be taken." (Signed by the obligees.)

A conditional judgment being entered against the appellant and his appearance bail, the latter, set it aside and pleaded payment. At a subsequent term, the appellant withdrew the plea, and judgment by nil dicit was entered by the clerk, for the payment of tobacco generally, with a stay of execution, but without specifying the particular warehouses, and without giving credit for sundry payments endorsed on the bill.

The appellees at a subsequent term, petitioned the same court for a writ of error coram vobis, and made an assignment of errors stating "that the clerk had entered up the judgment for payment of tobacco generally, whereas it ought to have been for 73,000lbs of sound merchantable tobacco of the inspection of 1780, at Fredericksburg, Falmouth, or Port Royal warehouses."

The appellant pleaded in nullo est erratum, and concluded with praying the court to proceed to examine as well the record and process aforesaid, as the matters aforesaid assigned for error, and that the judgment might be affirmed.

To this plea, there was a general replication.

The Court having inspected the record and proceedings, as also the original bill penal and indorsements thereon, and the original entry of the confession of judgment, reversed the same with costs, it not being rendered pursuant to the tenor of the penal bill, and the discounts endorsed thereon not being allowed. The court then proceeded to give judgment, for the penalty of the bond to be discharged by the payment of 48,927lbs of sound merchantable tobacco, passed at the Fredericksburg, Falmouth and Port Royal warehouses, with interest and costs &c.

From this judgment Gordon appealed.

Washington for the appellant. Writs of error coram vobis are unusual in this country, but they are certainly useful, and the rules respecting them in England are not difficult to understand. They lie to correct misprisions of the clerk, and errors in fact, or in the process and proceedings. But if the error be in the judgment of the court, it can only be corrected by a superior tribunal. So if the error be in fact, it can be tried only by a jury. 2 Lev. 38—2 Bac. Ab. 215, in the cases there cited. I object therefore in the first place, that the trial was by the court upon inspection of
132 the record, and not by a jury. *The withdrawing of the plea, and the entry of the judgment generally, might have been done in consequence of an agreement variant from the tenor of the bill, and therefore it involved a fact properly triable by a jury.

But I rely principally, that the judgment which is given to correct a former one, is itself erroneous for the same reason that the former is alleged to have been so.

It will not be questioned I presume, but that the memorandum endorsed on the bill, is as much a part of the obligation, as if it had been inserted in the body of the instrument itself; of course, the payment might be made of tobacco at Hobs-hole as well as at the other three warehouses. If the court then were right in correcting the former judgment, so as to make it conform to the tenor of the bill, they were wrong in omitting the Hobs-hole inspection, since by doing so, the tenor of the obligation was not pursued; so that at all events the judgment must be reversed.

Warden for the appellee. The error in this case is obviously clerical. The judgment is confessed generally, (as the record proves,) and the entering it up is the business of the clerk, who having the bond for a guide, ought to have pursued the tenor of it. The variance from it, is certainly his mistake and not that of the court, as we all know, that the proceedings in a cause are never examined by the court that the time when the orders are read and signed by the judge.

It is contended that the trial ought to have been by jury. To this there are two answers; 1st, that the error appears obviously from the record to be clerical, and therefore there could be no fact for the jury to try. And 2dly, the plea in nullo est erratum confessed the fact, and therefore it was unnecessary to try it.

As to the objection stated to the last judgment, it is not easy for this court to decide that it is error. For it is impossible to say, whether the memorandum was made at the time the bill was executed or not, or by whom it was made.

Wickham on the same side. I admit, that if the error assigned be a matter of fact dehors the record, it is triable only by a jury. But in such a case the parties must by their pleadings put the fact in issue For if the defendant in error instead of traversing the fact, tenders an issue in law, denying that there is error, he necessarily admits the facts alledged in the assignment to be true, as certainly, as a demurrer does in common cases admit the truth of the allegations on the other
133 side. Thus *if the error assigned be that the defendant was an infant and appeared by attorney, the opposite party may traverse the fact of infancy and have it tried by a jury; or he may admit the fact, and deny that it is error, and this is done by pleading in nullo est erratum. So that upon the pleadings in the cause, the court, and not the jury were to decide the

point in issue. But the truth is, that the error was merely clerical, and appears to be so upon the face of the record, and therefore it was properly amendable by the court upon inspection. The act of Assembly (Rev. Laws p. 118, § 21,) has prescribed the mode in which the clerk is to enter up judgments in actions on bonds; that is to say, for the penalty, to be discharged by payment of the principal, interest and costs. The confession in this case was general, but the clerk has omitted to enter up the judgment according to the rule above mentioned.

I am inclined to think that the court were right in not noticing the memorandum. It does not appear how, or when it was made. Besides, the obligors lost the election which it gave him of paying tobacco of the Hobs-hole inspection, by his not having made the payment within the twelve months.

Washington in reply. I admit that if the error stated had been one which was properly assignable, the plea would have confessed it. But if otherwise, the plea is considered as a demurrer Cro. Ja. 12. 29. 521. Raym. 231. Cro. Car. 421. But error in the judgment of the court, as I observe in opening the cause, is not assignable, nor can it be corrected by the same court.

The plea therefore confesses nothing. The error here is in the judgment of the court. The words are "therefore it is considered by the court that the plaintiff recover against the defendant," &c. &c. This is called the mistake of the clerk. It may be so, but it may not be so. The record states it as the mistake of the court, and there are no facts appearing to induce a different conclusion.

But I rely principally upon the other objection. The memorandum is signed by the obligees, and the bond continues in their possession. No question can exist but that a memorandum indorsed upon a deed is considered as a part of the deed, and consequently, if the amendment were properly made upon an inspection of the bond, it should have been wholly pursued, or not at all. The election given to the obligors by the memorandum is not restrained as to the time of payment, but the age of the tobacco after inspection. Mr. Wickham's
134 argument upon *this point is therefore founded upon a mistaken construction of the memorandum.

CARRINGTON, J.—This case tho' depending upon a practice not common in this country is by no means a difficult one. I have no doubt but that the error complained of might have been corrected by the same court upon motion, at a subsequent term; but I should not for that reason reverse the judgment, since the party having preferred a writ of error coram vobis had a right to proceed in that way, tho' a shorter, and much less expensive mode might have been pursued.

The plea of the defendant concluding to the court and resting the defence upon the law of the case, is a compleat answer to the objection made to the mode of trial. The error in this case appears on the face of the record to be merely clerical, and consequently, the court had a right to amend it. But in correcting two errors, there are three committed.

1st, The election given to the obligor by the endorsement (which is clearly to be considered as part of the bond,) of paying tobacco of the Hobs-hole inspection is omitted, as also the age of the tobacco as specified in the memorandum.

2dly, There is an error in the calculation of the balance due, after discounting the payments endorsed on the bond.

3dly, In awarding costs to the appellees. For as the error was merely in the officer of the court, which the injured party might have corrected upon motion, it is unjust that because the plaintiff in error chose to pursue this method, the defendant should be burthened with the payment of the costs.

LYONS, J.—The only difficulty which I was under from the beginning, was whether a writ of error coram vobis in a case of this sort was proper, since I have no sort of doubt, but that the error might have been corrected upon motion. However, I should not incline for this reason to reverse the judgment; but I concur in opinion with the judge who has gone before me, that the judgment itself is erroneous and must be reversed. I recollect a case, (tho' I have forgotten the names of the parties) where upon an appeal from the County Court of Middlesex to the District Court of King and Queen, a variance was suggested between the minutes and the record, and the clerk being summoned to attend the District Court with his minute book, and the variance appearing, he was directed by the Court to amend the record, and this proceeding was sanctioned upon an appeal to this court.

135 *The PRESIDENT. The first objection stated by the appellant's counsel was, that an error in the judgment itself, could not be corrected in the same court. This was admitted to be law by the counsel on both sides. It was then contended, that the error complained of in this case was in the judgment of the court. In form, it is so; and though the proceedings as drawn up by the clerk, are read over in court, and where there has been a trial, the same are then corrected, yet this is not done where a judgment is confessed as it was here, for in such case, the act of Assembly furnishes a rule by which the clerk is to enter up his judgment. There is no doubt, but the court may amend upon motion where a mistake is committed by their clerk, if there be, as in this case there was, something to amend by. Yet the party was at liberty to pursue the present mode if he chose to do so.

As to the correcting judgment, it is clearly chargeable with the three errors which have been mentioned. Upon the subject of costs I feel some difficulty. It is clear that the court had a power to correct the error upon motion, and therefore it was unnecessary to apply for a writ of error. The former practice (where notice is given of the motion to the adverse party) is upon every principle to be preferred; yet we should not for this reason quash the writ, since the party was at liberty to pursue either mode. Yet it would be un-

just, that Gordon should pay the costs unnecessarily incurred in correcting the mistakes of the clerk. But I was somewhat perplexed as to the law respecting this subject, writs of error coram vobis being so unusual in this country, as not to come fully within any of the acts relating to costs.

This case occurring in the year 1790, the act of 1792, Ch. 66, § 64, (see Rev. laws p. 87) cannot have any influence upon it. The District Court law passed in 1788, Ch. 67, § 73, refers this subject to the law enabling the General Court to settle and adjust costs. Upon examining that law (passed in the May session of 1783, Ch. 40, Chan. Rev. p. 207) the General Court are authorised in cases of appeal, writs of error, supersedeas or certiorari from the inferior Courts to award costs. This applies not to writs of error in the same court. We then assimilated this to the cases of motions, where, by the same law, the costs are discretionary. Yet this discretion is to be exercised with reason, and as I am clear that it was unreasonable to award costs in this case, I am of opinion, that the judgment is erroneous upon this point also.

136 *Judgment reversed with costs, and entered for 146000lbs of tobacco, the debt in the declaration mentioned, and the costs of the appellee in the District Court expended to the time of enterng the first judgment, but to be discharged by the payment of 49,085½lbs of sound merchantable tobacco inspected either at Fredericksburg, Falmouth, Port Royal or Hobs-hole warehouses with interest &c. and the costs of the first judgment.

Harrison Executor of Minge v. Margaret Field Executrix of James Field.

October Term, 1795.

Joint Bonds—Death of Surety.*—If a bond be made joint, without fraud or mistake, Equity will not charge the executor of the surety, who was discharged, at Law, by his death, in the life-time of the principal. Aliter, if the lending had been to both.

This was an appeal from the High Court of Chancery. The case was.—The testator of the appellee having loaned to William Claiborne a sum of money, he, together with Minge as his surety executed a joint bond to the testator for payment thereof. The bill states, that the testator of the appellee did not discover until after the death of Minge, (who was survived by Claiborne) that the bond was joint instead of joint and several. That Claiborne was at that time and is now insolvent; that the loan was made entirely on the credit of Minge, and that the bond was executed at a time when Field was not present. The object of the bill was to recover the debt from the executor of Minge.

The appellant demurred to the relief sought, and assigned as cause thereof, that by the appellees own shewing, the bond was joint, and that Minge died in the lifetime of the other obligor. He also answered, asserting that Claiborne was in good circumstances when the loan was made; and avers that he neither knows nor believes that the loan was made on the credit of Minge, or that the bond was made a joint one by mistake or fraud.

The demurrer coming on by consent to be argued was overruled, and commissions for taking depositions were awarded. But the cause being brought on during the same term for a hearing upon the bill, answer, and bond, a decree was pronounced that the appellant out of the estate of Minge in his hands to be administered should pay to the appellee, the principal money due by the bond (reduced according to the scale of depreciation) with interest and costs.

137 *From this decree Harrison appealed.

Copland for the appellant. The appellee having lost her remedy at law, a Court of Equity can upon no principle revive the duty, unless the bond were made joint by fraud, mistake or the like. If a Court of Equity can do this, it can supply the want of a seal, or bind heirs tho' not named in a deed; in short I know not what the omnipotence of that court may not do. Except cases, in which trust, accident or fraud are mingled, a Court of Equity cannot change the settled principles of law.

Stark for the appellee. The relief afforded by the Chancellor in this case, is founded upon well established principles which prevail in Courts of Equity. Though the remedy be gone, the duty is conscience still exists, and a Court of Equity will look back to the contract which preceded the evidence of it, and give it validity. The moral obligation to pay, cannot be done away by any accident destroying the evidence of that obligation, or which discharges the party from the legal remedy against him. The claim of a surety to be freed from this relief is not well founded, since in all cases the loan is made, or will be presumed to have been made upon the

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***Joint Bonds—Death of One Obligor—Survival.**—In Somerville v. Grim, 17 W. Va. 808, the court said: "Before our statute if one obligor in a *joint bond* was dead and the other living, the action could only be against him who survived. It was gone forever as to the representatives of the deceased obligor. His estate was entirely exonerated from the payment of the debt by his death; and the burden was wholly upon the obligor that survived. If the last surviving obligor died the action remained against his representatives. *Minge v. Field*, 2 *Wash.* 136; Elliott v. Lyell, 3 Call 268; Chandler v. Neale, 2 Hen. & M. 124; Atwell v. Milton, 4 Hen. & M. 253; ROANE, Judge, in Atwell v. Towles, 1 Munf. 181; Braxton v. Hilyard, 3 Munf 49." For this proposition, the principal case is further cited with approval in Reynolds v. Hurst, 18 W. Va. 654; Chandler v. Neale, 2 Hen. & M. 131; Atwell v. Milton, 4 Hen. & M. 256; Atwell v. Towles, 1 Munf. 180. See *foot-notes* to Elliott v. Lyell, 3 Call 269; Crawford v. Daigh, 2 Va. Cas. 521; Richardson v. Johnston, 2 Call 527.

Same — Same. — For the proposition that where money is lent to both the obligors in a joint bond, the law raises a promise in both to pay, the principal case is cited in U. S. v. Archer, 24 Fed. Cas. 849. The principal case is cited with approval in Powell v. White, 11 Leigh 329.

Equity Jurisdiction—Setting Up Lost Instrument.—As to the point that equity will set up a lost bond as well against the heirs of an obligor, as against a surety, see the principal case cited in Kerney v. Kerney, 6 Leigh 484.

In Hickman v. Painter, 11 W. Va. 395, a bill was filed by the plaintiff to set up a lost receipt, which the defendant had given to the plaintiff, as constable, for certain claims, put in the constable's hands for collection. On demurrer it was held, citing the principal case as authority, that the court relieves against the accident of the loss, by setting up the evidence of the debt.

faith and credit of the surety. Questions of this sort in the courts of England seldom occur, since almost all bonds in that country are accompanied with letters of attorney to confess judgment, and disputes like the present are never heard of, but when applications are made to correct irregularities in entering up the judgments. The bill states that the bond was drawn by Claiborne in the absence of Field, and this is not denied in the answer. The case of Acton and Peirce 2 Vern. 480, affords an instance where a Court of Equity will grant relief, tho' the remedy is gone at law. In this case, it was even afforded against an heir who was not bound at law. The case of Simpson and Vaughan 2 Atk. 32, seems to be in point, and it establishes the principle I contend for, namely, that the court consider the contract as distinct from the evidence of it. In that case, a joint bond was given which does not appear to have been so made by fraud, or accident, and yet the executor of the deceased obligor was bound. The Chancellor presumed the bond was drawn by an unskilful hand; in this country it is notorious that they are generally drawn by such persons. Bishop and Church 2 Ves. 101, tho' it differs from the present case in one circumstance viz. that the obligatory part is joint, and the condition joint and several, yet it establishes the principle laid down in Simpson and Vaughan. Probart and Clifford, cited in 2 Viz. 102, is also a strong case.

138 *We know that equity will set up a lost bond even against a surety, tho' the remedy be gone at law. So if A and B were bound in a bond to C, who should make the wife of one of the obligors his executrix, this would at law be a release to both obligors, yet a Court of Equity would relieve. But if I am wrong upon this point, the court will, if the decree be reversed, send back the cause, that the parties may have liberty to take depositions, as the case was heard at the same term when the demurrer was over-ruled, so that the plaintiff below had not an opportunity to prove such facts as might give a different complexion to his case.

Copland in reply. It is not true that a Court of Equity will afford relief in cases where the remedy is gone at law, merely because there exists a moral obligation on the party to pay. Thus, where there is a deficiency of personal estate, that court, no more than a court of law can subject the real estate to the payment of a debt however justly due. The case of Acton and Peirce is unlike the present, because in that, the intention of the parties and the mistake in the deed were apparent. Simpson and Vaughan is bottomed upon the loan having been made to both obligors, and consequently, the contract, which preceded the execution of the bond, was equally obligatory on both, and imposed on both a moral obligation to pay. This is the very ground of the Chancellor's opinion. In that case, the survivor became a bankrupt; and tho' in this case it is charged in the bill, that Claiborne was at the time insolvent, or afterwards became so, the fact is neither admitted in the answer, nor established by proof. The case of Heard and Stamford, Forrest 174, is in principle very much like the present.

As to Mr. Stark's expectation, that if this court should reverse the decree, the cause will be sent back for depositions to be taken, it need only be remarked that the hearing of the cause without depositions was by consent of parties.

ROANE, J.—In this case there is no evidence that the bond was made a joint bond by fraud or mistake, or if any such did exist, that Minge was privy to the same. The chance of survivorship was equal, and Minge was willing to submit to the legal consequences of such a bond. There may possibly exist reasons with an obligor for prefering a joint, to a joint and several bond, and it is impossible for this court to decide whether such reasons did, or did not prevail with Minge. The law is laid down in the case of Towers and Moor, 2 Vern. 99, that in a joint bond, the duty survives against the surviving obligor.

139 *The case of Simpson and Vaughan goes expressly upon the lending being to both of the obligors. A moral obligation therefore was imposed upon both by the contract, to pay the debt, and if by the form in which the bond was drawn the remedy was gone at law, the court thought it equitable to relate back to the moral obligation which was equally strong on both of the obligors. But in this case, the surety was under no moral obligation, not having been a borrower of the money, and was only bound by the bond itself; no antecedent contract therefore subsisted between him and Field whereon to found an equity for the extraordinary interposition of the Court of Chancery. The case of Bishop and Church also goes upon the lending being to both of the obligors. I will not say that there may not be circumstances which would subject even a surety to the relief now sought for, but I am clear that the present case is totally destitute of them, and therefore I am of opinion that the decree is erroneous.

FLEMING, J.—In the cases of Simpson and Vaughan, and Bishop and Church, the obligors were partners in the business; both had the benefit of the money lent, and the survivor became bankrupt. A stronger case could not have occurred to warrant the equitable relief granted by the court. In the latter case, the Chancellor postponed a decision of the cause, that enquiry might be made into the neglect suggested against the obligee, and it is highly probable that if that had been proved, he would have dismissed the bill. In this case Field, if he could upon any ground have been entitled to the relief he now asks for, would come into a Court of Equity with a very bad grace, after lying by so long as he has done, until Claiborne, the principal, has been reduced in his circumstances, and as the answer suggests is now unable to pay. Upon the whole, I am of opinion, that Minge was a mere surety, not bound at all in conscience, and his executor being exonerated at law ought not to be charged in equity.

The PRESIDENT. The case of Acton and Peirce in principle has no application

to the present. A husband upon his marriage agreed to leave his wife £1000 if she survived him; a bond for this purpose was drawn by an unskilful hand, and was made payable to the wife, with condition to leave her the £1000. In this case, the husband was by his agreement, and for a consideration deemed valuable in law, a debtor to the wife, and under a moral obligation to pay. Tho' the remedy was gone
140 *at law by the intermarriage, and that, in consequence of the unskilfulness of the drafts-man, yet the husband's conscience was bound, and therefore the court very properly considered him as a trustee for the wife. The principle contended for by Mr. Stark, that a loan creates a moral obligation to pay, which being a duty antecedent to, and independant of the bond, cannot be discharged by the loss of the bond, or by other accident is true, as to the borrower, and the cases of Simpson and Vaughan, and Bishop and Church are decided upon this ground only.

The Chancellor indeed in Simpson and Vaughan is made to say, that no stress was laid upon the circumstance of the obligors being partners. But this is certainly a mistake of the reporter, for in the case of Bishop and Church, the counsel, speaking of Simpson and Vaughan says, "the consideration your lordship went upon, was, that it was a sum lent to both, of which both had the advantage, and a debt arose against both from the nature of the transaction." In this assertion he is not contradicted by the Chancellor, which would seem to prove that the lending and borrowing was the ground upon which the decision in that case was bottomed. The principle then of these cases has no application to the present. The surety received no benefit from the loan; he was bound by no contract express or implied, antecedent to the bond he was under no mosal obligation to pay, and of course equity would not bind him farther than he was bound at law.

It is a maxim, that where equity is equal, he shall prevail who has the law in his favor, and the cases cited in Francis's maxims of equity p. 71, as an illustration of the principle are very strong indeed, to shew that a surety has equal equity with the obligee, and being discharged at law, equity will not charge him.

It is true a Court of Equity will set up a lost bond against a surety, but the reason is, that the surety is not discharged by the loss of the bond, and the court only relieves against the accident by setting up the evidence of the debt.

It was argued that it did not appear that Minge was a surety. This is a fact not to be disputed, since the bill itself so states it. Bonds are sometimes so drawn that it is impossible to distinguish the surety from the real debtor, but when distinguished by proof, the uncertainty arising from the face of the instrument can make no difference in the principle. Since the act of Assembly which gives to sureties a summary remedy against their principals, it might be well to distinguish in the bond, the one from the other.

141 *It was contended that the demurrer admitted the truth of the allegations in the bill. It is true that a demurrer without an answer does admit the facts charged on the other side, but if the defendant also answers and denies the allegations of the bill, as the defendant has done in this case, it cannot be said that they are acknowledged. When the demurrer was overruled, general commissions for taking depositions were awarded, of which the plaintiff might have availed himself if he had wished to establish any facts important to his cause. But instead of this, he appears to have consented to bring on the cause for a hearing without testimony, and therefore there is no ground for giving him an opportunity now of taking depositions.

The Opinion of the Court is, "that the testator David Minge having been neither the borrower, nor the user of the money lent to, and used by Claiborne, but a security only, ought not in equity to be further or otherwise bound than he was bound by the contract at law; and no fraud or mistake appearing to have occurred in the writing of the bond, it is to be considered as a joint obligation and subject to the legal consequence of Minge and his representatives being discharged by the death of him in the life time of Claiborne, and that the said decree is erroneous."

Decree reversed with costs and the bill dismissed.

Cole v. Scott.

October Term, 1795.

Vendor's Lien.*—A vendor of land, not having conveyed the same, or taken a security for the purchase money, has a lien upon the land for satisfaction thereof.

The only question in this cause was, whether the vendor of land sold and in possession of the vendee, but not conveyed, has a lien on it, so as to secure the payment of the purchase money. In this case, the Chancellor dismissed the plaintiff's bill which was brought to subject the land to the payment of the money for which it had been sold.

Stark for the appellant. I consider this question as compleatly settled by the cases of Chapman v. Tanner, 1 Vern. 267. Pollexsen and Moore, 3 Atk. 272—Walker and Preswick, 2 Vez. 622—Cator and Earl of Pembroke, 1 Brow. Ch. Rep. 301—Blackburn and Gregson, Ib. 420. In Han-
142 son and King's heirs, *in the former Court of Appeals, and in Lidderdell's heirs v. Pettis's executor and others in the Fœderal Court, in all of which the lands

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***Vendor's Lien—Waiver of.**—The rule is well settled that merely taking the bond, note or covenant of the vendee himself for the purchase money, is not of itself a waiver of the vendor's lien, for it may be taken to countervail the receipt of the payment usually endorsed on the conveyance. But if the vendor takes a distinct and independent security, either of real or personal property, from the vendee, or the responsibility of a third person, it is evidence that he did not repose on the lien, but upon independent security, and the lien is discharged. The principal case is cited with approval, to support this proposition in McCandlish v. Keen, 13 Gratt. 624; Blair v. Thompson, 11 Gratt. 443; Renick v Ludington, 16 W. Va. 395; Gilman v. Brown, 10 Fed. Cas. 401; Tompkins v. Mitchell, 2 Rand. 429. See *foot-notes* to Graves v. M'Call, 1 Call 414; King v. Hanson, 4 Call 259.

That a Mortgagee is a Bona Fide Purchaser.—The principal case is cited in note to Partridge v. Smith, 18 Fed. Cas., pp. 1281, 1282. See Cole v. Scott, Wythe 272.

were decreed to be sold for payment of the purchase money.

ROANE, J.—The question which this record presents to the court is whether the vendor of land which he has not conveyed, has such a lien upon it, as that he may apply to a Court of Equity for a sale to supply the deficiency of the personal estate in paying the purchase money?

Upon an examination of the cases cited at the bar, the law seems to be settled, that where land is sold and no security taken, nor money paid, the vendor retains a lien, and the rule must be the same, where a part of the consideration has been paid, as in this case. The authorities appear to be uniform in establishing this doctrine, where no bond is given for payment of the money. In the case of Blackburn v. Gregson, 1 Brown's Ch. Rep. 420, all the former adjudications upon the subject are brought into review before the court, and the circumstance of a bond being given, seems not to have been considered as important. However, I shall give no decision myself upon this point, as there is no bond in the present case. The doctrine seems also settled by the case of Hanson and King in the former Court of Appeals.

Upon the whole I am of opinion that the land is liable, and the decree consequently erroneous.

FLEMING, J.—It is clear in this case, that there is no personal estate in the hands of the executor to pay the balance of the purchase money remaining due, and I consider the law as settled, that the vendor has a lien upon the land. I concur in opinion.

The PRESIDENT. If this were a new case, I should feel no difficulty in making it a precedent. But the doctrine, that a vendor of land not taking a security, nor making a conveyance, retains a lien upon the property, is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the vendee, or of a purchaser with notice. But if he hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost. In this case however, there was no conveyance made, and the land is now in possession of volunteer claimants under the vendee.

The Opinion of the Court is "that the appellant not having conveyed the land, nor taken any security for the
143 *balance of his purchase money, hath a lien upon the lands in the hands of the appellees for satisfaction of such balance."

Decree reversed.

Terrell Executor of Holt v. Atkinson's Executor.

October Term, 1795.

In Debt on a Bill of Exchange Profert Is Not Necessary.

This was an appeal from a judgment of the District Court of Williamsburg rendered in favor of the appellee on a bill of exchange. Plea, nil debit.

The only question was, whether profert of a bill of exchange in an action of debt were necessary? In this case it was not made.

Wickham for the appellee contended, that it was not necessary, but that if it were, the statute of Jeofails cured it after verdict.

The Court affirmed the judgment.

Payne v. Ellzey.

October Term, 1795.

Damages—Verdict in Excess of Ad Damnum.*—In debt upon a bond with a collateral condition, the jury may assess damages beyond those laid in the declaration, if the penalty be sufficient to cover them.

This was an action of debt brought in the County Court of Fairfax by Payne against Ellzey upon a prison bounds bond, given to the sheriff by Ellzey, as surety for Gardner, in the penalty of £24:8:3, and 2804lbs of tobacco. The damages laid were £10.

On oyer of the bond and condition, the defendant pleaded "that he was not guilty of the premises laid to his charge." Replication, protesting that the defendant is guilty, and assigns as a breach of the condition of the bond, "that the said Gardner did not constantly keep himself within the bounds of the jail until he paid the debt and costs in the condition mentioned, according
144 *to the force and effect thereof." Rejoinder, that the said Gardner is not guilty of breaking the bounds of the said jail without paying the said debt and costs according to the form and effect of the condition of the said bond and tenders an issue which is joined. Verdict "that the defendant is guilty, for that the said Gardner did not constantly keep within the bounds of the jail till he paid the debt and costs in the said condition mentioned," and assess the plaintiff's damages to £34:10:8½.

A motion was made in arrest of judgment, because the damages assessed exceeded those laid in the declaration. The errors being disallowed, judgment was entered for the penalty of the bond, to be discharged by the payment of the damages and costs, from which the defendant appealed to the District Court of Dumfries where the judgment was reversed and the verdict set aside, from which decision Payne appealed.

Washington for the appellant. The principal error assigned as cause for arresting the judgment is, that the jury gave damages exceeding those laid in the declaration. If this had been an action sounding altogether in damages, the objection would have been a substantial one, unless a release of the excess had been entered upon the record. But this is an action to recover the penalty of the bond, and by the act of 1748, the judgment is to be entered for the penalty. But there being a collateral condition, if the damages assessed by the jury be less than the penalty, the defendant may by paying the former, be discharged from the latter. The demand in

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*Damages--Verdict in Excess of Ad Damnum.—See *foot-notes* to Johnston v. Meriwether, 3 Call 523; Hook v. Turnbull, 6 Call 85.

The principal case is cited with approval in Peerce v. Athey, 4 W. Va. 28; Winslow v. Com., 2 Hen. & M. 465; Lewis v. Long, 3 Munf. 156.

See Cloud v. Campbell, 4 Munf. 214.

this case was for the penalty, and the verdict is for a smaller sum.

Lee for the appellee. This is an action truly sounding in damages. The appellant says, that he has sustained damages in consequence of Gardner's having broken the prison bounds to the amount of £10. As he has himself ascertained the value of the injury, the jury have no power to give him more. I cannot discover that this case is distinguishable upon principle, from an action on the case brought to recover damages.

ROANE, J.—By the act of 1748, (Body of laws p. 181,) the judgment in cases like the present is to be for the penalty, tho' it may be discharged by the sum assessed by the jury. If this construction of the act wants any support, it may be derived from the case of Collins v. Collins 2 Burr. 824, upon the construction of the stat. 8 and 9 W. 3. ch. 11. which is precisely similar to our act as to the point in question. The penalty therefore, is that for which the plaintiff sues, and any sum below it is within the sum declared for. One
145 reason why a judgment *is erroneous, which is entered for more damages than the plaintiff has declared for, is, that he best knows the extent of the injury of which he complains, and consequently can best estimate the measure of the compensation.

This reason does not hold in the present case, because the sum recovered is less than the penalty of the bond. The judgment I think ought to be reversed.

CARRINGTON, J.—This is a plain case, and I entirely concur in the opinion which has been delivered.

LYONS, J.—There are two reasons assigned in arrest of judgment. The first is, that the proceedings are irregular. This is true; the proper plea was, "conditions performed," but the issue is substantially the same and is cured by the verdict.

The second was noticed at the bar. I have always been of opinion, that in actions upon bonds for the payment of money, the laying of damages was unnecessary, for the act of Assembly declares, that the penalty may be discharged by the payment of the principle, interest and costs, saying nothing of the damages. The point was so determined in this court in a question which respected the jurisdiction of a Corporation Court.

The demand of the plaintiff in actions upon bonds of this sort, is for the penalty; the parties have agreed to make that the standard of the damages, and the judgment is entered for it, tho' by the law the obligee is compelled to receive less than the damages thus agreed upon, if less be assessed by the jury. The breach laid is for the non-payment of the penalty, and not of the damages really sustained. The plaintiff therefore may recover less, tho' not more than the penalty

I am authorised by the President to say, that he entirely concurs in this opinion.

The judgment of the District Court must be reversed, and that of the County Court affirmed.

146 *Claiborne v. Parrish.*

October Term, 1795.

Hearsay Evidence—Admissibility—Exceptions to Rule.—The general rule is, that hearsay evidence is inadmissible; but to this rule there are exceptions. If it be admitted and excepted to, such a case should be stated upon the record as to show that it came within some of the exceptions; otherwise, the general rule will be against the admission.

Evidence—Admissibility—Fraud.†—The testimony of a witness tending to fix a fraud upon himself, ought not to be regarded.

This was an ejectment brought in the County Court of New-Kent for 200 acres of land. Verdict, that the defendant was guilty as to 155 acres of the land. The judgment was entered for the 150 acres of land in the declaration mentioned. At the trial, the defendant tendered a bill of exceptions which was sealed, stating, "that the plaintiff offered I. H. as a witness, one of the persons said to be a juryman on the execution of the writ of ad quod damnum, who was questioned by the plaintiff as to what he had heard William Parrish, one of the chain carriers on the survey made pursuant to the said writ of ad quod damnum say, with respect to his the said Parrish's misconduct in carrying the said chain in measuring unfairly the lands mentioned in the declaration; which enquiry was objected to by the defendant as improper, but the court permitted the witness to answer the question as it related to what he had heard the said Parrish say. The District Court of Williamsburg affirmed the judgment for the 155 acres, from which the defendant below appealed.

Wickham for the appellant. The principle point in this cause is, whether the evidence excepted to was admissible or not?

The hearsay evidence of any person, unless it be of one of the parties (if against him) is inadmissible in a case of this sort. It does not appear that the chain carrier was upon oath at the time he made the declaration, or that he was cross examined.

I will barely mention what may perhaps be a good objection though I do not much rely upon it. The declaration is for 200 acres, the verdict finds for the plaintiff 155 acres, and the judgment is for the 150 acres in the declaration mentioned. The difference in the number of acres between the verdict and judgment may be merely a clerical mistake, but it would seem that the jury ought to have identified the 155 acres to which the plaintiff had a title, so as that it might be distinguished from the residue.

Marshall for the appellee. If hearsay evidence aided by other testimony could be proper, then this court, presuming
147 that *the judgment below is right until the contrary appears, will suppose that there was other testimony which rendered the hearsay evidence admissible, since the party who has excepted to the opinion of the court, has not stated the contrary. It is the business of the person who would impeach the judgment of a court to state all the facts necessary for this purpose upon the record, and this is most

*For monographic note on Witnesses, see end of case.

†The principal case is cited in Taylor v. Beck, 8 Rand. 346.

properly done by a demurrer to the evidence.

Now in many cases hearsay evidence is proper. As for instance, if the chain carrier was examined at the trial, evidence of what he had said on a former occasion might be proved so as to impeach his credibility. It does not appear in this case, but that Parrish was examined at the trial, and that the examination of I. H. was intended to destroy the effect of his testimony.

Wickham in reply. I had always supposed, that tho' a demurrer to evidence must state the whole testimony, yet that a bill of exceptions was to some point, or part of the evidence, and need not set forth what was not proved.

The general rule is, that hearsay evidence is inadmissible, the bill of exceptions states that hearsay evidence was received and the legal conclusion is, that the court did wrong. But Mr. Marshall contends that there are some exceptions from the rule; I grant it. But if this case came within any of the exceptions, the party who tries to support the judgment upon that ground, ought to have spread enough upon the record to shew that the case was within the exceptions.

At present, it stands upon the record as a general proposition, that hearsay evidence may be admitted, without any thing to shew that this particular case is within any exception from the rule.

But if the chain carrier had been called upon to give testimony, it would have been improper for two reasons. 1st, That it tended to accuse himself of a fraud, if no worse; and 2dly, That a writ of ad quod damnum continues in force till quashed, and cannot be destroyed by a side wind in an ejectment.

ROANE, J.—It is very true, that by the general rules of law, hearsay evidence is inadmissible. The reason of the rule is so well founded and so generally known, that it is unnecessary to state it. But from this rule there are exceptions, warranted by reasons as sound as those which induced the rule itself. As in the case of proving pedigrees, and in other ancient transactions, in which it is the best evidence which
148 the nature of such cases *admit of. But these cases which form exceptions from the general rule, are regulated by another, and that is, that it should appear there is no better evidence behind, and in the power of the party to produce; for otherwise, the omitting to produce such better proof, creates a presumption against the admission of inferior testimony. In this case, the objection made by the appellant is confined to the general rule, and the party who relied upon the evidence ought certainly to have stated such a case, as to shew, that tho' the general rule was against him, yet, he was within some of the exceptions: as that the transaction was ancient, his witnesses dead, and that their attendance could not be procured, or the like. But this he has not done, and therefore the general rule is against him.

But I am of opinion that if Parrish had been present and sworn, his testimony ought not to have been credited on account of the turpitude of his own conduct, and which his evidence was to have established; the court ought to have instructed the jury to disregard it. Most clearly then, it was improper to admit as evidence his declarations made when not on oath.

I am therefore of opinion that both judgments are erroneous.

FLEMING, J.—Concurred.

The PRESIDENT.—In every view of this subject, I think the evidence was improperly admitted. It has been well observed, that in some instances hearsay evidence may be proper, where from the nature of the case it is not to be expected that better testimony could be procured. Such as where the transaction is ancient, and in others which have been mentioned. It was upon this principle, that the case of Jenkins and Tom (ante vol. 1. p. 123) was determined.

But how do the reasons which authorise the admission of hearsay evidence apply to this case. The writ of ad quod damnum is only 17 years old, it is not stated that Parrish was dead, or that his attendance could not be procured. In short, there is not a single reason stated to justify us in saying that a departure from the general rule was proper. Hearsay evidence may also be admitted to shew, that a witness has been uniform, or otherwise in the testimony he gives. But nothing of this sort, appears, and if there were anything in the case to except this out of the general rule, it ought to have been stated by the court as the ground of their opinion. But if Parrish had been present and sworn, his evidence ought to have been disregarded by the jury: it was to prove himself
149 guilty of a fraud against his *sworn duty as a chain carrier. Much less was it proper to admit as evidence, what he had declared when not on oath.

Judgment reversed and a new trial awarded.

WITNESSES.

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Cross References to Monographic Notes.

Depositions, appended to Field v. Brown, 24 Gratt. 74.
Husband and Wife, appended to Cleland v. Watson, 10 Gratt. 159.
Bills, Notes and Checks, appended to Archer v. Ward, 9 Gratt. 622.
Expert and Opinion Evidence.
Arrest, appended to Abrahams v. Com., 1 Rob. 675.

I. MODES OF PROCURING ATTENDANCE OF WITNESSES.

Subpœna.—The usual mode of obtaining the attendance of a witness is by means of a summons called a *subpœna*, which is issued upon the demand of either party, by the clerk of the court. And when it appears by affidavit, that a writing or document in the possession of a person not a party to the controversy, is material and proper to be produced, the court or judge in vacation, may order the clerk to issue a *subpœna duces tecum*, to compel its production. The ordinary *subpœna* is obtained at the pleasure of the party; but, as has been stated, the *subpœna duces tecum* is obtained only by order of the court or judge in vacation. 4 Min. Inst. (3d Ed.) p. 825; Va. Code 1887, ch. 164, §§ 3352, 3353; W. Va. Code, ch. 130, §§ 25, 26.

If a witness, after being served with such summons, fails to attend to give evidence, or to produce the writing mentioned in the *subpœna duces tecum*, the court on proof that there was paid to him (if it was acquired by indorsement on the process), a reasonable time before he was required to attend, the allowance for one day's attendance, and his mileage and tolls, shall, after service of the notice to, or rule upon him, to show cause against, it (if no sufficient cause be shown against it), fine him not exceeding twenty dollars to the use of the party for whom he was summoned; and the court may proceed by attaching his person to compel him to attend and give his evidence: and the witness shall moreover be liable to any party aggrieved for damages. 4 Min. Inst. (3d Ed.) p. 827; Va. Code 1887, ch. 164, § 3354; W. Va. Code, ch. 130, § 27.

And, if he attend, and yet refuse to be sworn, or to give evidence, or to produce any writing or document required, the court may commit him to jail, there to remain until he shall, in the custody of the jailor, give such evidence or produce such writing or document. 4 Min. Inst. (3d Ed.), p. 827, Va. Code 1887, ch. 164, § 3350; W. Va. Code, ch. 130, § 28.

Habeas Corpus Ad Testificandum.—Another mode of procuring the attendance of witnesses in civil cases, which, however, is very rare, is by means of a writ of *habeas corpus ad testificandum*, where the witness is in custody of the law, and is not at liberty to obey a *subpœna*. This writ is granted at discretion, on motion in open court, or by the judge at chambers, upon affidavit stating the nature of the suit, and the materiality of the witness. 4 Min. Inst. (3d Ed.) p. 427.

Attendance of Witnesses in Criminal Cases.—See Va. Code 1887, ch. 199, § 4080; W. Va. Code, ch. 162, § 1.

II. COMPETENCY.

A. PERSONS INTERESTED.

1. PARTIES TO RECORD.—The general rule of the common law was that a party to the record in a civil suit, who had any interest at stake in the suit could not be a witness, either for himself of for a co-suitor in the cause. The rule excluded a *prochein ami*, a guardian, an executor, or administrator. Murphy v. Carter, 23 Gratt. 485; Coalter v. Bryan, 1 Gratt. 89; Steptoe v. Read, 19 Gratt. 2.

And the liability of a party even for costs was sufficient to disqualify him; nor could he be restored to competency by either party paying down a sum of money sufficient to cover the costs, or by the other party releasing him from paying them. Cogbill v. Cogbill, 2 Hen. & M. 467; Tunstall v. Withers, 86 Va. 892, 11 S. E. Rep. 565.

But it has been held that a mere naked trustee in a deed, who is a party to the cause, but against whom no claim can be had either for costs or otherwise, is a competent witness. Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519; Taylor v. Moore, 2 Rand. 63; Ross v. Norvell, 3 Munf. 170, 182; Eacho v. Cosby, 26 Gratt. 112.

And a man who is made *prochein ami* to an infant without his knowledge or consent is not disqualified from being a witness. Burwell v. Corbin, 1 Rand. 131, 10 Am. Dec. 494.

So, also, an administrator, to whom a credit for a sum of money paid by him to the guardian of one of the distributees has been allowed by a final decree in chancery, is a competent witness in behalf of the ward, to prove the payment of the money to his guardian, though the latter was no party to the decree. Hooper v. Royster, 1 Munf. 119.

In an action against a guardian for necessaries furnished his ward, the administrator of a previous guardian is a competent witness for the plaintiffs. Young v. Warne, 2 Rob. 420.

And in a suit to establish a resulting trust, it has been held that two of the defendants, against whom no relief was prayed for, and who had been discharged in bankruptcy, were competent to testify, though parties to the suit and to the transactions under review therein, and though they co-operated with the trustee in a *devastavit* and were liable over to the other defendants. Moorman v. Arthur, 90 Va. 455, 18 S. E. Rep. 869.

The creditor of a testator, whose debt has been paid out of the proceedings of a sale of the decedent's land, which sale is afterwards disaffirmed, is a competent witness to prove the amount of his debt, where he entered into no covenants for the sufficiency of the title; is not chargeable with any fraud; nor in any way liable to the purchaser, the executor, or the devisees. Hudgin v. Hudgin, 6 Gratt. 320, 52 Am. Dec. 124.

But in those cases in which a party to the record had no interest whatever, either in the subject of the controversy, or in the costs of the action, the reason for his incompetency ceased, and he might have been examined. Accordingly, it was held that an executor claiming no interest as devisee or legatee under the will, and not having acted in such a way as to subject him to a decree for costs, was a competent witness between parties claiming the estate he represented; though he was a party defendant in the suit; though he had settled his account showing large balances in his hands; and though he was entitled to a commission upon his receipts and disbursements. Coalter v. Bryan, 1 Gratt. 18-89.

2. PERSONS NOT PARTIES TO RECORD.

a. In General.—A person who was directly interested in the result of a suit was an incompetent witness according to the rules of the common law. The policy of this rule was to exclude persons, who had a strong bias on their minds, from being placed in a situation where their interest might induce them to depart from the truth. Richardson v. Hunt, 2 Munf. 148; Moon v. Campbell, 1 Munf. 600; Brown v. Dickenson, 27 Gratt. 694; Grandstaff v. Ridgely, 30 Gratt. 4; Knick v. Knick, 75 Va. 13; Fant v. Fant, 17 Gratt. 11; Bartley v. McKinney, 28 Gratt. 751.

b. Nature of Disqualifying Interest.

Interest in Result of Suit.—But it was well settled that the interest which would render him incompetent, must have been an interest in the result of the suit, for though he might feel a bias or interest in the struggle, and even have occasion to contest the question in a future action of his own, yet this would not exclude him, if the proceedings in the cause in which he testified, could not be used as evidence for or against him, in any future action to which he might be a party. Baring v. Reeder, 1 Hen. & M. 164; Richardson v. Carey, 2 Rand. 87; Ross v. Norvell, 3 Munf. 182; Masters v. Varner, 5 Gratt. 168, 50 Am. Dec. 114; Clements v. Kyles, 13 Gratt. 468; Adams v. Martin, 8 Gratt. 107; Gilmer v. Baker, 24 W. Va. 72; Crothers v. Crothers, 40 W. Va. 169, 20 S. E. Rep. 927.

Direct, Certain and Vested Interest.—Moreover, as the courts disfavored objections to the competency of a witness on the ground of interest, it was held repeatedly that the interest to disqualify a person from being a witness, must be a direct, certain and vested interest in the result of the cause, not a mere remote or contingent interest, for this goes rather to the credit than to the competency of witnesses, and must be left to the consideration of the jury. Baring v. Reeder, 1 Hen. & M. 154; Braxton v. Hilyard, 2 Munf. 49; Barnett v. Watson, 1 Wash. 373; Stevens v. Bransford, 6 Leigh 249; Wilson v. Alexander, 9 Leigh 459; Coalter v. Bryan, 1 Gratt. 87; Steele v. Boyd, 6 Leigh 559. See Dickinson v. Dickinson, 2 Gratt. 493.

Accordingly the deputy sheriff, who sold the property under the execution, was not a competent witness, in an action in the name of the high sheriff upon the bond of indemnity, to prove that the property belonged to the person against whom the execution issued, because his interest is certain, direct and immediate. Carrington v. Anderson, 5 Munf. 32; Wilson v. Alexander, 9 Leigh 459, citing with disapproval Brent v. Green, 6 Leigh 29; Stevens v. Bransford, 6 Leigh 246. Compare Smith v. Triplett, 4 Leigh 590.

Legal Interest.—And the rule which rejected an interested witness, regarded only a legal interest founded on legal rights and liabilities, and not such an interest, inclination or bias as might arise from moral or honorary obligations. Chapman v. Hiden, 2 Pat. & H. 91, 99.

Belief by Witness That He Is Interested.—It was held that if a person acknowledged that he considered himself interested in the event of a suit, he was not a competent witness, though, in fact, not interested. Richardson v. Hunt, 2 Munf. 148.

Subsequently Acquired Interest.—But where a witness was once qualified to testify, he was not rendered incompetent by any interest subsequently acquired by his own voluntary act or design, or by the voluntary act and design of the party objecting. Chapman v. Hiden, 2 Pat. & H. 91.

Witness Testifying against Interest.—Where a witness testified against his own interest, the rule that interest disqualified did not apply. Crothers v. Crothers, 40 W. Va. 169, 20 S. E. Rep. 927.

Interest of Witness Equal between Parties.—And it was held in several cases that where the interest of the witness was equal between the parties, or

against the party in whose favor his testimony operated, he was competent. But to counterbalance or outweigh an interest in the witness in favor of the party offering him by an equal or greater interest the other way, this last interest must have been as direct and immediate as the former. Braxton v. Hilyard, 2 Munf. 49; Chapman v. Hiden, 2 Pat. & H. 91; Black v. Campbell, 6 W. Va. 51; Baring v. Reeder, 1 Hen. & M. 164; Brown v. Johnson, 13 Gratt. 644; Murphy v. Carter, 23 Gratt. 477.

For example, in an action against one of two obligors, the interest of the other arising from the liability to the defendant, for contribution, is more direct and immediate than his liability as obligor in the bond to the obligee; and he is, therefore, an incompetent witness for the defendant. Brown v. Johnson, 13 Gratt. 644.

But it was held in Ware v. Stephenson, 10 Leigh 155, that in assumpsit for goods furnished a third person, such person was a competent witness for the plaintiff; for he stood entirely indifferent between the parties litigant, or if he had any interest, that interest was against the party who offered him as a witness.

c. Cestui Que Trustent.—As neither the trustee nor the *cestui que trust*, in a sale by the trustee, is a warrantor of title, in the absence of express contract, the *cestui que trust* was a competent witness for the purchaser, in an action by the latter to recover the property. Petermans v. Laws, 6 Leigh 523.

d. Legatees.—But it seems that a specific legatee was not a competent witness to disprove the claim of a creditor against the estate of the testator. Temple v. Ellett, 2 Munf. 452.

e. Mortgagors.—It was held, in a controversy between two mortgagees, that the mortgagor was not a competent witness to prove that the second mortgagee had notice of a prior unrecorded mortgage. Sitlingtons v. Brown, 7 Leigh 271.

And in a suit by a prior against a subsequent mortgagee, in which he claims priority over such subsequent mortgage, it was held that the mortgagor who was a party to the suit, was not a competent witness for his co-parties and against the prior mortgagee, to prove that such prior mortgage is usurious. Beverley v. Brooke, 2 Leigh 425.

f. Grantors.—The grantor in a deed of trust for the benefit of creditors, was a competent witness for the claimant under the deed, to prove that the property levied on by the officer under an execution against the grantor, is the same conveyed in the deed. Kevan v. Branch, 1 Gratt. 274; Patteson v. Ford, 2 Gratt. 18.

g. Vendors of Land.—A vendor of land according to certain lines was presumed interested, and therefore incompetent as a witness to establish those lines, unless it appeared that he did not warrant the title. Moon v. Campbell, 1 Munf. 600.

h. Agents.—An agent is a competent witness to prove his own authority when it is by parol. Piercy v. Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

Where a party acts as the agent for and in the name of his principal in signing the principal's name to a promissory note, and whose identity he makes known at the time of executing the note, he is not personally liable, therefore not interested, and hence was a competent witness for the promisee in a suit against the principal. Piercy v. Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

If one, as agent for another, purchases a bill of exchange and endorses it to his principal, the latter may call the agent as a witness, if he first proves that he was an agent merely. Murray v. Carret, 3 Call 373.

A purchasing agent was a competent witness to prove that his principal had notice of an incumbrance, notwithstanding such agent joined in a deed conveying the property to the principal free from the claim of any person whatsoever, for the vendor himself may be purchasing agent for the vendee by his appointment, and the vendee, by constituting him his agent, makes him a competent witness to prove the notice. Blair v. Owles, 1 Munf. 38.

i. Obligor and Obligee.—The principal obligor in a bond could not be a witness for his surety jointly bound with him, for the latter would have recourse against the former for the whole recovery against him, including all subsequent costs expended by him. Jones v. Raine, 4 Rand. 386.

So, also, a surviving obligor was not a competent witness for a deceased co-obligor in an action on their joint bond against the personal representative of the latter. Brown v. Johnson, 13 Gratt. 644.

And in a controversy between the obligor and assignee of a bond on the question of usury, it was held that the obligee was not a competent witness to prove the usury. Gilliam v. Clay, 3 Leigh 590; Wise v. Lamb, 9 Gratt. 294.

But the guarantor, without consideration of a bond, was a competent witness for the obligors, to prove that it was given on a usurious consideration. Caldwell v. M'Cortney, 2 Gratt. 187.

j. Principal and Surety.—The principal debtor was a competent witness for the sureties, to prove an agreement between the creditor and himself, which discharged the surety from liability. Steele v. Boyd, 6 Leigh 547, 29 Am. Dec. 218; Armistead v. Ward, 2 Pat. & H. 504.

One of two sureties in a joint and several obligation for the payment of money, having received from the creditor a covenant that he shall never be sued thereon, was a competent witness for such creditor, in a suit brought by him as mortgagee of the debtor's land, to set aside a sale and conveyance of the land to third persons, under a prior deed of trust executed by the debtor. Waggener v. Dyer, 11 Leigh 384.

k. Parties to Negotiable Instruments.—This subject has been fully treated elsewhere in this series. See monographic *note* on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 622.

l. Attorneys.—The mere fact that a person was the counsel in the cause for one of the parties did not render him incompetent as a witness for that party; and in order to ascertain whether he had any interest in the result of the suit or to test his credibility, it was held that he might be asked what his fee was. Rea v. Trotter, 26 Gratt. 585; Moats v. Rymer, 18 W. Va. 642, 41 Am. Rep. 703.

m. Parent and Child.—A father is competent to testify in behalf of his children, where he has no other interest in the controversy than that produced by his relationship. This only affects his credibility. Grayson v. George, 85 Va. 908, 9 S. E. Rep. 13.

n. Competency Restored by Release.—At common law, the competency of a witness, disqualified by interest, could always be restored by a proper release. Murray v. Carret, 3 Call 373; Mandeville v. Perry, 6 Call 78; Richardson v. Carey, 2 Rand. 87; Reynolds v. Stephenson, 11 Leigh 369; Parrish v. Parrish, 11 Leigh 626; Unis v. Charlton, 12 Gratt. 484; Chapman v. Hiden, 2 Pat. & H. 91; Radford v. Fowlkes, 85 Va. 840, 8 S. E. Rep. 817; Black v. Campbell, 6 W. Va. 51.

An interested witness who had been examined on a former trial without being released, could be rendered competent on a subsequent trial by a release. The objection only went to his credit. Jones v. Raine, 4 Rand. 386.

But the release of an heir and distributee to the administrator, of all interest in the matter of co-

troversy and contract, did not restore his competency. Rowt v. Kile, Gilm. 202.

It was held, in actions against administrators of estates, that a distributee was a competent witness for the defendant, if he had made a valid release of all his interest in the estate. Janey v. Blake, 8 Leigh 88; Reynolds v. Stephenson, 11 Leigh 369; Parrish v. Parrish, 11 Leigh 626.

3. GRAND JURORS.—It seems that a grand juror is a competent witness to prove that a statement made by a person before the grand jury on the finding of an indictment, is different from the statement made by the same person before the petit jury on the trial of the indictment. Little v. Com., 25 Gratt. 921.

On the other hand, it has been held that a grand juror cannot for any purpose be interrogated as to his action as a grand juror. State v. Baltimore, etc., R. R. Co., 15 W. Va. 362.

4. PETIT JURORS.

Affidavits of Jurors to Impeach Their Verdict.—The general rule is well settled, with but few, if any, exceptions, that the testimony of jurors is inadmissible to impeach their verdict, either by showing their own misconduct, or by showing their ignorance or mistake of law. Price v. Warren, 1 Hen. & M. 385; Shobe v. Bell, 1 Rand. 39; Harnsbarger v. Kinney, 6 Gratt. 287; Koiner v. Rankin, 11 Gratt. 420; Bull v. Com., 14 Gratt. 614; Howard v. McCall, 21 Gratt. 205; Read v. Com., 22 Gratt. 946 (in this case the affidavit of a third person, as to what he heard jurors say respecting their verdict, was held inadmissible to impeach it); Thomas v. Jones, 28 Gratt. 383 (affidavit of juror that he did not consent to verdict); Steptoe v. Flood, 31 Gratt. 323; Danville Bank v. Waddill, 31 Gratt. 470; Moses v. Cromwell, 78 Va. 671; Elam v. Commercial Bank, 86 Va. 92, 9 S. E. Rep. 498; Buchanan v. Ellicott, 4 W. Va. 681; Lewis v. McMullin, 5 W. Va. 582; Probst v. Braeunlich, 24 W. Va. 356; Bartlett v. Patton, 33 W. Va. 71, 10 S. E. Rep. 21, 5 L. R. A. 523; State v. Cobbs, 40 W. Va. 718, 22 S. E. Rep. 310; Graham v. Bank, 45 W. Va. 701, 32 S. E. Rep. 245; Reynolds v. Tompkins, 23 W. Va. 229 (affidavits of jurors as to how they understood instructions of court).

And this is so in the case of an issue out of chancery. Steptoe v. Flood, 31 Gratt. 323.

Reasons for Rule.—The reasons why the affidavits of jurors to impeach their own verdict should be rejected are: 1st, because they would tend to defeat their own solemn acts under oath; 2nd, because their admission would open the door to tamper with juryman after they have given their verdict; 3rd, because they would be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had assented to it. Steptoe v. Flood, 31 Gratt. 323; Danville Bank v. Waddell, 31 Gratt. 483; Graham v. Bank, 45 W. Va. 701, 32 S. E. Rep. 246.

But in Moffett v. Bowman, 6 Gratt. 220, the testimony of jurors was received to prove that they rendered their verdict under a mistake as to its legal effect. See Cochran v. Street, 1 Wash. 79.

Affidavits of Jurors to Support Their Verdict.—In some cases the affidavits of jurors have been received in support of their verdict. But even then, they should be received with great caution. Com. v. McCaul, 1 Va. Cas. 271; Kennedy v. Com., 2 Va. Cas. 510; Overbee v. Com., 1 Rob. 756; State v. Cartright 20 W. Va. 32; State v. Harrison, 36 W. Va. 729, 15 S. E. Rep. 982; Graham v. Bank, 45 W. Va. 701, 32 S. E. Rep. 245.

In Koiner v. Rankin, 11 Gratt. 431, the court said: "I will remark that while affidavits of jurors will generally be received in support of their verdict, they will not readily be received to invalidate it."

5. CHILDREN.

General Rule.—It may be stated as a general rule, that a child of such tender years and feeble intelligence, as to be legally irresponsible for its conduct, and as to have no conception of the religious or moral significance of an oath, nor of the pains and penalties for false swearing, is not competent to testify. State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803, 19 L. R. A. 605; Uthermohlen v. Boggs Run, etc., Co., 50 W. Va. 457, 40 S. E. Rep. 410, 88 Am. St. Rep. 884.

Presumption of Competency.—At the age of fourteen every person is supposed to have common discretion and the necessary understanding of the obligation of an oath, until the contrary appears; but under that age no such presumption arises. Oliver v. Com., 77 Va. 590.

In State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803, the court said: "At fourteen years of age a witness is presumed to be competent, under that age, no such presumption arises. Under the age of six, presumption of incompetency would arise, and at the age of five the utmost limit would be ordinarily reached, unless extraordinary developments of the mental and religious faculties should be shown, to take the case out of the ordinary course of nature."

Infant under Fourteen Years.—It is well settled, however, that an infant under fourteen years of age may be examined as a witness, provided he sufficiently appears to understand the nature and moral obligation of an oath. Oliver v. Com., 77 Va. 590.

Mode of Determining Capacity of Children.—Accordingly, it has been held that, when a witness of tender years is offered in a criminal case, and a doubt is raised as to the competency of such witness, it is the duty of the court to determine that question upon a careful examination of the witness as to age, capacity, and moral and legal accountability. State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803, 19 L. R. A. 605.

And if, on the examination of such witness, its incompetency appears, it is the duty of the court, on a motion, to exclude the child's evidence from the jury; it would be error for the court to refer the question of competency to the jury, either by instruction or otherwise. State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803, 19 L. R. A. 605.

Re-examination before Jury Improper.—Moreover, where the court has once decided in favor of the child's competency, he cannot be examined before the jury touching his understanding of the obligation of an oath. Oliver v. Com., 77 Va. 590.

Test of Competency.—The competency of a child to testify depends, not on age, but on intelligence. Uthermohlen v. Bogg's Run, etc., Co., 50 W. Va. 457, 40 S. E. Rep. 410, 88 Am. St. Rep. 884; Oliver v. Com., 77 Va. 590.

Child Ten Years Old Held Competent.—In a prosecution for rape, it has been held that the prosecutrix, a child between ten and eleven years old, is a competent witness; the weight to which her testimony is entitled being a question for the jury. Givens v. Com., 29 Gratt. 830.

Child Five Years Old Held Incompetent.—But in State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803, a child of five years, introduced on behalf of the state, in a prosecution for rape, was held incompetent, owing, however, to the insufficient preliminary examination by the trial court to determine its competency. The court, in referring to the answers of the child made to questions propounded by the trial judge, said: "From none of her answers can her religious or moral accountability for falsehood be gathered. She knows nothing about God, nothing about Christ, has had no religious training or instruction, is only

five years of age, has never been to school, cannot read, does not know the letters of the alphabet, and seems to have been greatly neglected by her parents, who are from the humbler walks of life."

Discretion of Trial Court.—The examination of an infant witness as to his competency must be left to the discretion of the trial judge; and the discretion will not be reviewed by an appellate court, unless the error of the lower court be palpable and plain, amounting to an abuse of discretion. Uthermohlen v. Bogg's Run, etc., Co., 50 W. Va. 457, 40 S. E. Rep. 411, 88 Am. St. Rep. 884; State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803, 19 L. R. A. 605.

Therefore, where the prosecutrix, in a prosecution for rape, who was twelve years old, was allowed to testify, the appellate court refused to set aside a verdict of conviction on the ground that she was too young to understand the nature of an oath, as it appeared that she was closely and critically examined by the court to determine her capacity and competency as a witness, and the jury were instructed that they were the judges of her credibility. Smith v. Com., 85 Va. 924, 9 S. E. Rep. 148.

6. IDIOTS AND LUNATICS.—All persons who are examined as witnesses must be fully possessed of their understanding, that is, such understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; therefore, idiots and lunatics, whilst under the influence of their malady, not possessing their share of understanding, are excluded. Coleman v. Com., 25 Gratt. 865, 18 Am. Rep. 711.

But merely because a witness is a lunatic, is not enough *per se* to exclude him. If at the time of his examination he has a sufficient share of understanding to appreciate the nature and obligation of an oath, to discern between right and wrong, and to retain in memory the event of which he has been witness, he is competent. Coleman v. Com., 25 Gratt. 865, 18 Am. Rep. 711.

7. WANT OF RELIGIOUS BELIEF.—Under the Virginia constitution, no person is incapacitated from being a witness, on account of his religious belief. Perry v. Com., 3 Gratt. 632.

8. INFAMY.

Statement of Rule.—By the common law, a person convicted of an infamous offense was incompetent afterwards to be a witness. These offenses were treason, felony, or any misdemeanor of the sort known by the term *crimen falsi*. And by statute, a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor, and a person convicted of perjury shall not be a witness although pardoned or punished. Barbour v. Com., 80 Va. 287; Va. Code 1887, § 3898; W. Va. Code, ch. 152, § 17.

Felonies.—A felony is an infamous offense. And a felony has been defined to be such an offense as *may* be punished by death or confinement in the penetentiary. Barbour v. Com., 80 Va. 288; Benton v. Com., 89 Va. 570, 16 S. E. Rep. 725.

Accordingly, it has been held that a person who is tried and convicted of a felony, for which he has not been pardoned or punished, is not a competent witness, although the trial court in its discretion, assesses his punishment at fine and imprisonment in jail. Benton v. Com., 89 Va. 570, 16 S. E. Rep. 725.

But the infamous character of a witness is not proven by evidence that he is given to rows and to putting them off on others. Briggs v. Com., 82 Va. 554.

Petit Larceny.—At common law a conviction, even for petit larceny, rendered the party so convicted incompetent to testify, because that law recognized no distinction between grand and petit larceny, but considered both felonies. In Virginia, however, the statutes establish a distinction between these two offences, and make petit larceny a misdemeanor. Therefore, a conviction for petit larceny does not disqualify a witness from testifying in Virginia, although the conviction took place in another state. Uhl v. Com., 6 Gratt. 706; Barbour v. Com., 80 Va. 287.

Perjury.—A conviction of perjury, forever disqualifies the party from testifying, and neither pardon nor punishment restores competency to the witness. Va. Code 1887, ch. 190, § 3898; W. Va. Code, ch. 152, § 17.

On the trial of an indictment for perjury, the commonwealth offered as a witness a person against whom a civil action was pending, and in which action the defendant in the indictment had been summoned as a witness for the opposite party. It was held, nevertheless, that the witness so offered for the commonwealth had no such interest in the prosecution as rendered him incompetent to testify, although it would be to his advantage to get rid of the accused as a witness against him, which would be the effect of the accused being convicted of perjury. Com. v. Hart, 2 Rob. 819.

Sentence Necessary to Disqualify.—A person found guilty of an infamous offence, but not sentenced, is a competent witness. Brown v. Com., 86 Va. 935, 11 S. E. Rep. 799; Woods v. Com., 86 Va. 929, 11 S. E. Rep. 798.

West Virginia Statute.—And, in West Virginia, a person convicted of a felony and sentenced therefor, except it be for perjury, may, by leave of the court, be examined as a witness in any criminal prosecution, though he has not been pardoned or punished therefor. State v. Hatfield, 48 W. Va. 561, 37 S. E. Rep. 626.

Endurance of Punishment.—Where a convict has undergone the punishment or imprisonment in the penitentiary under his sentence, the statute restores to him competency as a witness. State v. Williams, 14 W. Va. 851.

Crimes Committed in Penitentiary.—Under the 58th section, 1 Rev. Code, 630, providing that when a crime is committed in the penitentiary, the judge shall require the keeper to produce the accused, together with any other person confined therein "who may be witnesses either for the commonwealth or for the party charged," it was held by a divided court, that on the trial of a convict from the penitentiary, for a felony committed in the penitentiary, another convict confined there for a felony is a competent witness for the prosecution. Johnson v. Com., 2 Gratt. 581.

9. ACCOMPLICES.—It is well settled that an accomplice, who has not been convicted and sentenced for an infamous offence, is a competent witness on the trial of his associate in crime; and the accused may be convicted on the uncorroborated testimony of the accomplice, the jury being the judges of his credibility. Byrd v. Com., 2 Va. Cas. 490; Brown v. Com., 2 Leigh 769; Oliver v. Com., 77 Va. 590; Dove v. Com., 82 Va. 301; Woods v. Com., 86 Va. 929, 11 S. E. Rep. 798; Brown v. Com., 86 Va. 935, 11 S. E. Rep. 799; State v. Betsall, 11 W. Va. 704; State v. Thompson, 21 W. Va. 757.

And although such testimony is suspicious, and emanates from a bad source, the trial court cannot properly instruct the jury as to the weight of such evidence. State v. Betsall, 11 W. Va. 704; State v. Thompson, 21 W. Va. 756. But see Brown v. Com., 2 Leigh 777, where the court, in speaking of the credibility of an accomplice, said: "The question of his credibility may surely be left to the determination of the jury *under the superintendence of the judge who tries the cause.*"

It has been held that though an accomplice has been found guilty, yet if he has not been sentenced he is competent. Brown v. Com., 86 Va. 935, 11 S. E. Rep. 799; Woods v. Com., 86 Va. 929, 11 S. E. Rep. 798.

Nor does the admissibility of an accomplice depend on the ancient and exploded doctrine of approvement. Byrd v. Com., 2 Va. Cas. 490; Oliver v. Com., 77 Va. 590.

Joint Indictment.—It was the rule at common law, and in Virginia formerly, that when two persons were jointly indicted for the same offence, a party in the same indictment was not a competent witness for his defendant, unless he had been first acquitted, whether they were jointly or severally tried. Campbell v. Com., 2 Va. Cas. 314.

But the present rule is that where two persons are jointly indicted for the same offence, but separately tried, the one not then tried, and his wife, are competent witnesses for or against the one on trial. Lazier v. Com., 10 Gratt. 708; Smith v. Com., 90 Va. 759, 19 S. E. Rep. 843. See Va. Code 1887, § 3900.

Right of Accomplice, Turning State's Evidence, to Pardon.—In Virginia, it has been held that even though an accomplice, called as a witness for the commonwealth on the trial of his associates, voluntarily gives evidence, and fully, candidly and impartially discloses their guilt as well as his own, he will yet have no legal right to a pardon for his own guilt. Com. v. Dabney, 1 Rob. 696.

10. PROSECUTORS.—It has been held that the prosecutor in an indictment for assault and battery, is a competent witness for the commonwealth, though liable for costs in case the defendant is acquitted. Baker v. Com., 2 Va. Cas. 353; Gilliam v. Com., 4 Leigh 688.

11. NEGROES.—In Virginia, it seems that a negro, that is, a person of one-fourth or more negro blood, was incompetent as a witness on the trial of a white man. Dean v. Com., 4 Gratt. 541. See Winn v. Jones, 6 Leigh 74; Hopper v. Com., 6 Gratt. 684.

But in West Virginia no person is incompetent to testify on account of race or color. W. Va. Code ch. 130, § 24.

12. INTERPRETERS.—It is provided by statute that interpreters may be sworn truly to interpret, when necessary. Va. Code 1887, ch. 164, § 3357; W. Va. Code, ch. 130, § 30.

13. HUSBAND AND WIFE.—A full treatment of this subject will be found elsewhere in this series. See monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

III. DETERMINING THE QUESTION OF COMPETENCY AND CREDIBILITY.

A. TIME FOR MAKING OBJECTION TO COMPETENCY.

Before Direct Examination.—The general rule is that an objection to the competency of a witness must be taken before the examination in chief; but the rule is not inflexible. Hill v. Postley, 90 Va. 200, 17 S. E. Rep. 946; Spence v. Repass, 94 Va. 716, 27 S. E. Rep. 583.

For example, it has been held, that an objection to the competency of a witness is not necessarily waived, because not made before the examination in chief. Hill v. Postley, 90 Va. 200, 17 S. E. Rep. 946; Warwick v. Warwick, 31 Gratt. 70.

After Cross-Examination.—But where a party, with knowledge of the incompetency of a witness, cross-examines him upon the issues involved, without objection to his competency, he will not be permitted afterwards to object to his competency. Hord v. Colbert, 28 Gratt. 49; Neilson v. Bowman, 29 Gratt. 732; Pillow v. Southwest Virginia, etc., Co., 92 Va. 144, 23 S. E. Rep. 32; Smith v. Profitt, 82 Va. 832, 1 S. E. Rep. 67; Spence v. Repass, 94 Va. 716, 27 S. E. Rep. 583.

It has been held, however, that where an objection to the competency of a party as a witness is written at the commencement of the deposition, the objection is not waived by the cross-examination. Neilson v. Bowman, 29 Gratt. 732, citing Statham v. Ferguson, 25 Gratt. 28.

In Appellate Court.—In Virginia, objection to the competency of a witness cannot be taken for the first time in the appellate court. Simmons v. Simmons, 33 Gratt. 452; McVeigh v. Chamberlain, 94 Va. 73, 26 S. E. Rep. 395; Baxter v. Moore, 5 Leigh 219.

But the rule is otherwise in West Virginia. Rose v. Brown, 11 W. Va. 122; Martin v. Smith, 25 W. Va. 580; Long v. Perine, 41 W. Va. 314, 23 S. E. Rep. 611.

B. EXAMINATION ON VOIR DIRE.—In one case, a witness was offered to be introduced, but was objected to as being interested, and proof *aliunde* of his interest was introduced. He was then examined by the party offering him on his *voir dire* to show that he had no interest, and this was objected to by the other party; but before he was sworn in chief, a deed was introduced which showed that he had no interest. The court held that even if it was error to examine the witness on his *voir dire* after his interest had been shown by evidence *aliunde*, the error was cured by the introduction of the proof of his want of interest, before he was sworn in chief. Harrison v. Middleton, 11 Gratt. 527.

C. EXTENT OF COMPETENCY.—A witness is not competent for one purpose only; if he is competent at all, he may be examined upon all questions pertinent to the issue. Steptoe v. Read, 19 Gratt. 1; Carter v. Hale, 32 Gratt. 119; Brock v. Brock, 92 Va. 173, 23 S. E. Rep. 224; Hoge v. Turner, 96 Va. 624, 32 S. E. Rep. 291.

It was held in a West Virginia case, however, that a witness may be competent to testify concerning some of the facts in issue, though incompetent as to others. South Branch R. Co. v. Long, 43 W. Va. 131, 27 S. E. Rep. 297.

D. PROVINCE OF COURT.

1. COMPETENCY OF WITNESS.—The question of the competency of a witness is for the court, because it is a question of legal ascertainment, requiring wisdom, knowledge and experience. Coleman v. Com., 25 Gratt. 865, 18 Am. Rep. 711; State v. Michael, 37 W. Va. 565, 16 S. E. Rep. 803.

E. PROVINCE OF JURY.

1. CREDIBILITY OF WITNESS.—But the credibility of a witness is a question for the jury. Akers v. DeWitt, 41 W. Va. 229, 23 S. E. Rep. 669; Harrison v. Brock, 1 Munf. 22; Lyles v. Com., 88 Va. 396, 13 S. E. Rep. 802; State v. Musgrave, 43 W. Va. 672, 28 S. E. Rep. 813; Hash v. Com., 88 Va. 172, 13 S. E. Rep. 398.

IV. INCOMPETENCY REMOVED BY STATUTE.

A. IN CIVIL CASES.—The incompetency of parties or persons interested in the event of an action, to testify, has been removed by statute. W. Va. Code, ch. 130, § 23; Va. Code 1887, ch. 164, § 3345; Gordon v. Funkhouser (Va.), 42 S. E. Rep. 677.

Under the statute in West Virginia, it has been held that a party to a civil action may testify in behalf of himself, or of any other party, to prove the conditions upon which a bond was delivered. Newlin v. Beard, 6 W. Va. 110.

B. IN CRIMINAL CASES.

1. RIGHT OF ACCUSED TO TESTIFY.—The statutes likewise provide, that the accused, on trial for a felony or misdemeanor, may, at his election, testify in his own behalf. W. Va. Code, ch. 152, § 19; Va. Code 1887, § 3897.

Purpose of Statute.—It has been said that the sole purpose of this enactment was to give the accused

an opportunity to testify or not as his interests might dictate. It was not intended to deprive him of that right, which he had before the passage of the statute, to deny his guilt and rely upon the legal presumption of innocence attaching to every person charged with crime. Price v. Com., 77 Va. 393.

May Testify as to His Feelings.—And since the passage of the statutes permitting the prisoner to testify in his own behalf, it has been held that he is a competent witness, in a murder case, to testify to the state of his own feelings when the fatal act was committed, his testimony to be taken for what the jury may think it worth. State v. Evans, 33 W. Va. 417, 10 S. E. Rep. 792.

Thus, where a person indicted for shooting another with intent to maim, etc., takes the stand in his own behalf, he may be asked with what intent he shot at the person he tried to shoot. State v. Meadows, 18 W. Va. 659.

Revocation of Liquor License.—But, even before the enactment of the statute, giving the accused a right to testify in his own behalf, it was held that the defendant, in a proceeding against him to revoke his license to sell liquor, was competent to testify in his own behalf; those proceedings being civil in their nature. Cherry v. Com., 78 Va. 375.

a. Cross-Examination of Accused.—Where the accused takes the stand and testifies in his own behalf he must submit to cross-examination like all other witnesses, in order to test the truth of statements made by him on his examination in chief. Watson v. Com., 87 Va. 608, 13 S. E. Rep. 23. See State v. Meadows, 18 W. Va. 666; State v. Lowry, 42 W. Va. 205, 24 S. E. Rep. 561.

2. COMMENT BY PROSECUTING ATTORNEY ON FAILURE OF DEFENDANT TO TESTIFY.—But the statutes expressly provide that the failure of the accused to testify shall create no presumption against him, nor be the subject of comment by the prosecuting attorney. Va. Code 1887, § 3397; W. Va. Code, ch. 152, § 19; Price v. Com., 77 Va. 393; State v. Greer, 22 W. Va. 800.

Instances of Remarks Held Not Improper.—In one case, where the prosecuting attorney, in argument before the jury, alluded to the failure of the accused to testify in his own behalf, the court refused to reverse a judgment of conviction, and grant a new trial, because the prosecuting attorney, upon exception by the defendant's counsel, withdrew his remarks and asked the jury not to consider them, and the court declared the remarks improper, and directed the jury to disregard them. State v. Chisnell, 36 W. Va. 659, 15 S. E. Rep. 412.

And where the prosecuting attorney remarked that, although he had no right to swear any man accused of crime, he had the right to prove his statements, it was held that there had been no violation of the statute. Sawyers v. Com., 88 Va. 356, 13 S. E. Rep. 708.

Nor is it a violation of the statute for the prosecuting attorney to remark that the prisoner had not accounted for his whereabouts at the time of the homicide, nor for his flight from the state, for these remarks have no reference to the failure of the accused to testify. Sutton v. Com., 85 Va. 128, 7 S. E. Rep. 323.

Remarks by Prosecuting Attorney to Prisoner's Counsel.—Where a witness for the state, after his examination in chief, was turned over to the prisoner's counsel for cross-examination, and the prosecuting attorney suggested to the prisoner's counsel, in the hearing of the jury, that they could prove a certain fact by their own parties when they were put on the stand, which they were now attempting to prove by their witness on cross-examination, it was held that this suggestion by the prosecuting attorney could not be considered as a reference made to or comment upon the prisoner's failure to testify in his own behalf, or as falling within the inhibiting clause of § 19, ch. 152, of the West Virginia Code, because the time had not yet arrived when the prisoner could have introduced himself as a witness, and, of course, before that time no comment could be made on his failure to testify. The statute contemplates an opportunity having been afforded the prisoner to testify, and his failure to avail himself of it, and then forbids any comment. State v. Ice, 34 W. Va. 244, 12 S. E. Rep. 695.

a. Time for Making Objection.—But an objection to comments by the prosecuting attorney on the failure of the accused to testify, comes too late after verdict, if the court can see that, under all the circumstances, a proper verdict has been rendered. Price v. Com., 77 Va. 393.

C. TRANSACTIONS WITH DECEDENTS.

1. IN GENERAL.—The statutes in Virginia and West Virginia, in removing the incompetency of parties or persons interested in the event of an action, suit or proceeding to testify, provided that where one of the parties to a transaction or communication is dead or otherwise incompetent to testify, then the other party to such transaction or communication shall not be permitted to testify. W. Va. Code, ch. 130, § 23; Va. Code 1887, § 3349.

Purpose of Enactments.—The plain purpose of these statutes was to declare that where the lips of one party to the original contract or transaction which is the subject of investigation, are closed in death, the adverse party shall not speak at all, thus putting the parties on terms of equality in regard to the opportunity of giving testimony. Grigsby v. Simpson, 28 Gratt. 348.

Does Not Create New Incompetency.—This statute, however, was not intended to create any new incompetency in witnesses to testify, not previously existing; but only to continue, in certain cases, the old incompetency of the common law. Therefore, a witness, competent to testify at common law, is competent under the statute. Reynolds v. Callaway, 31 Gratt. 436; Goodell v. Gibbons, 91 Va. 608, 22 S. E. Rep. 504; Crothers v. Crothers, 40 W. Va. 169, 20 S. E. Rep. 927; Oliver v. Hayes, 1 Va. Dec. 182; Mutual Life Ins. Co. v. Oliver, 95 Va. 445, 28 S. E. Rep. 594; Radford v. Fowlkes, 85 Va. 820, 8 S. E. Rep. 817; Borst v. Nalle, 28 Gratt. 434.

Accordingly, it has been held that persons interested may testify against their interest under these statutory provisions, as they were competent to this extent even at common law. The statutes only prohibit them from testifying in their own behalf. Burkholder v. Ludlam, 30 Gratt. 255; McMechen v. McMechen, 17 W. Va. 683; Beall v. Shaull, 18 W. Va. 258; Crothers v. Crothers, 40 W. Va. 169, 20 S. E. Rep. 927; Coffman v. Hedrick, 32 W. Va. 119, 9 S. E. Rep. 65.

And it has been held that, in an action against an executor for the price of lumber sold to the defendant's testator in his lifetime, the plaintiff's agent, who sold and delivered the lumber, is competent to testify for the plaintiff as to the transaction, because he would have been a competent witness at common law. Goodell v. Gibbons, 91 Va. 608, 22 S. E. Rep. 504.

Nature of Disqualifying Interest.—It also follows necessarily, that a person who is not a party to the record, and has no interest in the result of the suit, nor in the record as an instrument of evidence, is not disqualified by the statute, because we have seen that he was competent under such circumstances even at common law. Boyst v. Nalle, 28 Gratt. 423; Huffmans v. Walker, 26 Gratt. 314;

Knick v. Knick, 75 Va. 12; Gilmer v. Baker, 24 W. Va. 72; Crothers v. Crothers, 40 W. Va. 169, 20 S. E. Rep. 927.

But where one party to a contract is dead, the other being a party to the suit and liable for costs, though a discharged bankrupt, is not competent to testify. Tunstall v. Withers, 86 Va. 892, 11 S. E. Rep. 565, citing and distinguishing Reynolds v. Callaway, 31 Gratt. 436, for in that case the discharged bankrupt was not a party to the suit.

Where A. purchased for valuable consideration, property of B. which is afterwards, by the terms of the sale, conveyed to C., and C. promised in consideration thereof, to pay a debt due from A. to D., it was held that B. after C.'s death, is a competent witness to prove C.'s promise, as he is not a party to the suit and is not interested. Hooper v. Hooper, 32 W. Va. 526, 9 S. E. Rep. 937.

Interest in Result of Proceeding.—And the statute has not changed the common-law rule, that to exclude a witness he must have an interest to be affected by the result of the proceeding; an interest in the question litigated merely, does not exclude him. Gilmer v. Baker, 24 W. Va. 72; Crothers v. Crothers, 40 W. Va. 169, 20 S. E. Rep. 927; Lawson v. Zinn, 48 W. Va. 312, 37 S. E. Rep. 612.

But although a party to a suit is interested only to the extent of costs, that is sufficient to disqualify him. Tunstall v. Withers, 86 Va. 892, 11 S. E. Rep. 565.

Test of Competency.—The test of competency of a party under the Virginia statute, is not the fact to which such party is called to testify, but the contract or other transaction which is the subject of investigation. Grigsby v. Simpson, 28 Gratt. 348; Grandstaff v. Ridgely, 30 Gratt. 18; Mutual Life Ins. Co. v. Oliver, 95 Va. 445, 28 S. E. Rep. 594.

And it has been held repeatedly, that the test of the admissibility of testimony under the West Virginia statute is, does it tend to prove what the real transaction between the parties was. If so, it is not admissible. Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. Rep. 178; Poling v. Huffman, 48 W. Va. 639, 37 S. E. Rep. 526; Paxton v. Paxton, 38 W. Va. 616, 18 S. E. Rep. 765.

2. WHO ARE DISQUALIFIED.

a. Parties to Action.

(1) Rule in West Virginia.—In West Virginia, no party to an action, nor any person interested in the event thereof, shall be examined as a witness in his own behalf in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, against the personal representative, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person. W. Va. Code, ch. 130, § 23.

When Adverse Party Competent.—Unless such personal representative, Carter v. Gill, 47 W. Va. 504, 35 S. E. Rep. 828, heir at law, Metz v. Snodgrass, 9 W. Va. 190, or other beneficiary be first examined on his own behalf in regard to the same transaction or communication.

But when executors, heirs, or other beneficiaries claiming under a deceased person, testify in their own behalf as to transactions or communications had with the decedent, the testimony of the adverse party must be confined to a rebuttal, denial or explanation of the testimony given by the executor, heir, or other beneficiary, and he cannot be permitted to go beyond this and give substantive testimony as to such personal transaction or communication had by him with the deceased person and thus prove and establish his claim against the estate of the decedent by his own testimony. Kimmel v. Shroyer, 28 W. Va. 510; Zane v. Fink, 18 W. Va. 695.

Thus, where the heir of a deceased person has been allowed to testify to a personal transaction between the decedent and the defendant, which tends to fix liability on the defendant, then the latter is entitled to testify in his own behalf, in respect to the transaction testified to by the heir, but not as to any other transaction had personally with the decedent. Metz v. Snodgrass, 9 W. Va. 190.

And in a suit brought by the legal heir of a testator against his devisee and legatee to set aside the will, it was held that the defendant is not competent to testify in his own behalf, on cross-examination by his counsel, as to conversations or communications had by him personally with the deceased, when he was not examined in chief by the legal heir as to these conversations or communications, but the conversation or communication was entirely new matter introduced by the defendant in his own behalf. It was unnecessary to decide in this case how far the defendant might testify in his own behalf on cross-examination, as to transactions or communications had personally with the deceased party, when such evidence is in explanation of facts drawn from him on his examination in chief. French v. French, 14 W. Va. 460.

Cases in Which Statute Has Been Applied.—Where a written contract dividing land specified a fence as a line, and on the day of the contract, just after its signing, one of the two parties surveyed the lines, fixing a certain fence as the one referred to in the contract, it was held that he cannot, after the death of the other, give evidence denying the fixing of that fence as a line. Anderson v. Jarrett, 43 W. Va. 246, 27 S. E. Rep. 348.

And conversations held with a deceased person at any time, though not on the subject in controversy, but which simply tend to prove facts which would go to show that the subjects in controversy should be decided against the representatives of the deceased, cannot be proven by the adverse party with whom the alleged conversations were held. Anderson v. Cranmer, 11 W. Va. 562.

Directors and Stockholders of Corporation.—It has been held that directors and stockholders of a corporation are incompetent to testify against the administrators and heirs at law of a deceased person in favor of such corporation, as to any communication had with such deceased person in their official capacity as such directors, unless such administrator and heirs at law are examined as to such communications or transaction in their own behalf, or the testimony of such deceased person touching the same is given in evidence. Huntington, etc., Co. v. Thornburg, 46 W. Va. 99, 33 S. E. Rep. 108.

Payment and Loss of Note or Bond.—In a controversy between the surviving party and the administrator of the deceased party as to whether a note or bond given by the former to the latter had been paid, it was held that such surviving party was not a competent witness to prove the payment of the debt by him, and the delivery of the note or bond to him by the decedent at the time of payment; nor that after its delivery, and while in his possession, it was lost or destroyed. Calwell v. Prindle, 11 W. Va. 307.

And after the death of the parties to an agreement for the sale of land, the heir of one of them is incompetent as a witness in his own behalf to prove that the agreement has been lost or destroyed, and to give its contents. Robinson v. James, 29 W. Va. 224, 11 S. E. Rep. 920.

When Adverse Party Does Not Testify against Decedent's Interest.—But where the other party to a transaction with a person since deceased, is not testifying against the interest of such deceased person, he is a competent witness in his own behalf,

notwithstanding the death of the other party to the transaction. For example, in a suit brought by a creditor to set aside a deed for fraud as to his debt, the grantee was held competent to testify in support of his title and the good faith of the transaction between himself and the decedent, whose personal representatives or heirs are made parties defendant to the suit. Farmers' Bank v. Gould, 42 W. Va. 132, 24 S. E. Rep. 547.

Person Through Whom Party Derives Title.—Moreover, a person from, through, or under whom a party interested in the event of the suit derives title, is incompetent to testify as to transactions had with a deceased person, against the estate of such decedent.

For example, in a suit in equity brought to enforce the settlement of the accounts of an administrator, a party to whom the administrator pays a debt which is claimed to exist against the estate of the intestate, and from whom he receives a voucher, and derives title as administrator to such claim, is not a competent witness to prove such claim a valid debt, against the estate. Dawson v. Hemelrick, 33 W. Va. 675, 11 S. E. Rep. 31.

And a grantor in a deed delivered to the grantee cannot, after the death of the grantee, testify against his heirs that the deed was delivered to the deceased upon a condition. Paxton v. Paxton, 38 W. Va. 616, 18 S. E. Rep. 765.

Must Be Party to Suit.—In order that the witness may be excluded under the West Virginia statute, he must be a party to the suit or proceeding.

Thus, a person jointly bound with a deceased person may testify in a suit to which he is not a party, against the representatives of such deceased person in relation to transactions and conversations had personally with such deceased person, notwithstanding the fact that his testimony tends to throw the whole of such liability, in that suit, on the estate and sureties of such deceased person. Gilmer v. Baker, 24 W. Va. 72.

Nominal Parties.—But a party to a suit, although he has no interest in its result, is incompetent to give evidence of a personal transaction or communication between him and a person who, at the time of the examination of such party, is dead, against a devisee of such deceased person. Patterson v. Martin, 33 W. Va. 494, 10 S. E. Rep. 817.

b. Parties to Contract.

(1) **Rule in Virginia.**—The rule in Virginia is that, where one of the original parties to the contract or transaction, which is the subject of investigation, is dead, or otherwise incapable of testifying, the other party to such contract or transaction shall not be permitted to testify in his own favor or in favor of any other person whose interest is adverse to that of the party so incapable of testifying. Va. Code 1887, ch. 164, § 3346; Mason v. Wood, 27 Gratt. 783; Brown v. Dickenson, 27 Gratt. 690; Grigsby v. Simpson, 28 Gratt. 348; Morris v. Grubb, 30 Gratt. 286; Parent v. Spitler, 30 Gratt. 819; Carter v. Hale, 32 Gratt. 115; Ellis v. Harris, 32 Gratt. 684; Borst v. Nalle, 28 Gratt. 424; Smith v. Bradford, 76 Va. 759.

And, where one of the parties to the contract is dead, the adverse party is incompetent to testify in the cause, even as to a matter which occurred after the death of the other party thereto. Mason v. Wood, 27 Gratt. 783.

The incompetency of the opposing party to testify, by reason of the death of the other contracting party, also renders incompetent the co-contractors of the decedent, their assignee, and the heir of any deceased assignee, who is a party to the suit and interested in the result. Ginter v. Breeden, 90 Va. 565, 19 S. E. Rep. 656.

Cases in Which Statute Has Been Applied.

Surviving Obligors.—In an action of debt on a bond by the obligee against the surviving obligors, or against the personal representative of a deceased obligor, it was held that none of the surviving obligors were competent witnesses on behalf of the defendant against the plaintiff. Carter v. Hale, 32 Gratt. 115, following Grigsby v. Simpson, 28 Gratt. 349; Mason v. Wood, 27 Gratt. 783.

Sureties on Bonds.—In Parent v. Spitler, 30 Gratt. 819, two commissioners sold land and took from the purchasers bonds for the purchase money, with sureties. The court held that the sureties on these bonds were incompetent after the death of one of the commissioners, to prove that the purchase money was tendered to the deceased commissioner and accepted by him, because the estate of the commissioner was directly interested in the matter.

And in a suit brought to establish a trust in land, of which the plaintiff's mother was the legal owner, after the mother's death, the plaintiffs are not competent to testify to declarations of the mother tending to show a recognition of the trust. McDevitt v. Frantz, 85 Va. 740, 8 S. E. Rep. 642.

When Adverse Party Testifies in Behalf of Deceased—But where a person, having an interest adverse to that of the surviving party to a transaction, is first examined as a witness in behalf of the deceased party, this renders the surviving party a competent witness in his own behalf. McVeigh v. Chamberlain, 94 Va. 73, 26 S. E. Rep. 395; Cottrell v. Watkins, 96 Va. 783, 32 S. E. Rep. 470. And in an action by an administrator against a distributee of an estate, where other distributees, having an interest adverse to the defendant, had been allowed to testify in their own behalf concerning declarations of the decedent, it was held that the defendant is thereby rendered competent to testify in his own favor, not only as to the matters testified to by the previous witnesses, but upon all questions pertinent to the issue. Brock v. Brock, 92 Va. 173, 23 S. E. Rep. 224.

In an action against a surviving partner upon a transaction in which the deceased partner was the acting party, the plaintiff introduces the defendant as a witness. It was held that the defendant so introduced became a competent witness in the cause, but that this did not render the plaintiff a competent witness. Terry v. Ragsdale, 33 Gratt. 342.

When Party, Deriving Title from Deceased, Testifies in His Own Behalf.—Moreover, where one party to a contract is dead, the other party may testify if any one succeeding to the interest of the deceased testifies adversely, in his own interest. For example, the plaintiff in an action to enforce against an estate a claim arising under a contract with the deceased, is rendered a competent witness by an heir becoming a witness in his own interest. Copeland v. Copeland (Va.), 24 S. E. Rep. 218.

Parties to Contract.—The statute in Virginia applies only to one who is a party to the contract or transaction, which is the subject of investigation. Martz v. Martz, 25 Gratt. 361; Grandstaff v. Ridgely, 30 Gratt. 4.

Therefore, a witness who is not a party to the contract or transaction which is the subject of investigation, is not disqualified on account of interest only, although one of the original parties to such contract or transaction be dead, insane, or incompetent to testify by reason of infancy or any other legal cause, and for that reason the other party is rendered incompetent to testify. Huffmans v. Walker, 26 Gratt. 314; Simmons v. Simmons, 33 Gratt. 451; Knick v. Knick, 75 Va. 12; Hall v. Rixey, 84 Va. 790, 6 S. E. Rep. 215. See Hughes v. Harvey, 75 Va. 200; Baldwin v. Baldwin, 76 Va. 345.

For example, it has been held that one not a

party to a bond, but who has agreed with the obligor to pay it, and has received from him money for that purpose, is a competent witness to prove payment, though the obligee is dead. Wager v. Barbour, 84 Va. 419, 4 S. E. Rep. 842.

And where a lunatic was not a party to a contract made by his existing committee with a former committee concerning the lunatic's affairs, it was held that his existing committee was competent to testify in regard to such contract. Carter v. Edmonds, 80 Va. 58.

c. Donor and Donee.—A donee is not, after the death of the donor, a competent witness to prove delivery to himself of a gift by the donor. Lee v. Patton, 50 W. Va. 20, 40 S. E. Rep. 353.

And it has been held that a widow is incompetent to prove a gift of bonds to her by her deceased husband before marriage, as against the claims of his creditors. Martin v. Smith, 25 W. Va. 580.

d. Heirs and Distributees.—After the death of the parties to an agreement for the sale of land, an heir of one of them is incompetent to testify in his own behalf in regard thereto. Robinson v. James, 29 W. Va. 224, 11 S. E. Rep. 920.

So, also, a distributee is not a competent witness to testify concerning a judgment which an executor has paid as security for him, where the executor is then dead and incapable of testifying. Boyd v. Townes, 79 Va. 118.

And, where one distributee claims personalty in the possession of an ancestor at his death, under a parol purchase by the distributee from the ancestor, the distributee is not, in a suit with his codistributees, competent to prove the purchase. Saunders v. Greever, 85 Va. 252, 7 S. E. Rep. 391.

One who would inherit, but for the will, is incompetent, under ch. 130, § 23 of the West Virginia Code, to testify against the testator's capacity to make the will. Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. Rep. 493.

But in a suit by an administrator to set aside a transfer of personal property by the decedent, it has been held that the distributees are competent witnesses to support the claim of the transferee, because in such case they do not testify in their own favor, but against their own interest. Crothers v. Crothers, 40 W. Va. 169, 20 S. E. Rep. 927.

e. Subscribing Witness.—One of the subscribing witnesses to a will, who is unprovided for in the instrument, is, in the absence of the other subscribing witness, competent to prove its execution, although he is a party to the suit brought to impeach the validity of the will, and would inherit a portion of the property devised in the absence of the will. Coffman v. Hedrick, 32 W. Va. 119, 9 S. E. Rep. 65.

f. Husband and Wife.—It has been held in West Virginia, that, notwithstanding the statute removing the incompetency of husband and wife to testify for or against each other, the wife is incompetent to testify for her husband and against the administrator of a deceased person in regard to any transaction or communication had personally between her husband and such deceased person in his lifetime. In this case the husband was clearly incompetent, and on account of the identity of interest between husband and wife, the court said the wife was likewise incompetent. Kilgore v. Hanley, 27 W. Va. 451. See Oliver v. Hayes, 1 Va. Dec. 180.

The wife is incompetent to prove any transaction or communication personally between herself and her husband going to create or sustain a resulting trust, or any admissions by him of its existence, not only as against his heirs, but also his creditors seeking to subject the property. Smith v. Turley, 32 W. Va. 14, 9 S. E. Rep. 46.

And, in assumpsit against husband and wife jointly, both of whom are parties in interest, the plaintiff cannot testify as to matters in the knowledge of both himself and the husband, where the latter is excluded as a witness because of his wife's interest. Johnson v. Fry, 88 Va. 695, 12 S. E. Rep. 973, 14 S. E. Rep. 183.

But to exclude the evidence of a wife after the death of her husband as to conversations between the wife and husband, it must not only appear that she testifies against the parties mentioned in the statute, but also that she testifies in her own behalf, that is, she must also testify in her own individual interest, unless the conversations were such as would be excluded at common law. McMechen v. McMechen, 17 W. Va. 683. See White v. Perry, 14 W. Va. 66.

g. Debtor and Creditor.—A debtor, executing a deed of trust to secure a creditor, is incompetent to testify that it was procured from him by false representations of the trustee, both trustee and creditor being dead. Paxton v. Paxton, 38 W. Va. 616, 18 S. E. Rep. 765.

And a creditor is not a competent witness to establish a claim in his own right against the estate of his deceased debtor. Tate v. Tate, 75 Va. 522.

h. Parties to Negotiable Instruments.—In an action on a promissory note the maker is not competent to testify in his own favor, after the death of the payee, when no person, having an interest adverse to the makers, has testified to some fact occurring before the payee's death. Wells v. Ayres, 84 Va. 341, 5 S. E. Rep. 21.

So, also, where one of the joint makers of a promissory note is dead and an action is brought against the survivor to recover on such note, it has been held that the plaintiff in such action is incompetent to testify in his own behalf against the defendant. Heffiebower v. Detrick, 27 W. Va. 17.

And it has been held that where two persons endorse a note, and one dies, then the other is incompetent to show that the deceased became jointly bound with the maker. Quarrier v. Quarrier, 36 W. Va. 310, 15 S. E. Rep. 154.

i. Cosureties.—In a suit by a surety's administrator against his principals and a cosurety for reimbursement, the cosurety is an incompetent witness. Harper v. McVeigh, 82 Va. 751, 1 S. E. Rep. 193.

j. Partners.—Before the word "survivor" was enacted into the West Virginia Code, ch. 130, § 23, it was decided that a party to a civil action was competent to testify in his own behalf, against a surviving partner, in respect to a transaction had by him with the deceased partner. Carlton v. Mays, 8 W. Va. 245.

Where one of two members of a firm, acting within the scope of his authority, borrowed from a guardian the ward's money in the name of and for the use of his firm, and the other partner subsequently died, it was held in a suit by the ward against the deceased partner's estate to recover the loan, that both the guardian and the surviving partner were competent witnesses, notwithstanding the death of the other partner. Meriweather v. Shiflett, 1 Va. Dec. 385.

3. TRANSACTION WITH DECEASED PARTY'S AGENT.—The adverse party is competent to testify in his own behalf, in respect to a transaction or communication, personally had with the agent of a deceased or otherwise incompetent person, when such agent is alive and capable of testifying. Va. Code 1887, ch. 164, § 3346; Reherd v. Clem, 86 Va. 374, 10 S. E. Rep. 504. See Owens v. Owens, 14 W. Va. 88, 94, opinion of HAYMOND, J.

But in West Virginia it makes no difference whether the agent is dead or alive at the time the testimony is offered. Voss v. King, 33 W. Va. 236, 10 S. E. Rep. 402.

It has been held, however, that the examination of the adverse party must be confined to such portion of the transaction or communication as was personally had with the agent. Reherd v. Clem, 86 Va. 374, 10 S. E. Rep. 504.

But where the plaintiff, in an action upon a note given to her in consideration of an antecedent indebtedness, is incompetent to testify, the defendant's testimony is not rendered competent by the fact that the note was given at the instance and in the presence of the plaintiff's agent, who has testified in the case, the contract having been made with the plaintiff and not with the agent. Hill v. Postley, 90 Va. 200, 17 S. E. Rep. 946.

Officer before Whom Deed is Acknowledged.—An officer before whom a deed is acknowledged is not an agent of the grantee, nor a party to the transaction, so as to render the testimony of the grantor admissible, after the death of the grantee. Booth v. McJilton, 82 Va. 827, 1 S. E. Rep. 137.

But it has been held that an agent of the board of public works, is a competent witness to prove an arrangement between himself and the board, although two of its members have since died. Kelly v. Board of Public Works, 75 Va. 264.

Bank Directors.—And bank directors are competent witnesses to testify in behalf of the bank in an action by the bank against a third person, although they were the agents of the bank who negotiated the transaction in suit with the third party, and the latter is dead. First Nat. Bank v. Terry, 99 Va. 194, 37 S. E. Rep. 843.

Contract of Insurance.—In a contract of insurance, the original parties to the contract are the assured and the insurance company, therefore, in an action on the policy, the agent of the company who procured the policy, is a competent witness on behalf of the company, although the assured be dead at the time of the trial. Mutual Life Ins. Co. v. Oliver, 95 Va. 445, 28 S. E. Rep. 594. See Richmond, etc., R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 S. E. Rep. 573.

4. ACTIONS FOR WORK, LABOR, AND SERVICES RENDERED.—In an action of assumpsit against the personal representative to recover for work, labor and services rendered the deceased, the plaintiff cannot testify as to what work and labor he had done for the decedent in his lifetime, or what services he had rendered him, as this would be testifying in regard to personal transactions with the decedent. Owens v. Owens, 14 W. Va. 88.

And where one of the parties to a written contract dies, and the survivor brings suit on the contract for services performed thereunder, and offers him as a witness to prove what services were rendered, it was held that so much of his testimony as tended to prove what the transaction was should be excluded. Poling v. Huffman, 48 W. Va. 639, 37 S. E. Rep. 526.

But, it has been held that a contractor is competent to testify in his own behalf, as to furnishing labor on or material for a building, which he has contracted to build, although the other party to the agreement is dead, where his testimony does not tend to prove what the transaction was between them. Fouse v. Gilfillan, 45 W. Va. 213, 32 S. E. Rep. 178.

5. INDEPENDENT FACTS.—A party to an action, or interested therein, may testify to any fact, which is material in evidence, and does not involve a personal transaction or communication with the opposite party, notwithstanding the death of the other party. South Branch R. Co. v. Long, 43 W. Va. 131, 27 S. E. Rep. 297, citing 29 Am. & Eng. Enc. Law (1st Ed.) 740.

For example, when the question is whether the acts of a deceased person, in building a dam across a stream, injured the land of the plaintiff, the plaintiff is a competent witness to prove the condition of his land, the character of the stream doing the injury, the effect of the dam on the stream, and on the adjacent lands of the plaintiff, because these are independent facts, and relate to transactions with the deceased; therefore, his testimony, if untrue, could be rebutted by others, as readily as by the deceased. Field v. Brown, 24 Gratt. 74.

6. CONVERSATION BETWEEN DECEASED AND THIRD PARTY.—It has been held that a party to an action is incompetent to testify as to a conversation between the deceased, under whom he claims, and a third party, in the presence and hearing of the witness, whether he took any part in the conversation or not. Robinson v. James, 29 W. Va. 224, 11 S. E. Rep. 920. In this case the court said: "There is, I think, no real difference in the intent of the law between a conversation held between the defendant and a third person, in the presence of the plaintiff, which he overheard, and such a conversation, in which he took part. The same reason exists for excluding the evidence in the former as in the latter."

In Seabright v. Seabright, 28 W. Va. 463, it is said: "From JUDGE HAYMOND'S opinion in Owens v. Owens, Administrator, 14 W. Va. 97-8, we may infer, that in his opinion 'personal communication' with the deceased would include a conversation held by the deceased in the presence of the interested party produced as a witness, though the conversation was not with the witness, but he simply testified to having overheard such conversation and what was said by the deceased. This question has not been decided in this state, but I am of the impression at present, that, whenever it shall be presented, such witness will be decided incompetent to testify to such conversation with a deceased person."

7. COMPETENCY OF PERSONAL REPRESENTATIVE.—The personal representative of a deceased party, or a devisee or legatee under his will, are not parties to the transaction within the meaning of the Virginia statute. Martz v. Martz, 25 Gratt. 361; Ellis v. Harris, 32 Gratt. 684.

But where the executor is also an adverse claimant to the estate of his intestate he cannot testify as executor and then offer himself as a witness on his own behalf as an adverse claimant, because he had previously testified as executor. If such were the law, the personal representative could always make himself a competent witness in his own behalf against the estate of his decedent. Kimmel v. Shroyer, 28 W. Va. 512, citing Martin v. Smith, 25 W. Va. 579; Seabright v. Seabright, 28 W. Va. 412.

8. MEANING OF CERTAIN WORDS AND PHRASES IN STATUTES.

Virginia Statute.—A will is not a contract within the meaning of the Virginia statute. Martz v. Martz, 25 Gratt. 361.

"Subject of Investigation."—In a suit by an assignee against his assignor on recourse, the subject of investigation is the assignment whereon the claim is based, and not the communications between the deceased assignor and the assignee's attorney, wherein the former directed the latter not to sue on the assigned claims. Hall v. Rixey, 84 Va. 790, 6 S. E. Rep. 215.

And it has been held, that in an action upon a bond, "the subject of investigation," within the meaning of the statute, is the bond. Carter v. Hale, 32 Gratt.

115; Grigsby v. Simpson, 28 Gratt. 348. See Oliver v. Hayes, 1 Va. Dec. 180.

In a suit to enforce a vendor's lien, the testimony of the vendee as to the sale was "in his own favor," even though the claim against him was barred by limitations, and his interest in the suit was only as to the cost. Tunstall v. Withers, 86 Va. 892, 11 S. E. Rep. 565.

West Virginia Statute.

What is a "Transaction" within Meaning of Statutes.—In Owens v. Owens, 14 W. Va. 94, the court, in construing ch. 130, § 23 of the West Virginia Code, said: "A contract, whether express or implied by law, is a transaction. And it seems to me, that when one person testifies, that he did work and labor for another, generally he must be taken and considered as testifying to a transaction, in legal contemplation, between him and such other person, within the true meaning and intent of the law now under consideration, because the testimony of the witness tends to prove, in legal effect, not only a request to do the work, but also a promise to pay him therefor, what the same was reasonably worth, and also that he did the work in consideration of such request. The doing of the work and labor is the consideration of the contract or promise to pay, whether express or implied, and it seems to me, cannot be separated from the contract or transaction very easily."

The Word "Against" in West Virginia Statute.—It has been held that the word "against," as used in the West Virginia statute, does not mean on opposite sides of a suit, but as having opposing interests in the suit, whether on the same side as coplaintiffs or codefendants, or on opposite sides as plaintiffs or defendants. Seabright v. Seabright, 28 W. Va. 415.

"Grantees."—The word "grantees," has been construed to be included in the word "assignees," contained in the statute. Zane v. Fink, 18 W. Va. 695.

Devisees and Legatees.—And the devisees of a testator are his assignees within the meaning of the statute. McMechen v. McMechen, 17 W. Va. 683.

"Survivor of Such Deceased Person."—Moreover, the class intended to be designated by the words "survivor of such deceased person," includes every person, who by reason of his surviving the deceased becomes, as such survivor, interested in the subject of the controversy, as, for instance, a widow, who claimed as distributee a share in her husband's estate, when the question in controversy was, whether her husband in his lifetime had given away a portion of his personal property to one, who was his executor, or whether such personal property was her husband's at the time of his death. Seabright v. Seabright, 28 W. Va. 415.

"Next of Kin."—Within the meaning of the statute, the phrase "next of kin," includes any distributee of the deceased intestate, as for instance his widow, and is not confined to his nearest blood relations. Seabright v. Seabright, 28 W. Va. 415.

9. ADMISSIBILITY OF DECEASED'S DEPOSITION.—Within the meaning of the West Virginia statute, a party testifies in his own behalf when his deposition is read at the hearing of the cause, not at the time when it is actually taken. Hence, though the adverse party was living when his deposition was taken, it ought to be excluded if he was dead at the time such deposition is proposed to be used in the cause. Zane v. Fink, 18 W. Va. 695; Seabright v. Seabright, 28 W. Va. 415; Vanscoy v. Stinchcomb, 29 W. Va. 268, 11 S. E. Rep. 927.

In Keran v. Trice, 75 Va. 690, the deposition of one of the original parties to the transaction was taken, the other party to the transaction being present and cross-examining him. Afterwards the deponent died, and the other party gave his deposition. It was held that the deposition of the survivor could not be read, because the other party to the transaction was dead when he deposed, and, hence, he was disqualified when the deposition was taken; but not so with the deposition of the deceased party, because he was competent to testify in his own behalf when he deposed. The court thought that the deposition of the survivor might perhaps have been read, if it had been taken after, instead of before the amendment (Acts 1876-77, ch. 198, ch. 256) went into operation.

D. TRANSACTION WITH INSANE PERSONS.—No person interested in the event of any civil suit, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, insane, as against such insane person or his committee. Trowbridge v. Stone, 42 W. Va. 454, 26 S. E. Rep. 368.

V. EXAMINATION OF WITNESS.

A. IN GENERAL.—In practice, it is the interrogation of a witness, in order to ascertain his knowledge as to the facts in dispute between the parties.

The examination in chief is that made by the party calling the witness; the cross-examination is that made by the other party. 1 Bouv. Law Dict. p. 711.

1. DISCRETION OF TRIAL COURT.—The examination of witnesses lies chiefly in the discretion of the trial court, and its exercise will never be controlled or interfered with by an appellate court, unless it plainly appears that some injustice has been done. Brooks v. Wilcox, 11 Gratt. 411; Scott v. Shelor, 28 Gratt. 891; Taylor v. Com., 77 Va. 692; Burke v. Shaver, 92 Va. 345, 23 S. E. Rep. 749.

The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the trial courts, with which the appellate court will not interfere; and the trial courts must necessarily be vested with a large discretion in the regulation of their practice, but such discretion does not extend to the exclusion of legal evidence offered in its proper order. McManus v. Mason, 43 W. Va. 196, 27 S. E. Rep. 298, citing Railroad Co. v. Simpson, 14 Pet. 463.

2. LEADING QUESTIONS.

Statement of Rule.—Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed on the examination in chief; for to direct witnesses in their evidence, would only serve to strengthen that bias, which they are generally so much disposed to feel, in favor of the party that calls them. Vass v. Com., 3 Leigh, 786, opinion of LOMAX, J. Hausenfluck v. Com., 85 Va. 707, 8 S. E. Rep. 686. See Morgan v. Ins. Co., 6 W. Va. 500.

Must Suggest Answer Desired.—But a question is not open to the objection of being leading, unless it in some manner indicates to the witness the answer desired. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

Merely Directing Attention of Witnesses.—For questions are not leading which merely direct the witness' attention to the subject as to which he is questioned, without suggesting the answer. Cluverius v. Com., 81 Va. 787.

Question Held Not Leading.—For example, in an action against a county court for a balance due on a contract to construct a bridge, it was held that a question to a witness as follows: "Did the county court, at any time, accept that bridge, or any part of it, and take it off the contractor's hands?" was not objectionable on the ground that it is leading: it does not suggest the answer expected, and leaves

him free to answer it as he chooses. Chenowith v. County Court, 32 W. Va. 628, 9 S. E. Rep. 910.

Question Held to Be Leading.—But where the defendant asked a witness, called by him, "what the plaintiff said to him about the said other work, and if he was not to pay the defendant full plasterer's prices therefor?" it was held that, strictly interpreted, the question was leading. Brodie v. Clator, 8 W. Va. 599.

Dying Declarations.—It has been held that the rule excluding leading questions to witnesses is not applicable to the case of dying declarations made in answer to leading questions put to the declarant. Vass v. Com., 3 Leigh 786, 24 Am. Dec. 695.

Questions in Words "Whether or Not."—And a question to a witness in the words "whether or not" is not ordinarily objectionable as leading. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

For example, in Lemmons' Case, 6 Gratt. 684, it was held that such questions as: "State whether or not you examined the horse track towards Crogan's?" "State whether or not you had any difficulty in following the tracks," are not improper leading questions.

Discretion as to Leading Questions.—When, and under what circumstances, a leading question may be put is a matter resting in the sound discretion of the trial court. Accordingly, it has been held that where a witness is reluctant or slow of understanding, and the question does not produce any material addition to the previous words of the witness, the asking of leading questions, under such circumstances, is no ground for reversal. Hausenfluck v. Com., 85 Va. 702, 8 S. E. Rep. 683.

Duty of Counsel to Object to Form of Question.—Where the evidence sought to be adduced by a leading question is competent, it is the duty of counsel to direct his attention to the form of the question so as to give the opposite party an opportunity to bring out the evidence by a question free from objection. Washington, etc., R. Co. v. Quayle, 95 Va. 741, 30 S. E. Rep. 391.

When Objection Must Be Made.—But after a question has been propounded to a witness, and he has been allowed to answer it without objection, it is too late then to object on the ground that the question was leading. Jackson v. Commonwealth, 96 Va. 107, 30 S. E. Rep. 452.

How Answers to Leading Questions Suppressed.—The evidence of a witness given in answer to leading questions, ought not on that ground to be suppressed, otherwise, than by an order of the court, made before the hearing of the court, on a motion or petition for that purpose, and founded on an exception endorsed upon the deposition within a reasonable time from return thereof; and founded, moreover, upon an objection taken at the time of the examination of the witness, if the party seeking to exclude the evidence, his agent or attorney, was then present. M'Candlish v. Edloe, 3 Gratt. 330.

3. EXCLUDING WITNESSES FROM COURT ROOM.—It is a well settled rule of practice, in both civil and criminal cases, that it is the duty of the presiding judge, on the motion of either party, to exclude witnesses from the court room. Gregg v. State, 3 W. Va. 705; Hey v. Com., 32 Gratt. 946.

But this rule does not apply to attorneys or officers of the court. Gregg v. State, 3 W. Va. 705.

Discretion of Trial Court.—Trial courts, however, are allowed a discretion in the matter of the separation of witnesses. Therefore, if the trial court, in its discretion, excludes all the witnesses from the court room but one, its action in that respect will not be reversed unless it appears that its discretion has been improperly exercised, and that it operated to the prejudice of the party complaining of it. Jackson v. Commonwealth, 96 Va. 107, 30 S. E. Rep. 452.

Refusal to Order Separation No Ground for Reversal.—And, though the order to separate witnesses during the trial should rarely be withheld by the court, still it is not strictly a matter of right, and, therefore, a refusal to order a separation of witnesses is not ground for the reversal of a judgment, unless it affirmatively appears that the party suffered injury from its refusal. State v. Morgan, 35 W. Va. 260, 13 S. E. Rep. 385.

Disobedience of Order.—If a witness disobeys the order of the judge, and remains in the court room, he may be punished for contempt, but he is not for that reason disqualified from testifying. The practice is to allow him to be examined, subject to observation as to his conduct in disobeying the order. Gregg v. State, 3 W. Va. 705; Hopper v. Com., 6 Gratt. 684; Hey v. Com., 32 Gratt. 946, 34 Am. Rep. 799.

It is obvious, therefore, that a witness who has not been summoned, but who was present as a spectator, and heard a part of the evidence, cannot be excluded, because the court had previously ordered that the witnesses be examined out of the hearing of each other, for, as we have just seen, this would have been no ground for excluding him, even if he had been summoned as a witness before the order was made. Brown v. Com., 90 Va. 671, 19 S. E. Rep. 447.

B. CROSS-EXAMINATION.

1. EXTENT OF CROSS-EXAMINATION.—A party has no right to cross-examine any witness except as to the facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause. State v. Hatfield, 48 W. Va. 561, 37 S. E. Rep. 626; Virginia, etc., Co. v. Chalkley, 98 Va. 62, 34 S. E. Rep. 976.

And if a party cross-examines a witness as to facts and circumstances not connected with the matter stated in his direct examination, he, in effect, makes the witness his own, and waives any objection he may have made to his competency. Miller v. Miller, 92 Va. 510, 23 S. E. Rep. 891.

But it has been said that the evidence brought out on the cross-examination of a witness, explanatory or relative to his evidence in chief, is as much the evidence of the party calling the witness as the examination in chief, and is to be considered as such in ascertaining what facts the evidence reasonably conduces to prove. Horner v. Speed, 2 Pat. & H. 616.

2. TESTING ACCURACY, VERACITY OR CREDIBILITY OF WITNESS.—A witness may be asked, on cross-examination, any question touching his examination in chief, which tends to test his accuracy, veracity or credibility. Virginia, etc., Co. v. Chalkley, 98 Va. 62, 34 S. E. Rep. 976.

Testing the Recollection of Witnesses.—And it was held in Blankenship v. Chesapeake, etc., R. Co., 94 Va. 449, 27 S. E. Rep. 20, that the plaintiff might ask a witness, on cross-examination, if he did not remember that at the last trial of the case he did not testify as to a certain fact, where the object of the question was to test the recollection of the witness as to a material point in the defense.

Attacking Credibility of Witness.—Moreover, where the defendant in an action appears as a witness in his own behalf, the plaintiff has the right to so cross-examine him as to elicit any facts which would in any way tend to corroborate the testimony of the plaintiff, or contradict that of the defendant. McManus v. Mason, 43 W. Va. 196, 27 S. E. Rep. 293.

For example, where the defendant, in an action of assumpsit for services rendered him by the plaintiff, denied that he ever contracted with the plaintiff; that he ever employed him for any purpose; that he had nothing to do with his employment, and that he did not owe him anything, it was held that he might be asked, on cross-examination, if he ever gave the plaintiff any directions about the work. McManus v. Mason, 43 W. Va. 196, 27 S. E. Rep. 293.

Prior Inconsistent Statements.—So, also, on cross-examination, it is allowable to ask a witness, for the purpose of contradicting his testimony, if he had not on a former occasion, giving time, place, and person, made a different statement from that which he swore to on his examination in chief. Smith v. Watson, 82 Va. 712, 1 S. E. Rep. 96. See *post*, this note, "Impeachment."

C. RE-DIRECT EXAMINATION.—The trial court possesses much latitude of discretion in permitting a second examination of a witness; therefore if the circumstances of the case and justice demand that a second examination of the same witness should take place, an order will be made to permit it; and unless it was palpably improper to grant leave for the second examination, an appellate court will not for this cause reverse the decree. Fant v. Miller, 17 Gratt. 187; Carter v. Edmonds, 80 Va. 58; Burke v. Shaver, 92 Va. 345, 23 S. E. Rep. 749. See monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

D. RE-CROSS-EXAMINATION.—Ordinarily a party cannot, as a matter of right, re-cross-examine a witness, as it would obviously lead to great abuses, in harassing witnesses and protracting trials. Therefore, where a witness has been examined, cross-examined, and re-examined, the examination of the witness ought ordinarily to be considered as closed, unless new matter was brought out on the re-examination, in which case an opportunity should be given the opposite party to interrogate the witness as to the new matter. Atlantic, etc., R. Co. v. Rieger, 95 Va. 418, 28 S. E. Rep. 590.

And if, after a trial court has permitted a second cross-examination of a witness, it sees that it has granted a privilege which ought not to have been granted, or which is being abused, by going over that which has already been fully gone over, or that a further exercise of the privilege can serve no useful purpose, it may then and there put an end to the further re-cross-examination of the witness. Atlantic, etc., R. Co. v. Rieger, 95 Va. 418, 28 S. E. Rep. 590.

E. RECALLING WITNESSES.—Much latitude of discretion should be allowed the trial court in the matter of recalling witnesses, and its action will not be reversed by an appellate court except for palpable error. Livingston v. Com., 7 Gratt. 658; Burke v. Shaver, 92 Va. 345, 23 S. E. Rep. 749; Tate v. Bank, 96 Va. 765, 32 S. E. Rep. 476.

Re-examination as to New Facts.—But where a witness has been examined and cross-examined, and told to stand aside, it rests in the sound discretion of the court whether he shall be recalled and re-examined as to new facts, unconnected with his former examination and cross-examination. Howel v. Com., 5 Gratt. 665. See McManus v. Mason, 43 W. Va. 196, 27 S. E. Rep. 293.

In one case, the attorney for the commonwealth was allowed to recall a witness, even after he had made his opening argument and one of the counsel for the prisoner had spoken in his defense. Armstead v. Commonwealth, 7 Gratt. 599.

In another case it was held, that if, after a witness for the commonwealth has given his testimony and left the stand, the prisoner wishes to show that he has made a different statement at another time, he is entitled to have him recalled, and to examine him on the point, that the evidence in contradiction may be introduced; and this whether the failure to examine him when he was on the stand, was because he or his counsel were not informed of the evidence to contradict, or from inadvertence. Little v. Commonwealth, 25 Gratt. 921.

Explanation of Statement.—The court may recall a witness to ask an explanation of a statement made by him when on the stand. Snodgrass v. Com., 89 Va. 679, 17 S. E. Rep. 238.

So, also, where a dispute arises between counsel as to what a witness has said, the court may recall the witness and settle the dispute. Snodgrass v. Com., 89 Va. 679, 17 S. E. Rep. 238.

F. ANSWERS MUST BE RESPONSIVE TO QUESTIONS.—The answers of a witness must be responsive to questions asked; he must not volunteer statements unasked for. Brown v. Hall, 85 Va. 146, 7 S. E. Rep. 182; McBride v. Com., 95 Va. 818, 30 S. E. Rep. 454.

G. REFRESHING THE MEMORY.—A witness may refresh his memory by a reference to a paper, and it makes no difference whether the paper was prepared by himself or another, whether it be an original, a copy, or an extract, or whether it be referred to by the witness in court or elsewhere; but the witness must then speak from his own recollection thus refreshed. Harrison v. Middleton, 11 Gratt. 527.

And parties or their counsel, may orally or by writing, previous to the examination of a witness, direct his attention to the facts in regard to which he is intended to be examined, and he may refresh his memory in regard to such facts by examining books or papers, and make memoranda from them or otherwise, especially of dates and amounts, and use such memoranda for the purpose only of refreshing his memory, at the time of giving his evidence. Fant v. Miller, 17 Gratt. 188.

VI. IMPEACHMENT.

A. PRIOR INCONSISTENT STATEMENTS.—The credibility of a witness may be impeached by proof of statements made by him on some former occasion, inconsistent with the testimony he has given on the trial; but such testimony cannot be received as evidence of any fact touching the issue to be tried, because such statements are not generally made under the sanction of an oath. Charlton v. Unis, 4 Gratt. 58; Forde v. Com., 16 Gratt. 547; Little v. Com., 25 Gratt. 921; Smith v. Watson, 82 Va. 712, 1 S. E. Rep. 96; Morgan v. Ins. Co., 6 W. Va. 496.

And this is true, whether the previous statements of the witness, supposed to contradict his testimony, be written or verbal. Charlton v. Unis, 4 Gratt. 58; Unis v. Charlton, 12 Gratt. 484; New York, etc., R. Co. v. Kellam, 83 Va. 851, 3 S. E. Rep. 703.

Testimony before Grand Jury—Upon a criminal trial, either a person who was present, or, it seems, a grand juror, are competent witnesses to prove that a statement made by a witness before the grand jury was different from the statement made by him before the petit jury on the trial of the indictment. Little v. Com., 25 Gratt. 921.

1. LAYING FOUNDATION.—Before evidence of prior inconsistent statements by a witness can be admitted, however, to impeach his credit, a foundation for such evidence must first be laid, by an examination of the witness touching the fact of his having made such statements. Common justice requires that by first calling his attention to the subject, he should have an opportunity of making any proper correction, as well as explaining the nature, circumstances and design of what he is proved elsewhere to have said. Unis v. Charlton, 12

Gratt. 484; Davis v. Franke, 33 Gratt. 413; Little v. Com., 25 Gratt. 921; State v. Goodwin, 32 W. Va. 177, 9 S. E. Rep. 85.

And it is generally held necessary, in the case of verbal statements, first to ask the witness as to the time, place, and person involved in the supposed contradiction. Robinson v. Pitzer, 3 W. Va. 335; Smith v. Watson, 32 Va. 712; New York, etc., R. Co. v. Kellam, 83 Va. 860, 3 S. E. Rep. 703; Gordon v. Funkhouser (Va.), 42 S. E. Rep. 678. In this last case an omission to mention the place involved in the supposed contradiction, was held to be no error, as it did not appear to prejudice the other party.

Within the meaning of this rule, however, a sufficient foundation is laid, even though the names of the person involved in the supposed contradiction are not known, and hence, cannot be given, where they are otherwise sufficiently described. Little v. Com., 25 Gratt. 921.

a. Where Witness Denies Having Made the Contradictory Statement.—Where a witness is asked, on cross-examination, whether or not he has made certain statements out of court, contrary to what he has testified at the trial, and he answers in the negative, the proper foundation has then been laid for introducing evidence to contradict him. New York, etc., R. Co. v. Kellam, 83 Va. 859, 3 S. E. Rep. 708; Unis v. Charlton, 12 Gratt. 484.

Form of Question to Impeaching Witness.—After the denial, on cross-examination, of a witness that he has made such inconsistent or contradictory statement, although it is admissible, upon a principle of convenience or absolute necessity, to put the question to the impeaching witness in the same words that it had been put to the former witness, yet, it would be more satisfactory that the question should be obtained without a direct suggestion. And if the question put to the impeaching witness, is not in the same words as put to the former witness, it should, nevertheless, be relative and sufficiently precise so as to indicate to the impeaching witness the same subject-matter or transaction testified to by the former witness, and not so general as to introduce irrelevant and improper testimony, or such as tends to affect the merits of the case instead of impeaching the former witness. Morgan v. Insurance Co., 6 W. Va. 496.

b. Where Witness Does Not Remember Making Contradictory Statement.—But the rule in Virginia and West Virginia is different, as to whether contradictory statements by a witness on other occasions may be introduced to discredit him, when he does not deny having made such statements, but simply says that he does not remember making them.

Rule in Virginia.—Thus, on the trial of a prisoner for murder, a witness on his examination in chief makes a statement as to the action of a third person, and upon his cross-examination he is asked whether he did not make a different statement before the examining court; to which he says he does not remember. It was held, however, that the statement made by the witness before the examining court, may be proved in order to discredit him. Forde v. Commonwealth, 16 Gratt. 547.

Rule in West Virginia.—On the other hand, where a witness was asked whether he had a conversation with a certain person, at a certain time, at a certain place, in reference to a certain matter, and he replied that he did not remember any such conversation, it was held that no sufficient foundation had been laid for the admission of the statement of the witness to contradict him and impeach his credit. Robinson v. Pitzer, 3 W. Va. 335.

2. RELEVANCY OF CONTRADICTORY STATEMENTS.—It must be observed, however, that in order to impeach a witness by showing that on another occasion he made a statement contradicting those made on the trial, the statements must relate to a matter material and relevant to the case. State v. Goodwin, 32 W. Va. 177, 9 S. E. Rep. 85; New York, etc., R. Co. v. Kellam, 83 Va. 860, 3 S. E. Rep. 703; Morgan v. Ins. Co., 6 W. Va. 496; Robertson v. Com., 2 Va. Dec. 142; State v. Sheppard, 49 W. Va. 582, 39 S. E. Rep. 676.

And if a question is put to a witness on cross-examination which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but is conclusive against him. Murphy v. Com., 23 Gratt. 960; Morgan v. Ins. Co., 6 W. Va. 496; State v. Goodwin, 32 W. Va. 177, 9 S. E. Rep. 85; Forde v. Com., 16 Gratt. 547; Langhorne v. Com., 76 Va. 1012; Nuckols v. Jones, 8 Gratt. 267; Welch v. Ins. Co., 23 W. Va. 303.

Reason of Rule.—The reason why his answer cannot be contradicted in such case is that it would be unjust to the witness and to the party introducing him, for though every witness may be supposed to come prepared to sustain the truth of his testimony given on the trial, he cannot be expected to come prepared to prove the truth of every *collateral statement* he may have made on another occasion. Charlton v. Unis, 4 Gratt. 58.

Extent of Rule—Cross-Examination.—This limitation, however, only applies to answers on cross-examination. It does not affect his answers on the examination in chief, but they may be contradicted though collateral to the issue. Forde v. Com., 16 Gratt. 547; Nuckols v. Jones, 8 Gratt. 267; State v. Goodwin, 32 W. Va. 177, 9 S. E. Rep. 85; Welch v. Ins. Co., 23 W. Va. 289, 304.

Test as to Whether a Matter Is Collateral.—The test as to whether a matter is material or collateral, as regards the impeachment of witnesses, depends upon whether the cross-examining party would be entitled to prove it in support of his case. State v. Goodwin, 32 W. Va. 177, 9 S. E. Rep. 85; State v. Sheppard, 49 W. Va. 582, 39 S. E. Rep. 676, citing 29 Am. & Eng. Enc. Law (1st Ed.) 794.

Value of Land.—But where the value of certain land in controversy was material to the issue, and a witness, who had owned the land, was introduced by the plaintiff and examined by both parties as to its value, it was held that the defendant, after laying the proper foundation, might contradict the testimony of the witness, by offering evidence to prove the price at which the witness had himself offered it for sale. Daniels v. Conrad, 4 Leigh 401.

B. BIAS OR HOSTILITY.

General Rule.—A witness may be impeached on cross-examination by questioning him as to any statements made, or acts done by him, indicating feelings of bias or hostility towards either party to the cause; and if he denies such statements or acts they may be proved by other witnesses. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225; Rixey v. Bayse, 4 Leigh 330; Wadley v. Com., 98 Va. 803, 35 S. E. Rep. 452.

If the witness denies any ill-feeling, he may be contradicted by evidence of his own statements or acts, to which, however, his attention must first be specially drawn. Langhorne v. Com., 76 Va. 1012.

Collateral Facts.—But it is not proper to introduce evidence of collateral facts, such as the mere pendency of a suit between them, to show this bias or ill-feeling. Langhorne v. Com., 76 Va. 1012.

Particular Acts.—It has been held that the defendant, at the trial of an action of slander, may introduce evidence of particular acts of hostility by the plaintiff's witnesses towards him, to discredit their testimony. Rixey v. Bayse, 4 Leigh 330.

Bias towards Other Witnesses.—The general rule, however, applies only to parties to a suit, and not to-

witnesses in a cause for or against each other: except, perhaps, where one of the witnesses is being impeached for bad character, in which case the impeaching witness may be cross-examined as to his feelings, or bias towards the witness whose character he assails. Therefore, except in the case stated above, one witness cannot be asked if he is indebted to another witness in the cause, for the purpose of showing bias, and thus discrediting his testimony. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

C. IMPEACHING REPUTATION OF WITNESS.—It is well settled that a witness may be impeached, by proof that his general reputation for truth and veracity, in the neighborhood in which he resides, or recently resided, is bad. Langhorne v. Com., 76 Va. 1012; George v. Pilcher, 28 Gratt. 299, 26 Am. Rep. 350; State v. Meadows, 18 W. Va. 658; State v. Staley, 45 W. Va. 792, 32 S. E. Rep. 198.

Extent of Inquiry.—The examination of the impeaching witness, however, must be confined to the general character for veracity of the witness sought to be impeached, and cannot extend to his general character in relation to other things as well as veracity. Uhl v. Com., 6 Gratt. 706. See Davis v. Franke, 33 Gratt. 427.

1. KNOWLEDGE REQUIRED OF IMPEACHING WITNESS.—And, before an impeaching witness can be permitted to say whether he would or would not believe the witness sought to be impeached on oath, he must first state on his oath, that he knows his general character among his neighbors and acquaintances, and also his general character for truth among his neighbors and acquaintances, whether upon oath or otherwise. Uhl v. Com., 6 Gratt. 706; Clay v. Robinson, 7 W. Va. 350.

And the same rule has been applied in the case of a witness introduced to sustain the character of the witness sought to be impeached. Clay v. Robinson, 7 W. Va. 350. See *post*, "Knowledge Required of Sustaining Witness."

Opinion of Majority of Neighbors.—Where a witness is introduced to impeach the general reputation of another witness for truth and veracity in his neighborhood, and he states that he is acquainted with his general reputation in that regard, that it is bad and that he would not believe him on oath, he is a competent witness, notwithstanding he cannot say he has heard a majority of his neighbors speak of his character in that regard. State v. Meadows, 18 W. Va. 659.

Such a witness may be asked, however, whether he had ever heard a majority of his neighbors speak of his character, and if his opinion is made up from his own knowledge, or from what he has heard the neighbors say. State v. Meadows, 18 W. Va. 659.

Inquiry Not Confined to Immediate Vicinity.—One who is well acquainted with those of a community who best know another, is competent to give evidence as to his general reputation for honesty; and such evidence is not confined to the immediate vicinity of him whose reputation is the subject of inquiry. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

2. WHAT EVIDENCE ADMISSIBLE TO IMPEACH.

In General.—The credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts. Rixey v. Bayse, 4 Leigh 330; Barbour v. Com., 80 Va. 287.

Bad Character of Witnesses.—For example, where the accused, on trial for murder, sought to exclude witnesses for the commonwealth because of their alleged bad character, it was held that evidence of bad conduct on their part, that a warrant had been issued for their arrest under the charge of petit larceny, that the deceased and his wife kept a house of ill fame, and that the deceased's wife was a lewd woman, was properly excluded. Vance v. Com., 1 Va. Dec. 830.

Unchastity.—So, also, it has been held that the prosecutrix, at the trial of an indictment for rape, cannot be asked, on cross-examination, if she had not been before a person of unchaste character. Fry v. Com., 82 Va. 334.

Brawler.—The veracity of a witness cannot be successfully impeached, by evidence that he is given to rows and to putting them off on others. Briggs v. Com., 82 Va. 554.

Conviction of Crime.—A record of the conviction of a witness for petit larceny in another state, is not admissible evidence to impeach the veracity of the witness. Uhl v. Com., 6 Gratt. 706. This case was followed in Barbour v. Com., 80 Va. 289.

And where an attempt is made to impeach the veracity of a witness by proof of his conviction of a criminal offence, it must be such an offence as involves his character for truth on oath. Langhorne v. Com., 76 Va. 1012; Uhl v. Com., 6 Gratt. 706.

D. NEW TRIAL.—A new trial will not be granted to enable the party against whom the verdict is rendered, to impeach the credit of a witness examined at the trial. Brugh v. Shanks, 5 Leigh 597.

E. IMPEACHMENT OF ONE'S OWN WITNESS.—As a general rule, a party is not allowed to discredit his own witness. But it has been held, that a question put by the commonwealth to its own witness, inquiring as to his relationship with the accused, is not objectionable on the ground that it is an effort by the former to discredit its own witness. Snodgrass v. Com., 89 Va. 679, 17 S. E. Rep. 238.

VII. CORROBORATION.

A. IN GENERAL.—Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to the material facts, or by disproving by other witnesses material facts stated by him in his examination, or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth. George v. Pilcher, 28 Gratt. 299, 26 Am. Rep. 350; State v. Staley, 45 W. Va. 792, 32 S. E. Rep. 198.

But if the purpose and object of the cross-examination of a witness was not to impeach his credibility, he cannot introduce evidence to prove his reputation as a man of veracity. In other words, a party cannot bring evidence to confirm the character of a witness, before the credit of that witness has, in some manner, been impeached. Reynolds v. Richmond, etc., R. Co., 92 Va. 400, 23 S. E. Rep. 770; George v. Pilcher, 28 Gratt. 299, 26 Am. Rep. 350.

Thus, in an action for personal injuries alleged to have been due to a fall from the defendant's car, the plaintiff, on cross-examination, was asked as to other injuries received by him, to show that his present condition was not the effect of his fall, and the court held that this was not an attack on his credibility, so as to entitle him to evidence of his reputation for veracity. Reynolds v. Richmond, etc., R. Co., 92 Va. 400, 23 S. E. Rep. 770.

B. PRIOR CONSISTENT STATEMENTS.

General Rule.—As a general rule, proof of statements made by a witness out of court, cannot be received to corroborate his testimony in court. Oliver v. Com., 77 Va. 593; Howard v. Com., 81 Va. 488; Repass v. Richmond, 99 Va. 508, 39 S. E. Rep. 160.

Exception to General Rule.—One exception to this rule, however, is where a design to misrepresent, from some motive of interest or relationship, is imputed to the witness, in which case it may be

shown that he made similar statements before the acquisition of the interest or the date of the relationship, in order to repel the imputation. Repass v. Richmond, 99 Va. 508, 39 S. E. Rep. 160.

For example, where an attempt was made to discredit a witness by showing malice on his part growing out of his arrest for an offence, it was held admissible to show that the witness made the same statement before his arrest that he made in court. Howard v. Com., 81 Va. 488.

C. KNOWLEDGE REQUIRED OF SUSTAINING WITNESS.—Where the character of a witness for truth and veracity has been impeached, the evidence of a witness who has been acquainted for a long time with the impeached, and has never heard the character of the witness for truth and veracity questioned, is admissible, although such witness may never have heard any person or persons say anything whatever concerning the impeached witness' character. Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293; Clay v. Robinson, 7 W. Va. 348.

And when the witness states that he knows the reputation of the person sought to be impeached as a man of veracity, his competency to testify and the weight otherwise due to his testimony, are not at all lessened by the fact that he never heard the character of such person called in question, or made the subject of special conversation or discussion; for, although a man's character may not be discussed, it may, nevertheless, be well known to his neighbors, and in many cases the highest tribute that can be paid to the witness is that his reputation as a man of veracity is never called in question, or even made the subject of conversation in the community where he resides. Davis v. Franke, 33 Gratt. 413; Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293.

VIII. PRIVILEGE OF REFUSING TO ANSWER.

A. WHERE ANSWERS TEND TO CRIMINATE WITNESS.—Wherever a party on oath declares that the answer to the question propounded to him will criminate himself, the court must accept that answer as true, and as making a *prima facie* case in which he must be excused, unless there is something in the circumstances of the particular case which makes it appear either that the witness contumaciously refuses to answer, or where it appears that from all the circumstances he is clearly mistaken as to any possibility of his future prosecution. Temple v. Commonwealth, 75 Va. 892; Langhorne v. Com., 76 Va. 1021; Murphy v. Com., 23 Gratt. 960.

For, if the fact to which the witness is interrogated forms but a single remote link in the chain of testimony which may implicate him in a crime or misdemeanor, he is not bound to answer. Langhorne v. Com., 76 Va. 1012.

Waiver of Privilege.—And, because the witness has already made elsewhere a full and voluntary disclosure of the facts, as, for instance, before the coroner or grand jury, this will not deprive him of his privilege of declining to testify on the trial. A witness cannot be held to have waived this privilege until he is warned of it. Cullen v. Com., 24 Gratt. 624; Temple v. Com., 75 Va. 892.

B. CONSTITUTIONAL GUARANTY.—The Virginia constitution provides that in all capital or criminal prosecutions, no man can be compelled to give evidence against himself. Art. 1, § 10.

Under this guaranty, it has been held that a person is not only secured from giving evidence against himself on his own trial, but he cannot be compelled, on the trial of another, to testify, if his evidence will tend to criminate himself. Cullen v. Com., 24 Gratt. 624.

1. STATUTES TAKING AWAY CONSTITUTIONAL PRIVILEGE.—And before this constitutional privilege of refusing to answer can be taken away by statutes, there must be an absolute indemnity provided, and nothing short of complete amnesty to the witness, an absolute wiping out of the offence as to him, so that he can no longer be prosecuted for it, will furnish that indemnity. Opinion of JUDGE BOULDIN in Cullen v. Com., 24 Gratt. 635; Temple v. Com., 75 Va. 892.

In Cullen v. Com., 24 Gratt. 624, the witness, when asked what he knew of a certain duel, declined to answer, because his answer would tend to incriminate him. The lower court ordered him to answer, and, on his still refusing to do so, fined him and committed him to jail. But the court of appeals reversed this judgment, and held that before the constitutional privilege of a witness to refuse to give evidence tending to criminate himself, could be taken away by the legislature, there must be an absolute indemnity provided against prosecution, and that a statute providing that any statements made by a person concerned in any duel, shall not be used against him in any prosecution against himself, does not provide this indemnity. It would seem, however, that according to the decision in Kendrick v. Com., 78 Va. 491, Va. Code 1887, § 3692, does furnish such a full and complete indemnity against prosecution, as that the witness may be compelled to testify, in a prosecution for duelling, notwithstanding his constitutional privilege.

But the statute giving immunity to witnesses in prosecutions for unlawful gaming, does not apply to a prosecution for managing and conducting a lottery, and, therefore, a witness cannot be required to testify in such a case if he will thereby criminate himself. Temple v. Com., 75 Va. 892.

If, however, the statute secures full protection to the witness, he cannot refuse to testify because his answer will tend to criminate him. Kendrick v. Com., 78 Va. 490, LACY and RICHARDSON, JJ., dissenting. See W. Va. Code, ch. 152, § 18.

Neither Court nor Prosecuting Attorney Can Offer Indemnity.—No implied suggestion by the court, nor any implied or positive promise by the commonwealth's attorney could operate as an indemnity to the witness that he would not be further prosecuted. He has a right to stand upon his constitutional privilege, and not to trust to the chances of a further prosecution. The court, of course, could offer him no such indemnity. Nor could the commonwealth's attorney, for he might die, or be removed, or resign, and his successor might see fit to institute a prosecution against him. Or whether he did or not, a grand jury, without the advice or consent of the commonwealth's attorney, might institute such prosecution. Temple v. Com., 75 Va. 897.

C. EXPOSURE TO A PENALTY OR FORFEITURE.—See monographic *note* on "Bills of Discovery" appended to Lyons v. Miller, 6 Gratt. 427.

D. QUESTIONS TENDING TO DEGRADE CHARACTER.—The court may interfere during the cross-examination, to protect a female witness from answering questions tending to degrade her character, and possibly expose her to a criminal prosecution. Under this rule questions imputing a want of virtue in a female witness have been excluded. Howel v. Com., 5 Gratt. 664; Forney v. Ferrell, 4 W. Va. 729.

Strode v. Head.*

October Term, 1795.

Debt on Bond—Penalty—Value of Currency—How Ascertained.—Debt upon a bond in the penalty of 18001. Pennsylvania currency, of the value of 14401. Virginia currency. The defendant having

*The principal case is cited in Holliday v. Mye 11 W. Va. 299.

confessed judgment, it was entered for 1800l. Pennsylvania currency, of the value of 1440l. current money of Virginia, to be discharged by the payment of 720l. current money of Virginia, with interest, &c. The confession of judgment fixed the value of the money, and furnished the Clerk with a standard for ascertaining the value of the sum mentioned in the condition.

The appellee brought an action of debt in the District Court of Fredericksburgh, on a bond (with a condition) payable in Pennsylvania currency. The declaration was for the penalty, viz. £1800 Pennsylvania currency, of the value of £1440 Virginia currency. After oyer, the defendant pleaded payment. He afterwards withdrew his plea and confessed judgment generally. The judgment was entered up for £1800 Pennsylvania currency, of the value of £1440 current money of Virginia, to be discharged by the payment of £720 current money of Virginia, with interest and costs.

From this judgment, the defendant appealed.

Campbell for the appellant. Though it is certain, that if £1800 Pennsylvania currency is equal to £1440 Virginia currency, that the half of the former, must be equal to half the sum of the latter, yet as the value affixed by the plaintiff is merely arbitrary, a general confession will not warrant a judgment for the value fixed by the party himself. What the value of foreign money is, is always a fact to be ascertained by a jury, and not by the calculation of the clerk.

Lee for the appellee. The declaration having stated the value of the foreign money, the confession of judgment generally, is an acknowledgment that the value is truly stated, and renders the aid of a jury altogether unnecessary. The sum acknowledged to be due is in truth the penalty, and the permission to discharge it with a smaller sum, is an indulgence to the obligor. To do this, the condition, with the standard thus agreed upon by both the parties was properly resorted to; and as the sum in the condition, is the half of that in the penalty, and the parties have agreed upon the value of the penalty in Virginia currency, half that value must be in the sum to which the appellee is justly entitled. But if the appellant is unwilling to avail him-
150 self *of the benefit of the condition, I am willing to put it out of view, and to take a judgment for the very sum confessed by the defendant which is £1440. But I have always supposed that it was neither usual nor proper for the party to assign for error, that which is for his advantage.

ROANE, J.—If a verdict had been given in this case, it would have been necessary for the jury to have found the value of the Pennsylvania currency, since this is a fact proper for their enquiry. But the appellant by confessing a judgment, rendered the interference of a jury unnecessary, since he acknowledged that he owed the appellee £1800 Pennsylvania currency, of the value of £1440 Virginia currency. Having thus furnished a standard, the sum by which the penalty was to be discharged was easily found. I think there is no error.

The other judges concurred in opinion.

Judgment affirmed.

Terrell v. Ladd.

October Term, 1795.

Debt on Bond—Penalty—Judgment.—Debt upon a bond, the penalty of which was in current money, with condition to pay so much sterling money. After verdict for the plaintiff, the judgment should be for the current money mentioned in the penal part of the bond, to be discharged by the sterling money in the condition: and the Court ought to settle the rate of exchange, which on an appeal should appear in the record.

This was an action of debt on a bond the penalty of which was in current money, with condition to pay sterling money. Verdict for the plaintiff, and judgment for the debt in the declaration mentioned to be discharged by so much sterling money with interest and costs &c. From this the defendant appealed.

Copland for the appellant, objected, that the declaration being for current money and the judgment being entered to be discharged by sterling money, was error.

Wickham for the appellee, insisted, that the court, by the act of Assembly was directed to enter up the judgment according to the condition of the bond and therefore it would have been error to have directed a writ of enquiry. It has been decided in this court, that a judgment may be entered up for sterling money, and that the court may settle the rate of exchange.

The PRESIDENT. The point has been frequently so decided in this court.

Copland. It does not appear from this record that the rate of exchange was settled by the court.

151 *Wickham. This is always done by a general order at the end of the term, and applies to all the sterling judgments of that term without forming a part of every distinct judgment.

The PRESIDENT. Upon an appeal, the order should be annexed to each judgment, and should appear in the record.

Wickham then prayed a certiorari, which was awarded.

Note. The general order being certified, the judgment was affirmed in April 1796.

Brown & Others v. The Administratrix of Thomas Brown Deceased.

October Term, 1795.

Evidence—Guardian—Entry in Administrator's Books.*—An entry by an administrator in his books, of money paid over by him to the guardian, admitted as evidence against the guardian, under all the circumstances of the case, the administrator being dead, and his hand writing proved.

This was an appeal from the High Court of Chancery, in which the only question was, whether the master ought to have allowed an item in an account upon the evidence offered to prove it. The appellants who were the plaintiffs below are the children of Samuel Brown, to whom Wentworth

*Evidence—Books of Merchant—Entries by Deceased Clerk.—In Gale v. Norris, 9 Fed. Cas. 1079, the court said: "It is now fully settled, that the entries of his deceased clerk, in the books of a merchant, are evidence in his behalf, the handwriting being proved. Clark v. Magruder, 2 Har. & J. 77; Welsh v. Barrett, 15 Mass. 386; *Brown v. Brown*, 2 *Wash.* 151; Union Bank v. Knapp, 8 Pick. 96; Patton v. Craig, 7 Serg. & R. 126; Hood v. Reeve, 3 Car. & P. 532; Holliday v. Martinet, 20 Johns. 168; Wilbur v. Selden, 6 Cow. 162."

was administrator. He settled his accounts of that estate under an order of the County Court, admitting himself to be a debtor to the amount of £386: 10: 1. After his death, his wife was appointed his administratrix, and at the same time, Thomas Brown was appointed guardian to the appellants. After the death of Mrs. Wentworth, John Day qualified as administrator de bonis non &c. of Wentworth, whose estate was by a decree of the County Court in an amicable suit commenced for that purpose, divided amongst his children, one of whom was the wife of Thomas Brown. On Wentworth's books is an entry made by Day in the lifetime of Mrs. Wentworth the administratrix, charging Thomas Brown with £386: 9: 1, paid him as guardian of the plaintiffs on account of Wentworth's estate. Day is dead, and his hand writing proved. Thomas Brown on his day book debits himself with £155: 9: 1, received by him on account of his wards. But tho' all other entries from this day book are posted on his ledger, the sum of £155: 9: 1, is not carried to account there. It appears that an order was made by the County Court, directing a summons to issue to the said Thomas Brown, to settle his guardianship accounts, but
152 nothing farther was ever *done in the business. The defendant's exceptions to the master's report which allowed this sum of £386: 10: 1, to the debit of Thomas Brown's estate, with interest thereon from 1768, when the credit was entered by Day being sustained by the High Court of Chancery, an appeal was prayed from the decree founded thereon to this court.

Ronold for the appellant. Day, if living would have been a good witness at the time he made the entry, and his evidence is not destroyed by his afterwards becoming the administrator. But if I am wrong in this, the law is well settled, that if a witness were once competent, and afterwards becomes interested, his hand writing may be proved. In this case, the hand writing of Day being established, his entry ought to have been considered as evidence. Besides, if Brown, when summoned to settle his accounts had done so, there would have been no necessity of resorting to this evidence, and consequently slighter proof should be received to charge him.

Marshall. The rule is, that the best evidence which the nature of the case will admit shall be required, and not as Mr. Ronold supposes, the best evidence which it is in the power of the party to produce. This case from its nature admits of conclusive testimony. Wentworth, it is admitted, once had this money in his hands;—it is contended that he is discharged of it, and that Brown is chargeable because he was appointed the guardian, and in Wentworth's books an entry was made by Day, of the money being paid over to Brown. Now this is a case where Wentworth might, and as a prudent man ought to have taken a receipt, and therefore the entry is not the best evidence which the nature of the case would have admitted. Wentworth himself could not have been examined as a witness to discharge himself and to charge another. Can his entry then be admitted, or is the case stronger, because the entry is made by Day? The evidence of his hand writing proves only that he made the entry, but it does not establish the fact to which the entry relates. As to Brown's misconduct in not settling up his guardianship accounts, he might have been punished for not doing so, but it does not authorise the establishment of a principle as to him, which is repugnant to the rules of evidence when applied to general cases.

Ronold in reply. I do not contend that the entry of the party himself would be evidence; but it is sufficient if made by a third person, and his hand writing proved. It is like the case of a book keeper, whose hand writing may be proved after his
153 *death, to establish entries, with which perhaps he was himself totally unacquainted.

The Court delivered the following opinion and decree viz. "The court is of opinion, that the exhibits stated in the record are not only corroborative of the entry made in Wentworth's books by John Day, the clerk, or agent of Mary Wentworth the administratrix; but are abundantly sufficient independent of that entry, to charge Thomas Brown with the whole £386: 10: 1. The demand against Wentworth's estate was ascertained by his administration account duly settled and recorded, so as not to admit of doubt or litigation: Thomas Brown the same day, on which administration of that estate was obtained, is appointed guardian to Samuel Brown's children with a view, it would seem, to the receiving of this money before that estate was divided. There appears to have been so little doubt of the personal estate (of which there is no account) being sufficient to pay this, and all other demands, that Brown himself who married a daughter of Wentworth, with the husbands of the others, immediately commenced an amicable suit in Chancery to have a division of the lands and slaves: an order for such division is accordingly made and carried into execution, comprehending 17 slaves, which at their stated value, amounted to much more than this demand of Samuel Brown's orphans, and were liable thereto if the personal estate were not sufficient. Hence it appears that this money either was received by Thomas Brown the guardian, or he was guilty of gross neglect of duty, either of which would be a proper ground for charging him therewith. That he did receive it, is highly presumable from the circumstances before stated, and from that of his having entered in his memorandum book, the receipt of so considerable a part as £155: 9: 6, without having returned an account thereof to court as his duty required, or even carrying it to account in his own books, either to the credit of a general account with Samuel Brown's estate, or to the credit of each individual child, although such accounts appear to be open on his books, and although it is stated that he had posted from the memorandum book all other entries made at the same time. That therefore his estate ought to be charged with the whole £386: 10: 1, as received in May 1768, accountable to each child for one third thereof, with interest. But since the accounts of disbursements for their maintainance, appear to be inadequate

to that purpose, and probably de-
154 fective, *and the interest of the money a very moderate allowance, the court is of opinion that the interest with each child shall commence from the time when he or she attained the age of 21 years or married, till which period the interest shall be set against the maintainance, and all the accounts of his disbursements for the latter discarded, unless the plaintiffs can make it appear before the commissioner, that they derived part of their maintainance from some other source than from their said guardian, in which case the charge of interest is to be made against him, and he to be allowed his accounts for maintainance. The decree is reversed with costs, and the cause to be remanded to have the accounts reformed, and a final decree made according to the principles of this decree."

Bennet v. The Commonwealth.

October Term, 1795.

Escheat—Inquest—Number of Jurors.*—Upon an inquest of office, respecting property escheated, or forfeited to the Commonwealth, the jury might have been composed of twelve jurors, or of a greater or smaller number, prior to the Act of 1794.

This was an appeal from a judgment of the District Court of Dumfries, quashing an inquisition taken between the Commonwealth and the appellant, which found "that the appellant was a British subject; that he had since the peace of 1783 sold the land in question to citizens of this country, and that the Commonwealth hath no right to the same by way of escheat or otherwise." This inquisition was signed by 17 jurors.

The only question in the cause was, whether the jury might be composed of a greater number than twelve?

Lee for the appellant, cited 3 Blac. Com. 258—Finche's law 323, 4, 5, to shew that in inquest of this sort, no determinate number was required. That it might consist of twelve, or more, or less.

ROANE, J.—The quotations from the 3 Blac. Com. 258 are completely decisive, that no determinate number of jurors is requisite in questions of this kind by the English law, and no act of our Assembly prior to the year 1794, has altered the common law in this particular.

The act of 1794, to amend the act concerning escheators, after premising that a contrariety of opinions had prevailed as to the construction of the act of 1792,
155 goes on to limit the number *of jurors to serve upon an escheator's inquest. I have looked into that act, and find nothing which can warrant an opinion that any specific number of jurors were required, prior to the commencement of the act of 1794.

I am therefore of opinion, that the District Court erred in quashing the inquisition, and that the judgment ought to be reversed.

FLEMING, J., and the PRESIDENT, both concurred in the same opinion, that the number of jurors might be more or less than twelve, until the act of 1794, and therefore that the judgment was erroneous.

*See monographic *note* on "Escheat" appended to Sands v. Lynham, Escheator, 27 Gratt. 291.

Harrison Executor of Payne v. Sampson.

October Term, 1795.

Executors—Covenant against.*—An action of covenant respecting real estate, will lie against executors, though not expressly bound.

This was an action of covenant brought by the appellee against the appellant in the District Court of New-London, upon a deed made by Payne to Sampson conveying to him a tract of land in fee simple, and containing a covenant for quiet enjoyment, and that the premises were clear of all incumbrances.

The breach assigned was, that the land was not free from incumbrances, and that the plaintiff was not permitted to enjoy it free from eviction &c. for that the possession of the said land had been recovered from the plaintiff in an action of ejectment instituted by Agatha Payne. Upon the plea of covenants performed, the jury found a special verdict, stating the deed &c. and that after the death of Josias Payne the grantor, the land was recovered from the plaintiff, by Agatha Payne. Judgment in the District Court for the plaintiff,—From which Harrison appealed.

Marshall for the appellee. The only question existing in the cause is, whether this action will lie against the executors, they not being specially bound in the covenant, and therefore it is supposed, that this being a covenant real, the action will only lie against the heir. I contend that though the heir is not bound unless he be particularly named, yet in all cases the
156 *executors are, whether the covenant respect real estate, or be purely personal. I consider this point to be so plain, that it is unnecessary to cite authorities to prove it.

The Court affirmed the judgment, without assigning reasons.

Harvey et ux. and Others v. Borden.

October Term, 1795.

Feme Covert—Privy Examination—Commission.†—The commission for taking the privy examination of a feme covert must be directed to, and executed by, those who are in fact Justices of the Peace, but they need not be so named in the commission or certificate: they will be presumed to be such until the contrary appears.

Benjamin Borden being seised of a considerable real estate, by his will devises as follows, viz: "My will is, that all my lands

*See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

†**Married Woman—Privy Examination—Compliance with Statute.**—The principal case is cited with approval in Grove v. Zumbro, 14 Gratt. 514; Tod v. Baylor, 4 Leigh 513.

See *foot-notes* to Grove v. Zumbro, 14 Gratt. 501; Hairston v. Randolphs, 12 Leigh 445.

Deed—Acknowledgment—Official Character of Persons Taking.—In Hurst v. Leckie, 97 Va. 562, 34 S. E. Rep. 464, it is said: "It was also held by this court in *Harvey v. Borden*, 2 *Wash.* 156, Ware v. Cary, 2 Call 263, and Langhorne v. Hobson, 4 Leigh 234, that it was not essential that the official character of the persons taking the acknowledgment should appear in the certificate, but that it would be presumed that the acknowledgment was made before officers authorized to take it. These cases, however, arose before the enactment of the statute prescribing the form of the certificate of acknowledgment, which had the effect to change the law in this respect. Acts 1813, ch. 10, sec. 2, p. 35; 1 Rev. Code 1819, p. 363."

The principal case is cited in Harvey v. Preston, 3 Call 499.

and estates in New Jersey be sold, and all my lands on Bullskin, Smith's Creek, and North Shenando, and all my entries every where, and all my lands on the waters of James River, should be sold, excepting 5,000 acres of land that is all good, I give to my five daughters [by name] that is 1000 acres of good land a piece to every one of the said five acres, (meaning daughters) above mentioned, to them and their heirs and assigns for ever." He then directs all the rest of his lands to be sold as aforesaid (excepting the tract he then lived on), and be equally divided between his wife, his three sons and six daughters. He then appoints his three sons his executors, and empowers them to execute deeds for the lands which he had sold, and ordered to be sold. Only two of the executors named in the will, qualified. The testator was possessed of 92,000 acres of land on James River, as well as of other tracts on Catawba, a branch of the same river.

Joseph Borden the plaintiff in this cause, claiming under James Pritchard and wife (the latter being one of the five daughters of the testator) filed his bill in the High Court of Chancery against Harvey and his wife (the latter of whom is the heir at law of Benjamin Borden, the eldest son and executor of the said testator) for an allottment and conveyance of the 1000 acres devised to Mrs. Pritchard by the clause before mentioned. The bill states that Benjamin the younger had purchased the shares of the other four daughters, and had received a conveyance from Worthington the former husband of the fifth daughter,
157 *(now Mrs. Pritchard,) under whom the plaintiff claims, but that she was not privily examined as the law directs, in consequence of which his title to her share was invalid.

The answer states that the part to which the daughter, under whom the plaintiff claims was entitled, was set apart by the said Benjamin Borden the younger, out of a tract of 20,000 acres on James River; that he sold considerable quantities of land to discharge the debts of the testator, and he insists, that if the plaintiff is entitled to the quantity now claimed, it ought to be laid off out of the 20,000 acre tract.

An amended bill was filed for the purpose of making certain persons defendants, who are stated to be in possession of 2,218 acres on Catawba, of the best land which belonged to Benjamin Borden the elder, under a voluntary conveyance from their mother Mrs. Harvey, the female defendant, and heir at law of Benjamin Borden the younger, and praying to have the 1000 acres claimed by the plaintiff laid off out of those lands.

The new defendants insist, that the plaintiff ought to have his 1000 acres laid off out of the large tract on James River, and not out of the Catawba lands, as there was not in the latter tract as much land, as would satisfy the bequest of 5,000 acres, and of course that tract could not have been contemplated by the testator, in the devise to the daughters.

By the report of sundry commissioners, appointed by an order of the Court of Chancery to state the situations, ascertain the quantities, and describe the boundaries of the lands whereof Benjamin Borden the elder died seised, and particularly of such parts as had been allotted by Benjamin the younger, to any of the daughters of his testator, it appears, that Benjamin Borden the testator, at the time of his death, was possessed of sundry tracts on Catawba, amongst which was 2,218 acres, reputed to be his best land, and which the commissioners think more nearly answers the description of that devised to his five daughters, than any other.

It does not appear from any part of the record, that the commissioners who took the privy examination of Mrs. Pritchard, (who with her husband conveyed the land in question to the plaintiff,) were justices of the peace; they are not stated to be such in the commission, nor in the certificate. The deed from Mrs. Worthington, (now Mrs. Pritchard) and her husband to Benjamin Borden the younger, and which for want of her privy examination was void as to her, describes the 1000 acres thereby intended to be conveyed, to be on one of the branches of James River.

158 *The decree of the High Court of Chancery was as follows, viz: "That the defendants or such of them as are in possession of 1000 acres of land herein after directed to be assigned to the plaintiff do resign the said possession, and convey the said 1000 acres of land to the plaintiff at his costs, and pay to him so much of the profits of the said land since the commencement of this suit as shall exceed (if they do exceed) the value of the permanent improvements on the said land made by Benjamin Borden the younger, and by the defendants;" and commissioners were appointed to assign to the plaintiff one thousand acres of the land mentioned in the reports, to which Benjamin Borden the elder was entitled, and which is in possession of the defendants, or some of them, causing the said 1000 acres of land to be laid off by the county surveyor, in one entire parcel and in a convenient form; and to examine, state and settle the said account of profits and to estimate the said permanent improvements.

From this decree the defendants appealed.

Marshall for the appellant. The first question in this cause is, whether the appellee has any right at all? Secondly, whether the land decreed, best answers the intention of the testator?

1st, The act of 1748 Ch. 1, § 6, requires the commission for the privy examination of a feme covert, to be directed to two justices of the peace, which this is not.

It cannot be denied, but that if the persons to whom the commission was directed were not justices of the peace, the deed could not pass the estate of Mrs. Pritchard, and therefore, the Chancellor has presumed, that they were such as the law required. I cannot discover any ground upon which to raise such a presumption. The commissioners are not stiled justices of the peace in the instrument itself, nor does it appear from their own certificate that they were so. If either had been the case, a presumption might possibly have been created, so far at least as to lay the other side under a necessity of disproving it. It should at least appear upon the face of the instrument

that the law has been pursued, or otherwise it can have no legal operation.

2d, The testator had one tract of 92,000 acres of land on the waters of James River in one body. The lands which are subjected by the decree to satisfy that clause in the will are upon Catawba, a branch of James River, and it appears by the report of the commissioners that there are not five thousand acres of land in this tract. From these facts it seems to follow inevitably, that the large tract of land best answers the intention of the testator, because out of that tract 5,000 acres may be got in
159 *one body, and upon the waters of James River, sufficient to satisfy the will. Whereas the land decreed is out of a much smaller tract than 5,000 acres, and is on the waters of Catawba. In some parts of the will, where the testator speaks of other branches of James River, he calls them by name, clearly shewing, that he knew how to distinguish between James River and its branches.

Stark for the appellee. In no instance do commissions for privy examinations name the persons to whom they are addressed as justice of the peace, and if they did, it would not prove that they were so. Neither would the fact be established if the commissioners were to stile themselves so in their certificate. The Chancellor was right in presuming that they were magistrates, because the law required them to be so, and if they were not, it was easy for the appellant to repel the presumption by positive proof.

2d, It appears that Benjamin Borden the younger, disposed of all the good land out of the large tract, and having a general power to sell, under the will, he deprived the appellee of the power of resorting to that tract, even if it had best answered the description. The land on Catawba is in the possession of persons claiming under his heir as volunteers, and therefore they are in no better situation, than he would have been himself. The testator it is proved had not in any of his tracts 5,000 acres of good land in a body, and because that quantity cannot be found in one tract, is the appellee to have no land at all? We are then to come as near it as possible, and however hard it may be upon the appellants, that their land should be taken, yet it is to be attributed to the conduct of their ancestor who has caused it by disposing of all the other good lands.

Campbell on the same side. The objection to the appellee's title seems to be built upon a misapprehension of the act of 1748, which is merely directory to the clerk, and does not require that the persons named in the commission should be therein stiled, "justices of the peace." The words of the law are "that it shall be lawful for the clerk to issue a commission to two or more commissioners being justices of the peace," &c. Whether justices or not, is a fact capable of proof, and the court will presume they were so, until the contrary appears.

Benjamin Borden was bound as executor and trustee, to reserve 5,000 acres of land, all goods, for the five daughters. He did reserve lands on the Catawba, tho' not all in a body, nor does the will require it. Nay it appears that that quantity of
160 *good land in a body could not have been found in the estate of the testator. But it is said, that the appellee ought to receive his quantity out of the 92,000 acres of land. Benjamin the younger, has disposed of this land, and therefore it is holden either by purchasers for valuable consideration, or by volunteers, as the Catawba lands are holden. If the former, we cannot touch them. If the latter, may they not object to our claim with as much reason as the present appellants do?

The report of the commissioners appointed by the Chancellor to view the lands, leave no doubt, but that those on Catawba will best satisfy the intent of the testator, and to that report there is no exception.

Marshall in reply. There is no proof that the 92,000 acres are sold. But if there were it does not alter the question, which is, do those lands answer the description given by the testator, better than the Catawba lands? I contend for the reasons first mentioned that they do, and if so, and by the conduct of Benjamin Borden the younger, such land cannot be obtained by the appellee as he is entitled to by the will, then his claim for compensation will be against the estate of Benjamin Borden, and not against a part of his representatives, who by this decree are to bear the whole loss.

The opinion of the commissioner will not carry the claim from the 92,000 acres, if that was the tract contemplated by the testator. A part of this tract must at any rate have been taken to satisfy the devise, since there were not 5,000 acres on Catawba.

ROANE, J.—This is a plain case, and though contained in a voluminous record, the essential parts of it, lie within a small compass. An objection is made to the title of the appellee, because the commission which was to enable Mrs. Pritchard to pass away her estate, was not directed to Justices of the peace. The act of 1748 requires the commission to be addressed to persons being Justices of the peace, but does not prescribe the form of it. It is certainly necessary that the commissioners should in reality answer this description, because the law requires it, but it does not require that they should be so stiled in the commission. The question then is, ought we to presume the fact that they were justices? I think we ought. The law requires the clerk to direct it to such persons, and he ought not to be presumed to have done wrong. The contrary might have been shewn, and if the party meant to avail himself of this objection he ought to have proved the fact. I can never agree that the party should be surprised at the trial with an objection of this sort, particularly, where the presumption is in his favor.

161 *As to the location of the land claimed under the will, one thing is evident, which is, that the testator intended to give to each of his five daughters, 1000 acres of good land; and it is not required to lie in one body. But if it had been, the report proves that his intention as to quality could not in this respect have been fulfilled. It is to lie on the waters of James River, and so I think the Catawba lands do. But if it could be avoided, the land

ought not to be laid off in small surveys, and as it is in proof that the 5,000 acres of good land could not have been got in the large tract, in less than 20 surveys, the testator could not have meant that tract. Benjamin the younger, seems himself to have considered the Catawba lands as intended by the testator. Had he then a right to purchase up all the good land, and to impose the bad on the devisees? It is shewn by the report, that there remains no good land unsold, and it would be highly unjust, that the executor should by his conduct deprive any of the devisees of that which the testator intended for them, and the appellants claiming merely as volunteers, stand in the situation of Benjamin Borden whom they represent. I think the decree ought to be affirmed.

FLEMING, J.—The first objection made by the appellant's counsel to the decree was, that the commission was not so directed, or returned, as to pass the estate of Mrs. Pritchard. It is duly executed by the persons to whom it was directed, and the clerk is required to address it to justices of the peace. The deed with the commission is returned, and admitted to record. I do not think that we carry the doctrine of presumption beyond its accustomed limits when we say, that to support this deed, we will intend that the law has been obeyed unless the contrary appear.

The second point respects the location of the land. The Chancellor discovering much difficulty in ascertaining what lands would best fulfill the intention of the testator, very properly appointed commissioners to view all the lands of the testator on the waters of James River, and to report thereupon. These commissioners had certainly the fairest opportunity of judging, and after stating that Benjamin Borden the executor, had sold almost all the good land out of the large tract, they report their opinion to be, that the lands on Catawba more nearly answers the description given by the testator than any other. I am therefore of opinion that the decree is right.

The PRESIDENT.—I concur fully in sentiments with the other judges, and for the reasons given by them, I am of
162 *opinion, that the decree is right upon both points, and ought to be affirmed.

Lee v. Turberville.

October Term, 1795.

Supersedeas—Errors Apparent on Record.*—If a supersedeas be granted to an order of an Inferior Court, giving leave to build a mill, the Superior Court is not confined to errors apparent on the face of the record.

Leave was granted the appellant by the County Court of Westmoreland to build a mill. The appellee conceiving himself interested, prayed an appeal which was refused, because it appeared to the court that he was no party. He then applied to, and obtained from a judge of the General Court a supersedeas which removed the record before the District Court of Northumberland, where the order of the County Court was reversed, from which an appeal was prayed to this court.

Lee for the appellant. Before the court goes into the testimony which is about to be offered in support of the judgment of the District Court, I must object to the mode in which the cause was carried from the County Court. I believe it will not be contended on the other side, that there is error in the proceedings of the County Court apparent upon the face of the record, and therefore the appellee must expect to sustain the judgment of the District Court, upon evidence dehors the record. If the appellee had appealed from the judgment of the County Court, I admit that he might have been let in, to controvert the propriety of the order, in the District Court, upon the merits of the case, and for this purpose he might have gone into testimony, because in such a case, the court might have taken cognizance of the fact, as well as of the law. The County Court having refused the appeal, the party ought to have applied for a mandamus, or for a writ of error. But a supersedeas could carry only the law of the case before the District Court, and consequently if there be not error upon the face of the record, this court must reverse the judgment.

Marshall on the same side. The District Court may grant a supersedeas, or writ of error, and may receive appeals when allowed by an Inferior Court. A writ of error will give jurisdiction to the court to examine into fact in the same manner
163 as *an appeal would, and so it was determined in the old General Court. The reason given by the court was, that as a writ of error would lie in fact as well as in law, and the power given by the act of Assembly to grant writs of error being general, the judgment of an Inferior Court in matters of fact, might properly be examined before a Superior Court upon a writ of error. But a supersedeas only brings up a transcript of the record, and the court is confined to such errors in law as are apparent upon the face of it.

Washington for the appellee. The reason upon which the decision in the General Court is said to have been founded, does not appear to be a sound one, in support of the distinction taken between a supersedeas, and a writ of error. In England, a writ of error which issues from a Superior to an Inferior Court, can authorise only an examination of errors in law. If the errors be in fact, they are examinable in the same, not before another court. A supersedeas in England is an auxiliary process, and in certain cases it is the companion of a writ of error, and does not remove the record at all. It is considered by the laws of this state, as well as by the practice of the courts, as being similar in every respect to a writ of error; Either of them have the effect of removing the record before a Superior Court. A writ of error from a Superior to an Inferior Court to correct errors in fact, (except in some particular cases,) is as great a novelty in this country, as in England, and therefore it cannot be preferable to a supersedeas in cases like the present, where the facts are to be re-examined before the Superior Court. They are pre-

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*Supersedeas—Substitute for Writ of Error.—The principal case is cited in Wingfield v. Crenshaw, 3 Hen. & M. 252, 254; Hite v. Wilson, 2 Hen. & M. 285.

cisely alike, when the process issues from a Superior to an Inferior Court. In no case (except such as respects mills, wills, roads, and the like), can errors be examined into and corrected, which do not appear upon the face of the record. In those cases, the Superior Court takes up the cause ab initio, and enquires into the errors both in law and in fact. It is therefore of no consequence, whether the record is removed by appeal, writ of error, or supersedeas.

The Court having suspended an opinion upon this point until the testimony was gone through, reversed the judgment of the District Court, and affirmed that of the County Court upon the evidence.

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164 *Jordan v. Neilson.*

October Term, 1795.

Promissory Note—Evidence—Plea of Nil Debet.—If a promissory note be signed and sent to the payee with a blank for him to insert the amount, it is good evidence on the plea of nil debet.

This was an action of debt brought in the District Court of Charlottesville by Neilson, upon a note of hand for the payment of 7125lbs. of crop tobacco. On the plea of nil debet, the jury found a verdict for the plaintiff, upon which judgment was entered.

At the trial, the defendant below tendered a bill of exceptions which was sealed, stating, that the plaintiff produced in evidence a certain writing in these words, to wit: "I acknowledge myself indebted to James Neilson 7125lbs. of crop tobacco, of the Richmond or Manchester inspections, to be paid to said Neilson on demand, to which payment I bind myself, my heirs &c." signed "B. Jordan" with an indorsement as follows, viz: "Sir, I am at a loss for the prices of the articles I have taken of you, which prevents my filling up the note, which you will be pleased to do after seeing the memorandum," also signed "B. Jordan." That the plaintiff proved the note and endorsement to be of the hand writing of the defendant, except the following words to wit: "7125 pounds." The defendant objected to this testimony going to the jury, there being no other evidence in the cause, but he was over-ruled by the court. To the judgment of the District Court, a supersedeas was awarded.

Marshall for the plaintiff in error, insisted, that the note, upon which the action was founded having been blank when executed, ought not to have been read in evidence on the plea of nil debet, which is tantamount to the plea of non est factum in actions on deeds.

Wickham for the defendant. If a man sign a blank bill, or note, he puts it in the power of the person to whom it is made, to fill it up to any amount, Russel v. Langstaffe, 2 Dougl. 514. In that case, the bill was not thrown into circulation, and is therefore in principle precisely like the present. The maker of a note may fill it up himself, or delegate the power of doing so to another. By delivering, or remitting it in blank, he shews his intention to confide so far in the person to whom it is given, as to authorise him to fill it
165 up. How this doctrine *would apply in the case of a bond I cannot say. Perhaps from the solemnity attending the making of a deed it might be different, since it has no validity without a delivery.

The court being divided in opinion the judgment was affirmed.

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*The principal case is cited with approval in Bank v. Jackson, 9 Leigh 238.

Skipwith v. Baird.*

October Term, 1795.

Sterling Debt—Suit for.—A sterling debt may be sued for without laying the value in current money; if it be laid it is merely surplusage, and will not vitiate; but in such case, the damages should be laid in sterling money;—the verdict and judgment should be for sterling money, and the Court is to fix the rate of exchange.

This was an action of debt brought by the defendant in error against the plaintiff, in the Brunswick District Court, upon a protested bill of exchange. The declaration was for £120 sterling, of the value of £160 current money of Virginia, and 5s. 9 sterling money of the value of 7s. 8 current money the charges of protest, and interest at the rate of 10 per centum per annum upon the said principal sum of £120 sterling from the date of the bill. The damages are laid at £500 sterling, of the value of £666: 3: 4, current money. Upon the plea of nil debet, the jury found a verdict for the plaintiff, and judgment was entered for £341: 16, sterling, being the principal interest and charges of protest in the declaration mentioned, with interest thereon after the rate of 5 per centum per annum from that day, and the costs; but the said sterling money may be discharged in current money at the rate of 37½ per cent difference of exchange. To this judgment a writ of supersedeas was awarded by one of the judges of this court.

Campbell for the plaintiff in error. This case is precisely like that of Scott's executors v. Call, (ante vol. 1, p. 115) in which the court decided, that it was error for the declaration to demand the current money value of a sterling debt, which was recoverable only in sterling money.

Another objection to this judgment is, that the declaration is for £120 sterling, of the value of £160 Virginia currency, and interest after the rate of 10 per centum per annum, with charges of protest; and the judgment, instead of being entered for the principal, damages, and charges as demanded by the declaration, leaving
166 the calculations of the interest *to be made by the clerk when he issued the execution, is for the whole added together in one aggregate sum, the court undertaking the calculation. The inconvenience resulting from this mode of entering up the judgment is, that if a mistake be made by the court, it could only be corrected by a writ of error &c. whereas, if the clerk were to make it, the court might upon motion order it to be amended.

Stark for the defendant. I do not recollect the case of Scott's executor and Call, and therefore do not know how far it governs this. The last objection is in opposition to the common practice of entering

*The principal case is cited in Butts v. Shreve, 4 Fed. Cas. 929.

judgments upon protested bills of exchange.

LYONS, J., delivered the opinion of the court.

This was an action of debt upon a protested bill of exchange. The declaration which is in the usual form, demands the principle, interest, and charges of protest in sterling money, but lays the value of each in current money. Upon the plea of nil debet, the jury found that the defendant did owe the debt in the declaration mentioned generally, without saying that it was in sterling, or in current money. The court gave judgment for the aggregate amount of principle, interest, and charges of protest in sterling money, according to the act of Assembly, and at another day, they entered as usual a general rule settling the rate of exchange at which the sterling judgments of that term were to be discharged.

The first objection made to the judgment is, that the declaration having laid the value of the sterling money as if it had been foreign money, and the verdict being general, it should be considered as given for current money and not for sterling.

The answer to this is, that the debt as well as the damages are demanded in sterling money, and therefore the verdict and judgment must be for sterling money.

But it was contended, that sterling debts could only be sued for and recovered in sterling, and that the laying of the value in current money is erroneous, and for this, the case of Scott's executors v. Call is relied upon.

The value in current money has only been laid through abundant caution, under an idea perhaps, that since our separation from Great Britain, sterling money might be considered like other foreign money and to be sued for as such. But since the laws made before the revolution respecting sterling money debts are still in force, they may still be sued for and recovered, without laying the value in current money, 167 the courts having the *same power to settle the rate of exchange which they formerly had. But although there is no necessity for laying the value of the sterling money, yet if it be laid, it is merely surplusage, and will not vitiate the declaration.

The case of Scott's executors and Call was not like the present. It is true that in both, the demand was of a sterling debt, with an averment of the value in current money, but in that case, the damages were considered as being laid in current money because they were laid generally, whereas the demand being an entire one, and the debt being a sterling debt, the damages ought to have been in sterling money likewise, in order that the judgment for the debt and damages might be entered for the same sort of money. The court did not say, that an averment of the value of the sterling money was error, but the demand being in sterling money, it was considered to be improper to depart from that by laying the damages in current money only; and two of the judges who sat in that cause have been pleased to give this explanation of the reasons which influenced their decision in that cause.

Judgment affirmed.

Schwartz v. Thomas.

October Term, 1795.

[1 Am. Dec. 479.]

Slander—Proof of Circulation.*—A letter stating that the writer had heard of a slanderous report, is good evidence to prove the circulation of the report, and may be read for that purpose, the handwriting of the person being proved. But it would be inadmissible to prove that the defendant had propagated the report.

This was an action of slander brought in the District Court of Petersburg by the defendant in error. The parties executed mutual bonds with a condition to abide by the award of eight arbitrators, indifferently chosen by the parties, to determine all disputes between them for slanderous words spoken by the said Schwartz of the said Thomas, and to ascertain the damages which the latter had sustained or might sustain for certain slanderous words spoken of him by the former, for which a suit was then depending in the Petersburg court. And it was further agreed, that each arbitrator should, without consulting the others, state on a piece of paper the sum which he supposed should be allowed, and the aggregate amount being divided by the number of arbitrators, that the quotient should be the sum for which they were to render 168 their award; this to be done in *writing on or before the 8th day of August following, at Notoway courthouse; the said Schwartz to pay the costs of the said suit; if any damages should be awarded against him. That the indictment filed by the said Schwartz against the said Thomas should be no farther prosecuted, but the said arbitrators to determine in the same manner, as if the court and jury of the said District Court had determined the damages for the benefit of the commonwealth, the said arbitrators being requested to state in their award, the damages, if they should think any ought to be for the benefit of said Schwartz with costs, if any damages against the said Thomas on account of the indictment. Upon the bond there is a memorandum endorsed, that if any of the arbitrators should not meet, an award might be made by any number exceeding four. By a rule of court afterwards made, the parties agreed to submit all matters in difference in this suit to the determination of the above mentioned arbitrators, and that their award, or the award of any five of them should be made the judgment of the court, provided they should proceed to make the same, on or before the 8th day of August thence following, in the manner pointed out in the arbitration bonds reciprocally given by the parties. And it was further agreed, that the said arbitrators might proceed to make there award ex parte, if either party after 10 days notice of the time and place appointed for that purpose should fail to attend.

The arbitrators returned their award, in which, after reciting the order of court, and that in pursuance thereof they did meet, and in the presence of the parties examined the witnesses and other testimony there produced, and that they had proceeded in conformity with the said order, and in the

*See monographic *note* on "Libel and Slander" appended to Bourland v. Eidson, 8 Gratt. 27.

manner pointed out by the said arbitration bonds, they awarded the defendant to pay £55 damages to the plaintiff, with his legal costs expended in prosecuting this suit. Judgment was entered according to the award.

The defendant having objected to the award before judgment was entered up, and being over-ruled by the court tendered a bill of exceptions which was sealed, stating "that the arbitrators admitted as evidence, a letter said to be written by one Joseph White in North Carolina, and directed to F. White, who swore before them, that he believed the said letter to be the hand writing of the said Joseph White, (but there was no evidence that the said Joseph White had ever sworn to the truth of the contents of the letter, nor was he present,) which letter induced some of the arbitrators to award greater damages than they
169 *otherwise would have done, and the defendant produced an affidavit of one of the arbitrators to this effect: That it appeared by the affidavits of two of the arbitrators, that the said F. White was sworn as a witness, and deposed, that he believed the plaintiff had been injured by the slanderous report circulated by the defendant, and as a ground for such belief produced the letter in question, in which the said report was mentioned.

The cause came up to this court upon a writ of supersedeas.

Stark for the plaintiff in error. Although arbitrators are judges of the parties own chusing, they are nevertheless bound by the rule of law, and if it appear from the record, that they have decided contrary to those rules, the award may be set aside, more especially where the reference was made by rule of court. The letter of White was improperly admitted as evidence, and would have been so decided if it had been offered as testimony in court, since the truth of the contents of the letter, ought to have been proved by legal evidence, as all other facts must be.

Another question may perhaps arise in the cause. The rule of court refers all matters in dispute in this suit, and the bonds are of all matters in difference. The power of the arbitrators therefore is extended beyond the rule of court, which confines them to disputes in that particular suit. I should entertain no doubt myself respecting this objection, if the arbitrators had appeared to have acted under the general power given by the bond. It has been decided in England, and was so decided in this court, in the case of Shermer and Beale, (ante vol. 1, p. 11) that the parties could not by consent extend the time for making the award, or change the rule of court in any manner.

Wickham for the defendant. The decision in the case of Shermer and Beale, was the very reverse of what Mr. Stark supposes. In that case, the time for returning the award was extended from the 1st to the 20th of June.

I admit that if arbitrators make a plain mistake in fact, or in law, the award may be set aside. But this court determined in the case of Pleasants, Shore &c. v. Ross, (ante vol. 1, p. 156,) that those mistakes must appear upon the face of the award, and that affidavits could only be relied upon to prove misconduct in the arbitrators. And even if the mistake appear upon the face of the award, it must be a clear and gross one to induce the court to set it aside, 3 Atk. 462. But I contend, that the arbitrators did right in hearing the testimony excepted to. This letter was not introduced to prove the fact that the slanderous words had been spoken, but that the report had
170 been spread. *The witness thought the defendant had been injured by the speaking of those words, because the letter proved that the slander had circulated. If hearsay evidence can be admitted in any case, it surely ought in a case of this sort. A witness may certainly prove that he has heard the report circulating in a neighbourhood, tho' the persons from whom he heard it were not upon oath at the time they mentioned it.

Stark in reply. I admit the witness might have proved as a fact within his own knowledge, that the report was spread, but it was improper for him to prove what a third person had written respecting the existence of the report. Suppose the writer had made an ex parte affidavit of his having heard the report; could this have been read in evidence? And if it could not, surely his letter unattended with this solemnity ought not to have been read. If he had been present and cross examined before the arbitrators, he might with propriety have given evidence respecting the circulation of the report.

ROANE, J.—This was an action of slander, and issue was joined upon the plea of not guilty. After an ineffectual effort to obtain the verdict of a jury who could not agree, the cause was by mutual consent referred to eight arbitrators, seven of whom returned an award in favor of the defendant in error. The plaintiff tendered a bill of exceptions to the opinion of the court, over-ruling a motion to set aside the award, which states, that the arbitrators admitted as evidence, a letter, written by Joseph White in North Carolina to F. White, a witness sworn before them; and that the defendant also produced in court the affidavit of F. Fitzgerald one of the arbitrators, stating, that the said letter so admitted, induced some of the referees to give greater damages than they would otherwise have done; but that the motion was over-ruled, because it appeared from the affidavits of two of the referees made in open court, that the said F. White was sworn as a witness before them, and being asked, whether he believed the plaintiff Thomas had been injured by the slanderous report, circulated by the defendant, answered; yes, he believed he had been injured: and being further asked, what ground he had for such belief, he produced the letter above stated, in which the said report was spoken of, and declared he believed it to have been written by the said Joseph White. Such is the purport of the bill of exceptions, and the objection is, that the arbitrators ought not to have admitted this letter to have been read.

171 *After proving the speaking of the slanderous words in an action of this sort, the next enquiry is, whether the

plaintiff has been injured, and what is the extent of that injury. This depends in a great degree upon the circulation of the report, by which the character of the party aspersed may suffer in the estimation of those who have heard the slander. The only purpose for which the letter mentioned in the bill of exceptions was produced, was to prove that the report had circulated, and was known to the writer; the letter was not intended to prove that the defendant propagated the report, nor was it competent to establish that fact. If the letter had not only stated that the report was known to the writer, but had also averred that the plaintiff had propagated the report; such averment would have been inadmissible to prove this latter fact, and if the plaintiff had stated such to have been its purport in the bill of exceptions, it would have made his case very different from what it now is. But I must take it for granted upon this record, that the letter only spoke of the report as being known in North Carolina, and that it was merely produced to prove that it had circulated. The question then is, whether it was proper evidence for such last mentioned purpose. That the report has circulated so as to come to the knowledge of the writer, is as clearly established by the letter itself, as if he had deposed to the same effect before the arbitrators, and no cross examination could possibly do away a conviction that he who spoke of the report, had heard it. But this letter was also proved to have been written by Joseph White; it was therefore competent evidence for the purpose for which it was produced, and the arbitrators did right in permitting it to be read.

I think the judgment ought to be affirmed.

FLEMING, J.—It is true, that arbitrators ought to be governed by the same rules of evidence which prevail in courts of justice. The question then is, ought this letter to have been read in evidence if the cause had been tried in court. I am of opinion it ought. I consider this case as furnishing one of the exceptions from the general rule. The hand writing of Mr. White was clearly proved, and the letter was as compleat evidence of the fact for which it was produced, namely, that the report had been heard by the writer, as if he had been examined before the arbitrators, and had declared it upon oath. This case is very different from what it would have been, had the letter been produced to prove the speaking of the words, or the propagation of the report by the defendant. In
172 the one case the party might have *derived benefit from the cross examination of the writer, in the present case it would have been impossible.

The PRESIDENT concurred in opinion. Judgment affirmed.

APRIL TERM, 1796.

Overton et ux. Administrator & Administratrix of Josiah Hunley v. Charles Hudson Executor of Christopher Hudson.*

April Term, 1796.

Assumpsit—Demand against Sheriff—Declaration.— Indebitatus assumpsit will lie against a Sheriff for money received by himself, or his Deputy, under an execution; but the declaration ought to be so far special, as to distinguish the demand from one against him in his private capacity.

This was an action on the case, upon a general indebitatus assumpsit, for money had and received by the testator of the appellee, to the use of the appellant's intestate. The general issue was pleaded, and at the trial, the defendant tendered a bill of exceptions which was sealed, stating, that the plaintiffs to maintain their action, offered in evidence, a copy of a judgment obtained by the said Josiah Hunley against Thomas Mumford and the execution issued thereon, with a return endorsed, signed by M. Roach, D. S. "that the same was satisfied;" also a certificate, that the defendant's testator had duly qualified as sheriff, and that the said M. Roach
173 had also been admitted as *his deputy. That the defendant moved to nonsuit the plaintiffs, which the court refused to direct. That he then moved, that the judgment, execution and certificate above stated, might not be permitted to go in evidence to the jury, but in this also he was over-ruled. The jury found a verdict for the plaintiff, upon which judgment was accordingly rendered. This judgment being afterwards reversed by the District Court of Petersburg, a supersedeas was applied for, and awarded by one of the judges of this court.

Wickham for the plaintiff. By the bill of exceptions it appears; that this action was brought to recover money levied under an execution, by Roach, the deputy sheriff of Christopher Hudson, and the question is, if a general indebitatus assumpsit will in such a case lie against the high sheriff?

It is clear, that an action of debt might have been supported, and the general rule is, that wherever debt will lie, indebitatus assumpsit will, unless a specialty be the ground of the action.

This is a simple contract debt, though the proof of it depended partly on a judgment. The case is not altered on account of the bond given by the sheriff for the due execution of his office, for although an action of debt might have been brought upon that bond, yet, another action will lie to recover the money levied under this execution, as for so much received to the plaintiff's use. Neither is it important that the money was received by the deputy sheriff, for in the eye of the law, it was received by the high sheriff.

Campbell for the defendant. If there be any authorities to prove, that debt would lie against the sheriff in a case of this sort, I should wish them to be produced: I know of none such.

I admit, that great liberality is extended to the action on the case for money had and received; but it is laid under certain restraints even by the great patron of this action, so as to prevent a defendant from being surprised at the trial, by the want of notice of the real nature of the demand. This can seldom happen where the defend-

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*The principal case is cited with approval in Chichester v. Vass, 1 Call 99. See Isom v. Johns, 2 Munf. 272, and monographic *note* on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 183.

ant is charged with the consequences of his own acts, for then, he is supposed to be conusant of all the circumstances attending them, and he ought to be prepared to explain and to justify them. But it is otherwise where the charge respects the acts of a third person; for altho' as between him and the defendant, there may exist a privity created by a legal fiction, yet the latter may be as much a stranger to the transactions of such third person, as if no such connection had subsisted; and the law will not permit a fiction to work an 174 injury to *any person. The deputy is liable in an action of this sort, either in his individual, or in his official capacity; the high sheriff is only answerable in the latter character, and in that character therefore he ought to have been sued.

Wickham. I admit that an officer is not chargeable for a misfeasance in himself, or in his deputy, in an action of debt or of assumpsit. But this action is for a nonfeasance in failing to pay a sum of money levied for the appellant's use. As to the inconvenience which it is supposed the defendant may be subjected to, from a want of notice of the real ground of complaint, if it be an objection in this case, it is one which applies to this form of action in almost every other case. The court will not permit the defendant to be surprised at the trial; it is in their power to prevent it by setting aside the verdict. But it does not appear in this case, that the appellee was surprised; on the contrary, it is clear that he knew for what he was sued, because it is stated in the bill of exceptions, that he produced the sheriff's bond in evidence. The case of Moses and M'Farlane 2 Burr. 1005 was much stronger than this.

The deputy is in fact the servant of the sheriff, and his receipt is the receipt of the sheriff; every thing is done in the name of the latter. As well might a merchant oppose an action of this sort by saying, that the money was received not by him, but by his clerk. Even if the deputy be liable, it does not prove that the high sheriff is not; but I doubt if the action would lie against the deputy. The case of White and Johnson (ante vol. 1, p. 159) seems to be a strong authority to prove that it would not.

In the case of Speake v. Richards Hob. 206, it was determined, that debt would lie against the sheriff for money levied by him under an execution, upon the ground of an implied contract; and this is the foundation of the action of indebitatus assumpsit. In the case of Cockram v. Welby, 1 Mod. 245, it is said, that indebitatus assumpsit will lie against the sheriff for money levied upon a fieri facias.

It may occasion much surprise, that so few cases are to be found upon this subject; but the practice in England is to order the sheriff to bring the money into court, and if he fail to do so, an attachment issues against him. So in this country, it is most usual to proceed against him by motion.

Campbell. Although strictly speaking, the sheriff is liable for the acts of his deputy, yet no answer is thereby furnished 175 *to the objection, that the declaration should be so formed as to apprise him of the real ground of the action. If debt had been brought, the whole case must have been stated: if indebitatus assumpsit be preferred, the declaration should be special.

It will not be denied, but that a record (which the sheriff's return certainly is) is the foundation of this action, and where this is the case, the record should be certainly, and truly alledged, 1 Esp. 238. "No such record" is a good plea to an action of debt on a judgment. So to debt for an escape, Ib. 270. Where money is levied on a fi. fa. but the writ is not returned, nil debet is a good plea; otherwise if it be returned, Ib. But if the sheriff may be sued in this form of action, he would thereby lose the opportunity of denying that there was any such record.

Wickham. Trespass vi et armis will lie against the sheriff, for a tort committed by the deputy, and yet the declaration states it as the act of the sheriff. The surprise is as great in that, as in this case, and yet no objection to the action on that account was ever thought of.

It is contended, that if indebitatus assumpsit will lie, the declaration ought to be special; but no case is cited in support of this doctrine.

In 1 Bac. Ab. 166, it is laid down, that if the sheriff levy money on a fi. fa. the plaintiff may have indebitatus assumpsit against him, for money had and received. It is clear that the author does not mean a special indebitatus assumpsit, or he would have expressed himself so; for when this sort of action is spoken of without any qualification, a general action is always intended. In an indebitatus assumpsit for work and labor, the kind of work need not be mentioned. Comb. 430.

The case of Ackworth v. Kempe, 1 Dougl. 40 though not exactly in point, runs parallel with this in principle. The principle I contend for is, that the sheriff is not only liable for the acts of the deputy, but that they are in the view of the law, the acts of the sheriff. So too, in the case of Saunderson v. Baker &c. 3 Wils. 309, the deputy committed the trespass, and yet the action was against the sheriff, not for a tort done by the deputy, but by the sheriff himself. In the case of Woodgate v. Knatchbull 2 Term. Rep. 148, the action was brought upon a penal statute against the sheriff, for taking higher fees than the law permitted; the receipt was given by the deputy, and it was objected that the sheriff was not liable, though the deputy might be: but it was otherwise determined, and 176 upon the principle that the *act of the bailiff was the act of the sheriff. In Cowp. Rep. 403, it is laid down, that the deputy is unknown to the plaintiff, and that the action can only be brought against the principal.

LYONS, J.—The great objection is, that the action is founded on a record, which is not stated in the declaration; can any case be produced where a judgment upon such a declaration has been sustained?

Campbell. Wherever indebitatus assumpsit is brought, even upon a foreign judg-

ment, the judgment is set forth in the declaration. Crawford v. Whittall, Doug. 4, n.

Wickham. I contend that a general indebitatus assumpsit is always in the same form. The case cited by Mr. Campbell, is not of an action for money had and received: the judgment is no evidence of money received to the use of the plaintiff.

I admit that if a record be the ground of the action, it must be declared upon; but it is otherwise if it be but inducement. In this case, the receipt of the money forms the gist of the action, and that is a thing in pais.

Campbell. If the cause of the action grows out of a record, it must be stated; if it be necessary to state it, it cannot be avoided by changing the form of action 1 Esp. 238. Action of debt lies against the sheriff, if he return that he has levied the money, for it is matter of record, Palm. 148. If the money be levied upon a fi. fa. and the writ be returned, the sheriff cannot plead nil debit, for the return is matter of record, and not of fact. 1 Esp. 270; the return itself, is sufficient to charge the sheriff, without other evidence. These cases shew, that the return, which is a matter of record, forms the gist of the action, and that the receipt is but inducement.

Indebitatus assumpsit is not always general; the declaration not only does, but in many cases ought to contain a specification of the charge. The case of Crawford and Whittall proves this, and if it were necessary to be special in an action founded on a foreign judgment, the argument is a fortiori, in the case of a judgment rendered in our own courts.

Wickham. The plaintiff might have recovered in this action, merely upon proving the receipt of the money by virtue of the execution, though the writ had not been returned; and if so, it follows necessarily that the receipt is the ground of the action.

The case from Espin. 270 only shews, that if the plaintiff in his declaration sets forth the return of the execution, the sheriff is estopped to deny the receipt acknowledged on record; but it does not prove that the return must be set forth.

177 *I admit that declarations of indebitatus assumpsit generally, are as various in their forms as declarations in debt; but indebitatus assumpsit for money had and received, admits but of one form. The case of Crawford and Whittall was not an indebitatus assumpsit for money had and received; such an action would have been improper, as the judgment was not evidence of money received by the defendant.

ROANE, J.—The declaration in this action, containing a general count for money had and received, seems at first view to be a novelty, when used in a case like the present. On an examination and search into precedents, none have been found, which can warrant so general a declaration as this, in an action against a sheriff for money levied by his deputy upon an execution.

There is no doubt, but that the receipt of the deputy is sufficient to charge the sheriff, and that it is to be considered in law, as if the money had been actually received by the sheriff; but the question with me is, whether a general count for money had and received is a proper form of action in which to try the point, or whether the declaration should not have set out the particular grounds of the assumpsit? Such a specification would not vary the action; it would still remain an action of indebitatus assumpsit founded upon a general implied promise, though the particular grounds on which such promise arose, would be set out, and a recovery in that case might be pleaded in bar of an action of debt for the same cause. Such a specification, would not convert the action into an assumpsit upon a special undertaking. Thus, in the case of Crawford and Whittall, the action was indebitatus assumpsit upon an implied promise, and yet a foreign judgment was set out as the ground of the promise; many instances similar to this might be mentioned, if it were necessary. The utmost that the books say upon this subject is, that indebitatus assumpsit will lie against a sheriff, for money levied on a fi. fa.

Until Slade's case, a notion prevailed, that on a simple contract for a sum certain, an action of assumpsit would not lie, and the decision in the above case, goes to a denial of that opinion; but this does not bind us to sustain a general count for money had and received, in a case like the present, of which I find no precedent.

Great encomiums have been passed upon the action for money had and received, by able judges; but I am satisfied, that the generality of the count in that action may often tend to surprise a defendant; I shall therefore not incline to extend it, beyond the limits within which it is now confined.

178 *If the sheriff in this case, had been sued for the same cause in an action of debt, the return and proceedings must have been set out: if an action had been brought upon his bond of office, the particular charges would have been specified in the assignment of breaches: if a motion had been made against him for the money, the notice must have particularized the charge. Why then shall we not restrain the plaintiff to a mode of declaring, which is always in his power, which is equally as favorable to him, and more so to the defendant than the present, and is analogous (as it respects notice of the ground of complaint) to the above mentioned modes of proceeding?

However conusant a man in his private character is supposed to be of his own transactions, and of those of his agents, it appears to me reasonable, that a public officer should have notice, when he is charged in his official character, of the nature of that charge. In this country, the deputy sheriffs are competent to most of the duties of the office, without the co-operation, or sanction of their principles. It is therefore highly reasonable, that the sheriff should be previously notified of the particular acts of his deputy, for which he is to be made responsible.

Being of opinion, that this court has the

power, (which has been heretofore beneficially exercised by courts of law) to mould and fashion declarations and pleadings, so as to answer more effectually the ends for which they were invented, and there being no series of decisions (if a single one) sustaining a general count in cases like the present, I must say, that I think this declaration insufficient upon the evidence exhibited in the cause, and appearing in the record; that the judgment of the District Court, reversing that of the County Court on account of the generality of the declaration, is right, and as far as it goes should be affirmed. But a new trial ought to have been awarded, with liberty to the plaintiff to give such testimony as might correspond with, and support the declaration. The judgment of the District Court ought therefore to be reversed and remanded, with a direction to award a new trial, with such directions as above-mentioned, and not to allow the evidence which was excepted to, to go to the jury.

FLEMING, J.—There is no doubt, but that indebitatus assumpsit will lie against the high sheriff in a case like the present, and if the particular grounds of the charge had been specified in this declaration, it would in my opinion have been unobjectionable.

179 *The action on the case for money had and received is a beneficial remedy, and may be rendered more so by restraining it within proper limits. But it would defeat the great object of pleading, if we were to countenance this action in the latitude contended for. The case should be truly and fairly stated, that the defendant may not be surprised at the trial by a want of notice of the real cause of action, and also, that he may be enabled to plead the judgment in that action, in bar of any other suit, which might be brought against him for the same cause.

The defendant is the executor of the sheriff, and is called upon to answer for the acts of the deputy; how is it possible that he could from this declaration acquire information respecting a transaction, to which we must suppose him so entirely a stranger? If the case had been properly stated, he might have defended himself by shewing there was no such record. If the sheriff be obliged to answer for the misconduct of his deputy, he ought to be enabled to recover over against the deputy, and to shew upon the record, on what account the judgment against him had been rendered; this could not have been done in the present case.

That indebitatus assumpsit will lie against the sheriff, for money received by his deputy upon an execution, is not denied; but the declaration may properly contain a specification of the charge, and in my opinion ought to do so. The case of Woodford v. Deacon, Cro. Ja. 206, is not so strong as this, and yet judgment was reversed on account of the generality of the declaration. Upon the whole, I concur with the judge who has preceded me, in the judgment which this court ought to render.

LYONS, J. That this is a beneficial action to both parties, seems to be agreed by every one. It is also agreed, that an action of indebitatus assumpsit will lie against a sheriff, to recover money received upon an execution by his deputy. But unless the form of the action in such a case be laid under certain restrictions, it would very illy merit the encomiums which have been passed upon it.

The great object of pleading, is to apprize the contending parties of the real subject of dispute; without it, they may be entrapped at the trial, and real injustice may be produced.

I can find no precedent in England, or in this country, to warrant so general a declaration as the present. It is true, that the reported cases do not furnish us with the forms of the pleadings, but it is to be inferred from them, that the declara-
180 tions *in cases of this sort were special. In the case of Woodford v. Deacon, Cro. Ja. 206, it appears, that the practice had been to declare generally; but the court in that case corrected it, assigning as a reason, that the declaration did not shew for what cause the action grew due.

Being unshackled by precedents, I consider the court as at perfect liberty to modify this action, so as to promote the great object of pleading. I do not say that the declaration should contain a special state of the case; but the defendant should have been apprized that he was sued for money received in his official capacity.

The following opinion was entered viz: "This court being of opinion, that in all actions against sheriffs for money had and received by them, by virtue of their office, the nature of the debt or demand should be so far stated in the declaration, as to distinguish them from private debts and contracts, in order to prevent surprise, by giving notice to the defendants of the causes of action, that they may be ready to answer the same, and the plaintiffs not having stated in the declaration filed in this suit, that the money had and received by the defendant's testator was so received by him by virtue of any execution or of his office of sheriff, there is error in the judgment of the County Court, in the court's allowing the copies of the records in the proceedings mentioned to go as evidence to the jury; and that there is no error in the judgment of the District Court reversing the judgment of the said County Court on that account, but that there is error in the judgment of the said District Court, in not setting aside the verdict in the said County Court, and awarding a new trial in the said cause, with directions not to permit the copies aforesaid to go as evidence to the jury, therefore" &c.

Both judgments reversed and a new trial awarded &c.

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181 ***Ruffin v. Call.***

April Term, 1796.

Appearance Bail—Debt on Bond with Collateral Condition.—Appearance bail is not required in actions of debt on bonds with collateral conditions; and

*The principal case is cited with approval in Metcalfe v. Battaile, Gilm. 194; Hatcher v. Lewis, 4 Rand. 156.

in such cases, it is error to enter a judgment by default against the Sheriff, for not returning appearance bail.'

This was an action of debt brought by the appellee, as surviving obligee of Alexander Morris and others, late justices of the County Court of Prince George, for the benefit of Nicholas Garrat and Sarah his wife, upon a guardian's bond. The defendant not appearing, an office judgment was entered against him and the sheriff, and a writ of inquiry was executed and damages assessed. The cause came before this court by a writ of supersedeas awarded upon the petition of the defendant Ruffin.

ROANE, J.—In the argument of this cause, many points were made at the bar; But it will be unnecessary to decide any but this; namely, whether the judgment was legally rendered against the sheriff for his not taking appearance bail upon service of the writ.

As a preliminary to my opinion upon this point, I will give my present impressions upon another, which is somewhat connected with it, and which was also mentioned in the argument. It is, whether in a case like the present, of a judgment by default for want of an appearance in an action of debt upon a bond with a collateral condition, an enquiry of damages must necessarily take place?

There is no doubt, but that the 21 sect. of the act "for limitations of actions; for preventing frivolous and vexatious suits; concerning Jeofails, and certain proceedings in civil cases," Ch. 76, was meant to extend an enquiry of damages to all cases of interlocutory judgments, in actions of debt on such bonds. The English statute of 8 and 9 Will. 3, C. 11, is substantially like our act, as to the present point; and it is laid down in the case of Goodwin v. Crowle executor, Cowp. Rep. 359, that according to the true construction of that statute, the penalty is not to be levied in any case whatever.

But our act, following that statute too implicitly, has omitted to direct an enquiry of damages to be executed, in case of a judgment by default for want of an appearance; and it would be a subject of much regret, if this inattention should defeat the design of the legislature, which was, that the penalty should not be levied for the first breach, but should remain as a security, until it should be exhausted.

But fortunately for the object of
182 *this beneficial law, the 42 section of the District Court law, which is in pari materia with the other, has cured the omission: it declares, "that all judgments by default for want of an appearance, &c. obtained in the office, and not set aside on some day of the next succeeding District Court, shall be final in actions of debt founded on any specialty, bill or note in writing, ascertaining the demand, unless the plaintiff shall choose in any such case to have a writ of enquiry of damages, and in all other cases, the damages shall be ascertained by a jury, to be empanelled & sworn to enquire thereof." Now, if the words, ascertaining the demand, be not referred to the word specialty, the judgment for the penalty of a bond with a collateral condition, would be final, and the intention of the above law would be frustrated, in case of a judgment by default for want of an appearance; whereas, by such a reference, the judgment is final only, when the specialty is for payment of money or tobacco, and bonds with a collateral condition, will fall under the latter description of the clause, whereby the intention of the law will be answered, by awarding an enquiry of damages.

The above clause in point of expression, seems nearly analogous to the 26th section of the same law which provides, "that in all actions of debt, founded on any writing obligatory, bill, or note in writing for the payment of money or tobacco &c. the sheriff shall return on the writ, the name of the bail by him taken, and a copy of the bail bond," &c. Are the words, for payment of money or tobacco here, to be referred to the words writing obligatory, so as to produce a construction which would dispense with the return of a bail bond in actions of debt on a writing obligatory with a collateral condition? I have just shewn that analogous words in another clause must be understood according to such reference; in both cases, the grammatical construction of the sentence seems to warrant it; and the sentence in question may well be understood, as having the same meaning, as if the word or, had intervened, between the words obligation, and bill.

As the true meaning of the 21st section of the act first mentioned is, that the penalty should not be levied, but should merely stand as a security for such damages as might be recovered, (which may often be very small when the penalty is very large) perhaps the legislature did not act unreasonably, in restricting appearance bail to cases of bonds for payment of money or tobacco. Be this as it may, neither the words, nor the just interpretation of this section seems to require appearance
183 bail to be returned, *in actions of debt on bonds with collateral conditions; and if so, the judgment in the present case against the sheriff is erroneous; but as it has been decided in this court, and partly in the case of White and Johnson, that a judgment against a defendant and sheriff, which as to the latter is erroneous, must be reversed in toto, all the proceedings in this case subsequent to the declaration, must I think be set aside, and the cause remanded.

*The opinion of The COURT, was as follows, viz: "The court is of opinion, that appearance bail is not required by law, in actions of debt on bonds with collateral conditions, and not for the payment of tobacco or money only; and the action in this cause, being founded on a bond given by a guardian to the justices of the County Court of Prince George, with a collateral condition as set forth in the declaration, judgment ought not to have been entered at the rules in the clerk's office, against

*Note. The reporter was not in Court this term, when the opinions were delivered in the cases of Ruffin v. Call, Winston's executor v. Francisco, Pearpoint v. Henry, Burwell v. Anderson, and Walker v. Walke, but was favoured by JUDGE ROANE with the notes of the opinions delivered by himself in those cases.—Note in Original Edition.

the sheriff, for the non-appearance of the plaintiff to the said suit, and that the said judgment not having been set aside as to the said sheriff before the writ of enquiry in the proceedings mentioned was executed, and final judgment rendered thereon against the plaintiff, the judgment of the said District Court is erroneous."

Judgment reversed with costs, the verdict set aside, and all the proceedings subsequent to the declaration, and the cause to be proceeded anew on the sheriff's return on the writ, against the plaintiff only.

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184 *Ruffin v. Pendleton and Courtney Executors of Harwood.*

April Term, 1796.

Executors†—Devastavit—Plea of Plene Administravit.—In debt upon a judgment rendered against an executor upon motions, the declaration suggested a devastavit of assets, which came to the executor's hands after the judgment. The executor is not precluded from pleading a special plene administravit, and from supporting it by proof.

This was an action of debt brought by the appellant in the District Court of King and Queen, upon a judgment recovered by motion against the appellees, as executors of William Harwood. The declaration states the judgment and award of execution thereupon, with the return, "that no effects of the testator were to be found in the hands of the defendant." The declaration avers, "that after the rendition of the said judgment, divers goods and chattels which were of the said testator at the time of his death, of value sufficient to satisfy the said judgment, came to the hands of the defendants to be administered, which goods and chattels, the defendants wasted &c. by which an action accrued" &c.

Plea, "that the plaintiff his action aforesaid ought not to have or maintain against the defendants, because they say, that at the time the said judgment given against them by the said District Court, no goods and chattels which were of the said testator at the time of his death were in the hands of the defendants to be administered, nor have any goods or chattels of the said testator at any time afterwards come to their hands to be administered, except only goods and chattels to the value of £ and which are not sufficient to satisfy the several judgments herein after mentioned, and which are bound and liable to the execution of the said judgment," [here follows a specification of the judgments] "which said judgments are still in full force, and in no manner reversed or annulled; and the defendants further say, that they have not wasted, eloined, converted or disposed of any of the goods and chattels which were of the testator at the time of his death to their own proper use, in manner and form" &c. To this plea the plaintiff replied generally and issue was joined.

At the trial, the plaintiff objected to the defendant's giving any evidence to the jury in support of the issue joined, tending to prove any part of the plea, which might have been properly pleaded to the exoneration of the defendants upon the original *motion, whereon the judgment mentioned in the declaration was obtained, the plaintiff having given in evidence the judgment, execution and return thereon. But the court being of opinion, that the former judgment obtained against the defendants, not being according to the course of the common law, they had been thereby precluded from defending themselves, as otherwise they might have done, over-ruled the motion, and permitted the defendants to give evidence in support of every part of their plea; whereupon the plaintiff tendered a bill of exceptions which was sealed and made part of the record.

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Verdict and judgment for the defendants, from which the plaintiff appealed to this court.

Marshall for the appellant. It is most clear, that nothing can be pleaded in bar of an action of debt, or of a scire facias upon a judgment, which might have been pleaded to the original action. A full administration, or subsisting debts of superior dignity might have been properly used as a defence in the original action, but were inadmissible in the present suit. The judgment obtained upon the motion, amounted to a confession of assets, and estopped the defendant from afterwards denying that he had a sufficiency to satisfy this judgment. The reason assigned by the court for over-ruling the motion was certainly not a sound one; for the appellee might have given evidence to prove a deficiency of assets, as well upon a motion, as in a regular common law action.

Campbell for the appellee. The plea of "fully administered" does not go to bar the plaintiff's claim, but to protect the executor; and therefore, the rule mentioned by Mr. Marshall does not apply. But if I should admit the plea to have been bad, still this will not impeach the opinion of the court; for if the plaintiff, instead of demurring, take issue on the plea, the defendant ought not to be prevented from proving the truth of it.

Marshall. If the plea be immaterial the court will award a repleader; this is always done when the plea, if true, offers no bar to the action; and if I am right in this, the judgment must be reversed. We are then brought back to the validity of the plea. If the appellee had fully administered the assets, the appellant could not have had a judgment, unless he were contented to take one when assets might come. But if a judgment be obtained against the executor, he can only defend himself against an action founded upon that judgment, by some matter posterior to the judgment.

186 *Campbell. The first judgment does not burthen the executor with the payment out of his own estate, unless he put in a false plea. Upon the pleas of payment, and fully administered, the verdict may be against the plaintiff upon the second, and in his favor upon the first plea.

This case is much stronger for the executor, on account of the first judgment having been rendered upon motion; these summary remedies are not to be favored,

*The principal case is cited with approval in Gordon v. Justices of Frederick, 1 Munf. 14.

†See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

because they are contrary to the course of the common law. The executor had a right to a trial by jury upon his plea of fully administered, and though the existence of the debt might have been established by the first judgment, it was still right, that this collateral question should have been decided by the jury. It is impossible that any precedents should be found to govern this case, and therefore the court will so construe the law which sanctions this summary mode of proceeding, as to preserve the trial by jury where it is not expressly taken away.

Marshall. The amount of Mr. Campbell's argument is, that there is no difference between a general judgment against the executor, and one which is to depend upon assets afterwards coming to his hands. But it is clear law, that in the former case, the sheriff may return a devastavit if he please, because the executor is estopped to deny assets; the scire fieri inquiry is only for his safety. It is certain, that judgment rendered upon confession, or by default, is in admission of assets; so if it be rendered upon the plea of non est factum, or upon the plea of payment. Salk. 310—1 Atk. 292. And there is no difference between those cases, and the present, for the estoppel is produced by the defendant's not pleading fully administered to the first action.

Campbell. The case from Atk. is not supported by the authorities which are there cited. Rol. Ab. title executors is referred to in 2 Bac. 436, and the law there stated is, that the executor is no further chargeable than as he has assets, unless he make himself liable by a false plea, or by suffering judgment to pass against him by default. If the not pleading fully administered will subject him to the payment of the debt out of his own estate, why do the books all lay it down, that he makes himself liable by a false plea? Judgment by confession, or by default is stated to be an admission of assets in 1 Esp. 295.—In Hob. 178, it is laid down, that a confession of judgment is not an admission of assets, and yet there is no plea of fully administered in that case. But none of the 187 cases prove, that assets are *confessed, by the failing to plead fully administered. If the doctrine contended for by Mr. Marshall be correct, what reason can be assigned for the judgment being entered de bonis testatoris?

The COURT delivered the following opinion: "That the appellant having in his declaration filed in this suit, only suggested a devastavit of assets which accrued after the judgment obtained by him against the appellees as executors of William Harwood in the District Court of King and Queen, as stated in the said declaration, the appellees were not estopped from pleading a special plene administravit in bar of the appellant's action, nor precluded from proving the same by the evidence stated in the record as offered by them on the trial of the issue in support of their plea, and that there is no error in the District Court permitting that evidence to go to the jury."

Judgment affirmed.

Winston's Executor v. Francisco.

April Term, 1796.

Assumpsit—Gist of Action—Jeofails.*—In actions of assumpsit, the gist of the action is the promise to pay, and if this be not averred, the omission is not cured by verdict.

This was an action on the case brought by the appellant in the County Court of Buckingham. The declaration states, "that the defendant in the year 1783, was indebted to the testator of the plaintiff in the sum of £50, for a riding chair and clock, and being so indebted, the defendant left in the hands of the testator, a bond given by Abraham Sandefier to Richard Fretwell for £50, and gave directions to the testator to collect the money when it should become due on the said bond, and apply it to the payment of the said debt due from the defendant, and if the money mentioned in the said bond could not be collected, or the same prove bad, that he the defendant would make it good, or pay to the testator the said sum of £50, whenever afterwards required," and avers, "that the said bond was given for a gaming consideration, and that the obligor hath refused to pay, of which defendant had notice, who notwithstanding promising the said money to the plaintiff to pay in right of his testator, when required, he hath not paid, though 188 thereto *often times required, to the damage of the plaintiff as executor aforesaid £300.

Upon the plea of non assumpsit, the jury found a verdict for the appellant.

A motion was made in arrest of judgment for the following causes.

1. That there was no assignment of the bond by Fretwell to Francisco, nor by Francisco to the testator.

2. That it did not appear in evidence that suit had been ever brought on the bond, or at what time application for payment had been made.

3. That the declaration is uncertain, illegal and informal.

The Court determined the errors to be sufficient, and arrested the judgment, from which the plaintiff in the County Court appealed to the District Court of Prince Edward, where the judgment was affirmed, "because it appeared to the court, that there was no assumpsit laid in the declaration."

From this judgment of affirmance, an appeal was granted to this court.

ROANE, J.—Altho' an assumpsit is the very gist of this action, yet I would always incline to sustain a declaration where one is laid, however irregular the expressions to

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***Statute of Jeofails—Declaration—Gist of Action Omitted.**—For the proposition that the statute of jeofails will not cure a declaration in which the gist of the action is omitted to be charged, see the principal case cited and approved in Chichester v. Vass, 1 Call 97; Moore v. Dawney, 3 Hen. & M. 134; Kerr v. Dixon, 2 Call 382; Young v. Gregorie, 3 Call 454; Ballard v. Leavell, 5 Call 534; Laughlin v. Flood, 3 Munf. 262; Syme v. Griffin, 4 Hen. & M. 280; Spiker v. Bohrer, 37 W. Va. 262, 263, 16 S. E. Rep. 577; Wolf v. Spence, 39 W. Va. 496, 496, 20 S. E. Rep. 611, 612; Burton v. Hansford, 10 W. Va. 474.

The principal case is distinguished in Ballard v. Leavell, 5 Call 535; King v. M'Daniel, 4 Call 452. In this connection, see the principal case cited with approval in Quarrier v. Peabody Ins. Co., 10 W. Va. 509. See *foot-note* to Chichester v. Vass, 1 Call 83; Baird v. Mattox, 1 Call 257; and monographic *note* on "Amendments" appended to Snead v. Coleman, 7 Gratt. 300.

that effect may be, especially after a verdict. But it must be positively charged, otherwise the declaration does not set out a sufficient cause of action, to entitle the plaintiff to recover.

In this declaration it is no where averred, that the defendant promised to pay the money, and in this respect, it is no way distinguishable from the case of Lee v. Welch, 2 Stra. 793. In that case, the declaration ran thus, "that the defendant being indebted to the plaintiff for goods sold and delivered, would well and truly content and pay" leaving out the words and in consideration thereof assumed upon himself and then and there promised &c. After judgment by default, it was arrested, there being no promise actually laid.

In the present case there is a verdict, and the question is, whether this will cure the defect in the declaration? In the case of Avery v. Hoole, Cowp. Rep. 825, it is said, that altho' a verdict will cure ambiguity, it will not aid where the gist of the action is not laid in the declaration. And the rule laid down by the English judges, that a verdict will supply whatever must of necessity have been proved to the jury, is supposed not to extend to cases where the gist of the action is omitted.

189 *So too, that clause in our act of Jeofails which declares, "that a verdict shall cure the omission of the averment of any matter, without proving which, the jury ought not to have given such a verdict," cannot be construed to cure the want of an averment of the cause of action, for in such a case, no judgment can be given.

But it was contended, that the following words in the latter part of the declaration, "who notwithstanding promising to pay said money &c." amount to an averment of a promise; but the promise ought to be directly averred, and not by way of inference. I think the judgment ought to be affirmed.

The COURT affirmed the judgment of the District Court.

Downman v. Chinn Executor of Downman.

April Term, 1796.

Forthcoming Bond—To Whom Payable*—Recital of Amount of Execution.—A forthcoming bond should be made payable to the creditor, and not to the Sheriff;—the amount of the execution ought to be recited, and the condition should be to deliver the property at the time and place of sale, and not when demanded.

Same—Quashal †—If the bond be defective in any of the above instances, or in others, the Court may, and ought to quash it on motion.

Same—When Satisfaction of Judgment.‡—A faulty forth-coming bond, whilst in force, is a satisfaction of the judgment, and a second execution cannot issue until it is quashed.

Same—Execution—Quashal.—The common course is to quash the execution as well as the bond, if a motion for that purpose be made, otherwise it is not necessary.

On the 3d of October 1791, a writ of fi. fa. was sued out by the defendant in error against the plaintiff, upon a judgment of the District Court of Northumberland.

The sheriff took a forthcoming bond payable to himself, with condition to deliver the property to the sheriff when demanded; but the amount of the execution was not recited.

It appears from the record, that on the 4th of January 1793, a second execution issued upon the original judgment, by which part of the money was made, but this execution is not spread upon the record by a bill of exceptions, nor does it appear to have been noticed by the court. Upon the motion of the defendant in error, the forthcoming bond above stated was quashed, as being informal. The order of the court was entered as follows viz: on the motion of John Chinn &c. executors of Rawleigh Downman deceased, against Rawleigh Downman, on a bond taken on an execution sued out of this court by the said executors, against the said Rawleigh Downman, it is ordered, that the bond taken on an execution sued out of this court by the said executors against Rawleigh Downman to Richard Beale sheriff of Richmond county for the forthcoming of property taken on the said execution, be quashed, it appearing to the court that the same is insufficient."

190 *To this order a supersedeas was awarded by one of the judges of this court.

Campbell for the plaintiff in error, contended, that the court had no right to quash a forthcoming bond, although it should be informally taken; that it was to have the force of a judgment, and was as completely out of the reach of the same court to which it was returned, as the judgment of a preceding term would have been. But that if the court might properly exercise this power, the second execution ought also to have been quashed, since it improvidently issued upon the original judgment, after a forthcoming bond had been taken and returned; and to prove this he relied upon the case of Taylor v. Dundass decided in this court, (see ante vol. 1, p. 92.)

Washington for the defendant, contended, that the bond being clearly defective, could no otherwise be got rid of, so as to authorise the plaintiff to proceed to obtain the effect of his original judgment, than by a motion to quash it; That in the case of

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***Forthcoming Bond—To Whom Payable.**—That a forthcoming bond which is made payable to the sheriff, instead of to the creditor, is faulty, and will be quashed on motion, see the principal case cited in Hall v. Wadsworth, 35 W. Va. 379, 14 S. E. Rep. 6; Meze v. Howver, 1 Leigh 443.

†Same—Quashal.—In Wallace v. McCarty, 8 W. Va. 199, it is said: "It was competent for the court to quash a forthcoming bond for defects and irregularities. *Downman v. Chinn*, 2 *Wash.* 189; Couch v. Miller, 2 Leigh 545. In each of these cases the bond was quashed on motion of the defendant."

In this connection the principal case is cited with approval in Windrum v. Parker, 2 Leigh 367; Lynchburg T. & S. Bank v. Elliott, 94 Va. 702, 27 S. E. Rep. 07. See *foot-note* to Hendricks v. Dundass, 2 Wash.

‡Same—Bar to Proceedings on Original Judgment.—forthcoming bond, even if defective, is a bar to any further proceedings on the original judgment, until quashed. The principal case is cited, in support of this proposition in Randolph v. Randolph, 3 Rand. 492; Garland v. Lynch, 1 Rob. 561.

In this connection, see the principal case cited in Ward v. Vass, 7 Leigh 143; Lusk v. Ramsey, 3 Munf. 439.

See generally, monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Variance—Execution and Forthcoming Bond.—As to what is a fatal variance between the execution and the forthcoming bond, see the principal case cited in Glascock v. Dawson, 1 Munf. 606. See Brouaughs v. Freeman, 2 Munf. 266.

Hendricks and Taylor v. Dundass (ante p. 50) this court had affirmed the judgment of the county court, quashing a forthcoming bond.

As to the second execution, that was merely a ministerial act, and could only have been quashed by the court from whence it issued, upon a motion regularly made for that purpose, and if upon that motion the court had given an erroneous opinion, it might properly have been corrected upon an appeal to this court.

But upon this appeal, the court is confined to the judgment of the District Court upon the motion which was made, and cannot notice the second execution which is regularly no part of the record. This point was settled in the case of Leftwich and Stoval (ante vol. 1, p. 303). In the case of Taylor v. Dundass, a second execution issued without a previous motion having been made to quash the forthcoming bond, and the motion which produced the judgment in that case, was to quash the second execution.

ROANE, J.—There is no doubt, but that this bond is faulty in the following instances at least, 1st, that it is made payable, not to the creditor, but to the sheriff. 2dly, the amount of the execution is not recited in it; and 3dly, the condition is to deliver the property, not at the time and place of sale, as it should have been, but when demanded. But it is objected that the court had no power over the bond, so as to quash it, though ever so faulty. The cases which were cited by the counsel for the defendant in error, and another 191 also decided in this court of *Hubbard and Taylor (ante vol. 1, p. 259) furnish a compleat answer to this objection.

The order of the District Court though right upon the main points, is rather too general, in not specifying the bond more particularly by its date, amount &c. however, as it is spread upon the record, we must suppose, that it was that bond to which the motion and order related.

As to the second execution, there is no doubt, but that the court ought to have quashed it, if a motion for that purpose had been made. But it does not appear that the court were informed of its existence, and therefore we cannot say that they erred.

CARRINGTON, J.—Concurred in the same opinion.

LYONS, J.—It seems to have been admitted by the counsel for the plaintiff, that this bond was faulty, but the power of the court to quash it is denied. It would certainly be highly inconvenient, if ministerial acts like the present were without the controul of that court to which the officer belongs, and if the only remedy for the party aggrieved by his mistakes, were an action against the officer. I hold the law to be otherwise, and that the court may properly correct the ministerial acts of its own officers.

The proceedings in this case have certainly been very irregular; the court ought to have quashed the second execution, if an application for that purpose had been made, because the forthcoming bond whilst in force, was a satisfaction of the first judgment. The general course is to quash the execution, as well as the bond; but as no motion for this purpose was made, we cannot condemn the order which was made.

Order affirmed.

Dalby v. Price.*

April Term, 1796.

Depositions†—General Commission to Take—Hearing of Cause.—In all cases where a general commission issues for taking depositions, upon an answer and replication, in any suit in the High Court of Chancery, the cause must remain at rules six months from the time of filing the replication, before it is set down for hearing: unless this be dispensed with by consent of parties, entered on the record.

The appellant, against whom a decree had been entered in the High Court of Chancery, filed a bill of review stating new matter. The appellee answered, and 192 a general replication *was entered and commissions awarded; in less than a month after these proceedings, the cause was set down, heard, and a decree entered, from which Dalby appealed.

The following, was the opinion and decree of this COURT, "Whenever a general commission issues for taking depositions, upon an answer and replication filed in any suit depending in the High Court of Chancery, six months from the time of the replication should be allowed the parties for taking their depositions, and that such cause ought not to be set for hearing, nor heard and finally determined, without the consent of the parties entered on record, before the expiration of the said six months, according to the direction of the act of Assembly concerning the High Court of Chancery; and it appearing by the record, that the replication in this suit was filed in the month of May 1795, and that the cause, was without the consent of the parties so entered on record, heard and finally determined on the 2d of June following, the said decree is erroneous." Therefore it is decreed and ordered, that the same be reversed and annulled, and that the appellee pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And it is ordered, that the cause be remanded to the said High Court of Chancery to be put on the rule docket and proceeded in according to the foregoing opinion of this court, allowing the parties six months including the time the cause had remained at the rules after the replication, and before the date of the decree aforesaid for taking their depositions, before the same be again set for hearing."

Pearpoint v. Henry.

April Term, 1796.

Trover and Conversion—Detinue‡—Price of Thing Converted.—In an action of trover and conversion,

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*The principal case is cited in Bartlett v. Bartlett, 37 W. Va. 239, 16 S. E. Rep. 452.

†See monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

‡See monographic *note* on "Trover and Conversion" appended to Eastern Lunatic Asylum v. Garrett, 27 Gratt. 168, and monographic *note* on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

the declaration need not state the price of the thing converted, although it is otherwise in detinue.

This was an action of trover and conversion brought in the District Court of Monongalia, by the appellee, for a negro woman. Upon the plea of not guilty, the jury found a verdict for the appellee. The appellant moved in arrest of judgment, and amongst other errors assigned the following viz. "that the price or value of the negro is not set forth in the declaration."

193 *Judgment for the appellee, from which an appeal was granted to this court.

Williams for the appellant. It is essential in an action of trover and conversion, that the price should be stated in the declaration, 5 Bac. 275. If so, it is not cured by the act of Jeofails. It is true, that a mistake in setting forth a sum of money, quantity of merchandize, &c. is cured, if the same be rightly stated in any part of the record; but this clause in the act of Jeofails, will not aid the total omission of price.

Marshall for the appellee. It is laid down in the case of Wood v. Smith, Cro. Ja. 129, by three judges against two, that at common law, it was not necessary to state the price in an action of trover and conversion, and the reason given seems to be a sound one, viz: that damages are demanded, and not the thing itself. But if this were not so, it is certainly mere matter of form, and therefore cured by the act of Jeofails. It does not appear that the case cited from 5 Bac. Ab. 275, was after verdict.

Williams in reply. Another reason why the value should be stated in this country is, that the court may see whether they can properly try the suit in that particular form of action, for if the value were below £6, the suit by the law of this state should be by petition.

ROANE, J.—It seems to be the better opinion, that a declaration in this action need not state the price of the thing converted, tho' this is necessary in the action of detinue, where the thing itself, or the value is to be recovered. In the former case, it is not the price, which the plaintiff goes for, but damages for the conversion: and even where the price is laid, he may recover more or less, provided the damages do not exceed those laid in the declaration.

The COURT affirmed the judgment.

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194 *Burwell v. Anderson & Co,

April Term, 1796.

Supersedeas*—Execution improperly issued.—A supersedeas will not lie where an execution has improperly issued upon a twelve-month's bond. The injured party may move to quash the execution, and the judgment on that motion, if erroneous, may be corrected on an appeal or supersedeas.

The appellant obtained a supersedeas, to remove the record of the proceedings of the County Court of Gloucester, before the District Court of Williamsburg. The record contains a twelve months replevy bond, given by Burwell to Anderson; an affidavit of Matthew Anderson, agent for Matthew Anderson & Co. that the whole amount of the replevy bond was then due. It is then stated, "that a fi. fa. issued on the above bond, on the 12th of October 1793."

The errors stated in the petition for the supersedeas were, 1st, That it doth not appear in the bond, for what property of the said Burwell the same was entered into, as the law intended it should."

"2d, That the affidavit on which the execution issued upon the said replevy bond, was not made by the creditor, or by his assignee."

The District Court quashed the writ of supersedeas with costs, as having improvidently issued, from which judgment Burwell appealed.

ROANE, J.—It is unnecessary to consider the errors stated in the petition for the supersedeas, though at present, I do not think there is any weight in them. The only question is, whether the writ of supersedeas improvidently issued or not?

A supersedeas, is one mode pointed out by our law, by which the record of an Inferior Court, may be removed into a Superior Court, and the propriety of the judgment there examined. But there must be a judgment of the Inferior Court; this is apparent from a view of all the laws upon that subject, and particularly from that, which directs the Superior Court upon a reversal, to give such judgment as the Inferior Court ought to have given.

This case, was assimilated by the counsel for the appellant, to an award of execution upon a forthcoming bond, in which case, a supersedeas might properly issue. But in that case, there is a judgment of the court, or an award of execution in nature of a judgment. If the bond in question be faulty, the party might have moved the County Court to quash it, as well as

195 the execution *issued upon it, and the opinion of the court upon such motion might, if erroneous, have been corrected by a Superior Court upon a supersedeas; but in this case, there was no judgment to supersede.

The COURT affirmed the judgment of the District Court.

Sarah Walker & Thomas Walker Executrix & Executor of Thomas R. Walker Deceased v. Thomas Walke.*

April Term, 1796.

Paper Money—Scale of Depreciation—Payments by Guardians.—Payments by a former to a subsequent guardian, in depreciated paper money, should be accounted for at their nominal amount, and are not subject to the scale of depreciation.

Guardianship†—Termination of—Appointment of Successor.—By the appointment of a second guardian, in the room of a former one, the power of the

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*Supersedeas—Substitute for Writ of Error.—In Virginia a supersedeas serves a different purpose from that which it is made to serve in the courts of other states. In that state it is a substitute for the writ of error in all cases in which it is designed that the judgment of the court below shall be superseded. Williams v. Bruffy, 102 U. S. 249, citing 1 Rob. Pr. p. 660; White v. Jones, 1 Wash. 118; *Burwell v. Anderson*, 2 *Wash.* 194; Wingfield v. Crenshaw, 3 Hen. & M. 245. The principal case is cited in Hite v. Wilson, 2 Hen. & M. 287.

*The principal case is cited in Jennings v. Jennings, 22 Gratt. 320.

†See monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

former, as well as his habit of receiving and disbursing moneys, generally, on account of the ward, ceases: and therefore, payments made by him in depreciated paper money to the subsequent guardian, are not subject to the scale.

The appellee filed his bill in the County Court of Princess Anne, stating, that the said Thomas R. Walker was appointed his guardian, and in the year 1776 was indebted to the plaintiff, £1312: 12: 0:½, as appeared by his guardianship accounts, settled and filed in the County Court. That in the year the said Thomas R. Walker, paid to John Thoroughgood, the subsequent guardian of the plaintiff, £854: 3: 3 in bonds, leaving a balance of £468: 8: 8½ still due. The prayer of the bill is for payment of this balance with interest.

The answer states, that after the appointment of Thoroughgood as guardian to the plaintiff, he and the testator, Thomas R. Walker, settled the accounts of the latter, and stated a balance then due to the plaintiff, of £244: 12: 2. That they have understood, that in the year 1787, after the plaintiff came of age, he accepted a bond from the said testator for the above balance. They state a small payment since, and are ready to discharge the balance still due.

Amongst the exhibits filed in this cause, is a letter from Thoroughgood, to the testator, Thomas R. Walker, dated in June 1786, enclosing a blank bond, with a request, that the testator would settle the balance due to the ward, (the present plaintiff,) fill up the bond with the sum due, and return it executed. The writer also acknowledges in this letter, the receipt of £300, in January 1780, "which" he
196 says "will, according to the scale *of depreciation amount to £7: 10 specie, and being deducted from the balance now on the books of the said testator, will be the amount in which he is indebted." He also adds, "that the testator should not complain of hardship in the settlement, as a great part of the money paid by the testator, was received by him in paper money according to its nominal amount." In answer to this letter, (also dated in June 1786,) the testator promises to prepare for the settlement, and adds, "that he shall say no more about hardships, being fully satisfied that all debts should be settled."

The bond was accordingly filled up with the sum of £244, and returned: it was afterwards accepted by the plaintiff without objection, except, that by letter, he required a bond from the testator for the amount of the interest on the £244, from a date anterior to the principal bond; this bond for interest was not given.

The cause coming on to be heard, on the bill, answer, replication and exhibits, an account was directed. The commissioners report a balance of £784: 4 due the plaintiff, with interest. In this account they reduce the £300 by the scale of January 1780; they also make a special report, stating the bond above mentioned, amongst other exhibits, but give it as their opinion, that the plaintiff was not bound by the settlement, nor by his letter to the testator, since the terms of it were not accepted.

The report not being excepted to, a decree was made confirming it, from which the defendants appealed.

The High Court of Chancery directed an account to be settled, before one of the masters of that court.

To the report made by the master, exceptions were filed, and amongst others, the following; viz; that the settlement with Thoroughgood ought to be established; and if not, the payments in paper money ought to be credited at their nominal amount, and not according to the scale.

The exceptions being over-ruled, the decree of the County Court was affirmed, and an appeal was prayed to this court.

Marshall for the appellant. The settlement between the first and second guardian was binding upon the ward, unless unfairness or collusion between them in making it, had been charged, and proved. But if I am incorrect in this, I contend, that the payments made to the second guardian in paper money, ought not to have been scaled. The act of 1781, Ch. 22, is too clear upon this subject to be misunderstood; it
197 declares, that all *payments, either to the full amount, or in part discharge of any debt, are to be credited at their nominal amount. Nothing I conceive, but the agreement of parties could vary this rule.

It is true, that in this case, the payments were scaled by the settlement, but this was part of the settlement, and if the settlement be annulled, the agreement to scale has equally lost its obligation upon the parties; for surely, the court will not set aside the former, and bind the parties by the latter, when both constitute one entire act.

Campbell for the appellee. This is the common case of a ward calling upon his guardian for an account. The guardian attempts to avoid it, by insisting upon a settlement made with the former guardian; a fact not responsive to the bill, and therefore not to be noticed, further, than as he could prove it to be correct and fair. That it was either, in this case, cannot be contended.

As to the payments made by the guardian, they ought to be scaled. That clause of the act of 1781, Ch. 22, which declares, that payments made of any sum, either to the full amount, or in part payment of any debt, should be credited at the nominal amount, was never considered as being applicable to cases of running accounts.

Wickham on the same side. I consider it as an important question, whether the exception to the master's report, can avail the appellant, as it was not originally taken to the report made in the County Court.

I doubt very much the power of the High Court of Chancery, acting as an appellate court, to direct an account. The decree such as it appeared upon the record, should have been affirmed, or reversed and remanded; and if so, the former must have taken place, since the report on which the decree sought to be reversed, was founded, was not excepted to. As well might this court direct an account, and upon the report, make a decree corresponding with it, but this was never yet attempted. The reference in this case was only for the

purpose of calculation, and was not intended to open the decree.

As to the merits, I lay it down, that nothing can discharge the guardian from accounting, but a settlement with the ward, after his attaining full age. Payments to the second guardian, would I admit, be valid, but a settlement would not. Great inconvenience might result from a contrary doctrine; the second guardian might with the best intentions be imposed upon; and yet he might repel the claim of the ward, by saying, he was a trustee, and acted
198 *with good faith, and therefore should not be charged; and the first guardian would defend himself by the settlement.

But in this case, no settlement appears. One guardian demands it of the other, and calls for a bond for the balance: a bond is given, but no settlement is made.

The consent of the appellant to be accountable by the scale, forms no part of the settlement, but is antecedent to it.

The act of 1781 with respect to partial payments, is never applied to items in unliquidated, running accounts, and so it has been often settled in this court. But certainly it can never apply in the case of a trustee.

Marshall in reply. There is no doubt, but that the Chancellor may, upon an appeal, open the decree, and if necessary, direct a new settlement of the accounts; he is in the constant practice of doing so, and I have never before known it questioned.

In Humphrey and Smith, this court reversed the Chancellor's decree, because a calculation had not been made by the master, which any person might have made in one minute.

But be this as it may; if the error appear in the decree of the County Court, or is apparent upon the face of the account, it will be sufficient to reverse the decree of the High Court of Chancery, although no exception was specially taken; for an exception is not necessary, where the error appears, either upon the face of the account, or in a special report. The use of an exception is, to bring into view such objections to the report, as do not appear upon the face of it.

In this case, the commissioners have stated specially, the ground upon which the account is settled, and the court are at liberty to say, if they decided right or not.

But it is contended, that no settlement was made; we see a letter respecting a settlement, with an admission of the sum then due, an account, and a bond for the balance, in the possession, first of the guardian, and then of the ward. Suppose that the ward was not originally bound by the settlement; he is certainly concluded by his subsequent consent to, and ratification of it.

This consent is proved by his having possession of the bond after his arrival at age, and his letter to the testator, demanding a bond for the interest due on the £244.

It is then said, that in cases of this sort, we are not entitled to a credit for payments at their nominal amount, and that the point has been so decided in this court. If such have been the decisions, I am a stranger to them.

199 *The testator ceased to be guardian before depreciation began; Thoroughgood succeeded him in that office, which completely closed the accounts of the former; the balance then due, whether liquidated or not, was a debt to be paid; no further items could be introduced into it but payments, and these, when made, were like all other payments.

It is objected, that Walker was a trustee; so he was until he ceased to be a guardian; but whether he was or was not, it has been determined in this court, in the case of Sallee and Yates, and Granberry and Granberry, that payments made by an executor to the estate he represented, and entered on his books, should be credited at their nominal amount.

We are then brought to consider, whether this right to a credit at the nominal amount has been abandoned. It is not true as was contended, that the consent of the testator to scale, preceded the settlement; but if it were, the principle of the settlement is thereby established, and if the settlement be set aside, it would be monstrous to bind the testator by his concessions in that letter, which were made in order to produce the settlement.

ROANE, J.—Upon the appointment of Thoroughgood, in 1776, as guardian of the appellee, the character of the appellant's testator as guardian ceased, and with it, his liability to pay and receive monies generally, on account of his ward. Consequently, any payment by him thereafter, to the succeeding guardian, should be considered as a payment on account of a debt admitted to be due. And the receipt for £300, given by Thoroughgood, in January 1780, which uses the terms "£300 in part of your account with T. Walke" strongly imports, that that money was received in part of a debt, due from the testator to the appellee as his former guardian; of course, that payment, must, according to the second section of the act of Assembly, directing the mode of adjusting and settling certain debts and contracts, and agreeably to prior decisions by this court, be credited at its nominal amount.

If the letter of the appellant's testator of June 1786, can be construed into an admission, that the payment of the £300 should be subjected to the scale of depreciation, it was made in consequence of an offer of Thoroughgood, in his letter of the same date, to accept a settlement made by the said testator from his books, according to the tenor of that letter; and the appellee, by bringing this suit, having departed from the settlement so made, or expected
200 *to be made by the testator, the admission, if it can be considered in that light, (for the expressions are extremely vague and indefinite as to that,) is no longer binding upon the representatives of the testator.

I am therefore of opinion, that the decree is erroneous in not allowing the credit for the £300, as its nominal amount.

The COURT gave the following opinion decree viz: "By the appointment of John Thoroughgood to the guardianship of

the appellee, the guardianship of the appellant's testator, as also his habit of receiving and disbursing monies generally, on account of the appellee, having ceased, the receipt thereafter of any money by the said John Thoroughgood, from the said preceding guardian, should be considered as a payment on account of a debt, admitted to be due from him as guardian aforesaid; that by authority of the act of the General Assembly passed in 1781, entitled "an act directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes" and in conformity to former decisions by this court, the payment of £300, made the 3d of January 1780, by the appellant's testator to the subsequent guardian, was not subject to the operation of the scale of depreciation: That there is error in the decree of the High Court of Chancery, permitting that payment to stand reduced, and that there is no error in the residue of the said decree, therefore &c."

Davenport v. Mason.*

April Term, 1796.

Appeal—Quære.—If an appeal can be taken from a decree dissolving an injunction with costs?

The appellee, obtained an injunction in the County Court, to a judgment rendered against him in the same court. After answer put in, a motion was made to dissolve, and on a hearing the court over-ruled the motion, but continued the cause and awarded commissions to take depositions. At a subsequent court, on hearing the bill, answer, depositions and exhibits, the court dissolved the injunction, and decreed the plaintiff in that court to pay costs.

201 *From this decree the defendant appealed. The High Court of Chancery directed issues between the parties, which were accordingly tried and a verdict certified thereon. The Chancellor reversed the decree of the County Court, and decreed a perpetual injunction, from which Davenport appealed.

Mr. Campbell for the appellant contended, that the decree of the County Court was interlocutory, since it only dissolved the injunction. That no appeal could have been taken until the decree was made final by a dismission of the bill; until this was done, the cause was still depending.

Mr. Marshall for the appellee insisted, that this is a decree for costs and, as to that, is final. But if not final, then the County Court erred in decreeing costs, and therefore the reversing decree is right either way.

The court affirmed the decree of the High Court of Chancery.

*Costs—Motion to Dissolve Injunction.—Costs should not be taxed upon overruling or sustaining a motion to dissolve an injunction. Barnett v. Spencer. 2 Hen. & M. 7. The court said: "This is not like the case of *Davenport v. Mason*. 2 *Wash*. 200. The decree in that case was made in the regular course of the docket, upon the final hearing of the cause; but, in this case, it was only a motion to dissolve; and costs were improperly decreed."

See monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

Decrees—Interlocutory and Final.—The principal case is cited in Royall v. Johnson, 1 Rand. 427; Core v. Strickler, 24 W. Va. 695. See *foot-note* to Fleming v. Bolling, 8 Gratt. 292, and monographic *note* on "Decrees" appended to Evans v. Spurgin, 11 Gratt. 615.

Ragsdale Executor of Ragsdale v. Balte Executor of Balte.*

April Term, 1796.

This was an action of debt instituted in the District Court of Brunswick by the defendant in error against the plaintiff for £32: 4: 2 with interest thereon from the 16th of June 1770, also one penny, and 460lbs. of gross tobacco. The action was founded upon a judgment of the General Court rendered in the year 1784, in favor of the testator of the defendant against the plaintiff for £64: 8: 4, for debt, also one penny for damages, and 460lbs. of gross tobacco for his costs, but to be discharged by the payment of the above mentioned sum of £32: 4: 2, with interest thereon from the 16th of June 1770, together with the damages and costs above mentioned. Upon the plea of payment, a verdict was found for the defendant in error, in the year 1794; whereupon judgment was entered, "that he recover the said sum of £32: 4: 2, with interest from the 16th of June 1770," as also the damages and costs aforesaid.

202 *The plaintiff applied for, and obtained a supersedeas to the above judgment, from one of the judges of this court, assigning as error therein, "that by the defendant's own shewing in his declaration it is manifest that he ought to have brought his suit for £64: 8: 4, instead of £32: 4: 2, with interest from 1770, whereby the interest recovered exceeded the sum for which the judgment, on which this suit was instituted, had been rendered."

Judgment reversed.

203 *OCTOBER TERM, 1796.

Lewis Stephens v. Alexander White.

October Term, 1796.

Damages—Omission to Lay—Jeofails.†—The omission to lay damages in the declaration, though in an action sounding in damages, is cured, after verdict, by the Statute of Jeofails.—Construction of that Statute.

Attorney and Client‡—Negligence of—Consideration—Case at Bar.—Declaration, that plaintiff, by advice of defendant, an attorney, instituted a suit against J. S. and then and there employed defendant to prosecute said suit to judgment, who in consideration thereof, undertook to conduct the same to the best of his skill; yet he had neglected to file a declaration whereby, &c.

*The principal case is cited with approval in Anderson v. Price, 4 Munf. 309.

The principal case is distinguished in Kemp v. Mundell, 9 Leigh 16.

†**Damages—Omission to Lay—Jeofails.**—It was held in Kennedy v. Woods, 3 Bibb (Ky.) 323, citing the principal case, that the omission to lay damages in the declaration, though in an action sounding altogether in damages, is cured after verdict.

See the principal case cited in Hook v. Turnbull, 6 Call 87; Roderick v. Railroad Company, 7 W. Va. 58; Moss v. Moss, 4 Hen. & M. 310; Darby v. Henderson, 3 Munf. 115. See monographic *note* on "Amendments" appended to Snead v. Coleman, 7 Gratt. 300.

Same—Same—Action of Debt.—The principal case is cited in Craghill v. Page, 2 Hen. & M. 457, to the point that it is not necessary to lay damages in the declaration in an action of debt.

Assumpsit—Allegation of Damage.—In James v. Adams, 16 W. Va. 257, the court said: "As the object of an action of assumpsit is to recover damages for the breach of the contract, it is essential for a plaintiff to allege in his declaration in such action, that the breach of the contract has resulted in his damage. See *Stephens v. White*, 2 *Wash*. 203."

‡**Attorney and Client.**—See monographic *note* on "Attorney and Client" appended to Johnson v. Gibbons, 27 Gratt. 632.

It being stated that the defendant understood how to conduct the suit, and mismanaged it, the want of a consideration is not material.

Demurrer to Evidence—Presumption of Court.§—Upon a demurrer to evidence, the Court must presume any and every fact which the jury might have inferred from the evidence. But those conclusions must be such as would result from a just and reasonable construction of the whole evidence, and not from arbitrary inferences.

Variance—Writ and Declaration—Oyer.‖—Variance between the writ and declaration cannot be taken advantage of without craving oyer of the writ; yet you may refer to it to amend by, without oyer.

This was an action on the case brought by the appellant against the appellee in the District Court of Winchester. The declaration states, that the plaintiff by the advice of the defendant, who was an attorney authorised to practice law, commenced in November 1779, in the County Court of Frederick, an action of debt for £62, against B. Chambers executor of William Williams, and then and there employed the defendant to prosecute the said suit to judgment, who in consideration thereof undertook to conduct the same to the best of his skill and judgment; yet the defendant had neglected to do his duty as an attorney, by failing to file a declaration, whereby the judgment obtained in the said suit was reversed, and the plaintiff had lost his said debts of £62 and costs, and had sustained injury to £ . Plea not guilty.

At the trial, the defendant filed a demurrer to the evidence, stating, that the plaintiff had proved by one witness, that after the judgment against Chambers had been obtained, the de-
204 fendant *requested the witness to inform the plaintiff, "that he had recovered a judgment against Chambers, in the suit in which he the defendant had been employed by the plaintiff." That it also appeared from the docket of the court in which the judgment was obtained, that in July 1784, the letter W. was placed opposite to the said suit, and the clerk of that court proved, that it was customary to write the initial letter of the attorney's name opposite to the suit in which he was concerned; that the letter W, on that docket, was intended to denote, that the defendant appeared as attorney at that court for the plaintiff. The same witness declared, that he believed Peter Hogg, then a practising attorney, ordered the said suit for the plaintiff, but of this he was not certain. That from the same docket it appeared, the suit was instituted in November 1779, and that in March 1780, no attorney appeared of record for the plaintiff; that the suit was put to issue in March 1783, and it did not appear from any evidence that the defendant appeared as attorney in that suit before July 1784. That the verdict was given in October 1784, in favor of the plaintiff for £61: 19: 3 debt, and £49: 11: 4 damages, and that the same was written on the back of an award, which was the only paper except the writ now filed in that cause. That the judgment was reversed with costs for the want of a declaration. That it did not appear that P. Hogg was marked as an attorney upon that docket after the year 1778. That Chambers always had been, and yet is, a resident in the state of Pennsylvania.

The demurrer being joined, the jury found a verdict for the plaintiff, and assessed his damages at £146: 18: 7, subject to the opinion of the court upon the demurrer to evidence.

The defendant then moved in arrest of judgment, 1st, because there is no consideration stated in the declaration, and 2dly, because no damages are laid.

Judgment for the defendant from which the plaintiff appealed.

Lee for the appellant. It is a general and well established principle of law, that if a man undertake to perform a professional act, he is chargeable for neglect to the person who employed him, although he has received no reward.

As to the want of damages in the declaration, this, if error independent of the act of Jeofails, is clearly cured by that act.

The judgment of the District Court having been given upon one or both of these points, I have thought proper to notice them first; but if there be any difficulty in the cause, I think it arises out of the demurrer to evidence.

205 *The jury being the only proper judges of the weight of evidence, if either party shall chuse, by a demurrer to evidence, to withdraw the decision of the cause from that body, the court will make such conclusions from the facts stated, as the jury might have done, if they had decided upon them. The rule therefore is laid down in the case of Cocksedge v. Fanshaw, Dougl. 124, that a demurrer to evidence admits the truth of all facts which the jury might have inferred from the evidence.

Now the only question in this cause is, whether White was employed as the attorney in the cause? The message sent to Stephens, and the marks on the docket prove this fact. If it were necessary to establish the fact, that he was originally employed to commence the suit, or that he was employed at so early a period as to be chargeable with the neglect imputed to him of not filing a declaration, the jury had sufficient evidence laid before them to authorise a conclusion that the fact was so.

But it was not necessary to prove an original engagement in the suit; for al-

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§**Demurrer to Evidence—Rule.**—The principal case is cited with approval in Richmond, etc., R. R. Co. v. Moore, 78 Va. 97; Clark v. Richmond, etc., R. R. Co., 78 Va. 712; Richmond, etc., R. R. Co. v. Williams, 86 Va. 167, 9 S. E. Rep. 990; Green v. Judith, 5 Rand. 8; Muhleman v. Nat. Ins. Co., 6 W. Va. 514.

Same—Evidence Circumstantial and Complicated.—In Hansbrough v. Thom, 3 Leigh 155, JUDGE CABELL said: "Nor is it any objection to a demurrer to evidence, that the evidence is circumstantial, and even complicated; as will clearly appear from the case of *Stephens v. White*."

The principal case is cited in Trout v. Railroad Co., 23 Gratt. 637.

Same—Joinder in—When Compelled.—See *foot-note* to Boyd v. City Savings Bank, 15 Gratt. 501.

The principal case is cited in Peabody Ins. Co. v. Wilson, 29 W. Va. 535, 2 S. E. Rep. 892.

See monographic *note* on "Demurrer to the Evidence" appended to Tutt v. Slaughter, 5 Gratt. 364.

‖**Variance—Writ and Declaration—Oyer.**—The principal case is cited with approval in Wilson v. Berry, 30 Fed. Cas. 109.

Writ—When Part of Record—Oyer.—The principal case is cited in Lambert v. Ensign Mfg. Co., 42 W. Va. 816, 26 S. E. Rep. 432, for the proposition that the writ is never a part of the record, unless made so on oyer, where the defendant has appeared: but the writ may be looked to, to sustain the proceedings which are sought to be reversed.

See *foot-note* to Hickam v. Larkey, 6 Gratt. 210.

The principal case is cited with approval in Mills v. Black, 1 Call 242.

though the appellee had been employed after the issue was made up, it was his duty to have moved the court for leave to file a declaration, and if he had failed in this attempt, he might have urged that fact in order to repel the charge of neglect. As things are, the debt is lost, not only by length of time, but by the non-residence of Chambers, and to the conduct of the attorney alone it can be attributed.

Ronold for the appellee. The first point which I shall contend for is, that the District Court had not jurisdiction of this cause, because it can only hold plea of suits where the debt or damages amount to £30. In this case, there are no damages laid in the declaration; and it is in this point of view that I consider the omission to be clearly fatal. It is true that no plea was filed to the jurisdiction, nor was it necessary, since the court being confined to a particular sum, it ought to appear certainly upon the record, that the court has jurisdiction of the case.

Another ground upon which the judgment of the District Court may be sustained is, that the appellant gave in evidence a different judgment from that stated in the declaration. The breach laid is, that the judgment was reversed, whereby the plaintiff lost her said debt of £62, and costs. By the demurrer, it appears that the judgment given in evidence was for £61: 19: 3, and £49: 11: 4 damages. So that it does not appear that the judgment mentioned in the declaration was reversed, or the amount of it lost by the supposed negligence of the appellant.

206 *Washington on the same side. The first question in the cause is, whether a sufficient consideration is laid in the declaration, or whether it was necessary to lay any at all? I have always supposed it to be a clear principle of law, that a promise without a consideration of some sort, imposes no legal obligation upon the party who makes it. I admit, that if in such a case, he shall enter upon the performance of the act, and shall so mismanage it as to produce an injury to the other party, he will be chargeable with all the consequences. The doubt in this case is, whether it is sufficiently averred in the declaration, that the appellee undertook, and did actually conduct the suit? He is charged only with having promised to do so, and though the appellant (as it is stated in the breach) may have lost the debt in consequence of the appellee having failed to file a declaration, yet this might well happen, and still amount to no more than a breach of promise, made without consideration, and therefore not binding upon the appellee.

The second question is, whether the omission to lay damages in the declaration be fatal? If the damages found by the jury exceed those laid in the declaration it is error, and it can only be cured by releasing the excess; the same principle applies with equal if not encreased force to a case where no damages whatever are laid. I cannot discover any clause in the act of Jeofails which cures this error. That act cures mistakes in stating sums of money, where they are truly stated in any part of the record; but this is not a mistake, it is a total omission to state any sum. The act also cures the omission of an averment of any matter, without proving which, the jury ought not to have given such a verdict, this clause applies only to the averments of such facts as are necessary to describe the plaintiff's case, and which being omitted, must have been proved to warrant the verdict. The truth is, that the objection in this case goes to the verdict itself, which finds more damages than are laid in the declaration.

I admit that the demurrer to evidence presents the most important and difficult question; can the court infer every fact which is necessary to sustain the action? It is essential to this action, that the appellee was employed at the time when the neglect which produced the injury complained of took place. If he were originally employed, it was his duty to have filed the declaration; if he were employed afterwards, to conclude what some other attorney had begun, that other attorney was liable for the neglect, and upon no principle of justice could his faults descend upon his successor.

That Mr. White was employed, 207 *is clear; the single question is at what period? If as counsel to argue the cause, he is not liable for slips committed in the pleadings by another, not employed by him, but by his client.

Now though it be true, that a demurrer to evidence admits the truth of all facts which can be fairly, and consequently inferred from the evidence, yet that inference must grow necessarily out of the evidence. That Mr. White was employed in July 1784, the jury might, and this court may infer, though not positively proved; because the letter W, being affixed to the suit at that time, furnishes ground for the presumption; but because he was employed then, does it follow necessarily, or at all, that he was employed in 1779? That he instituted the suit, or neglected to file a declaration before 1783? These important conclusions do not grow out the facts stated. If presumptions are to weigh, they are strongly in our favor, for the appellee being marked in July 1784, and not before, it is probable that he was not sooner engaged.

It is said that the appellee might have moved the court for leave to file a declaration.—It may be doubted whether he was bound to do this, any more than a carpenter who undertakes to finish a house, is bound to pull it to pieces in order to rectify the blunders of his predecessor. But the breach is, for failing to file a declaration in a suit advised and commenced by the appellee, and not for want of skill, or for omitting to correct mistakes to which he was not privy.

Marshall on the same side. I admit the doctrine laid down in the case of Cocksedge v. Fanshaw, to be correct, but then, there must be some evidence stated in the demurrer from which the particular fact to be concluded from it, may fairly be infered. If in trover there be a demand and refusal proved, the jury may, and (if those facts were stated in a demurrer to evidence) the court ought to conclude a conversion; But if the time of the conversion be important, neither of

them could infer from those two facts, that it was at one, rather than at another period. The time when Mr. White made the undertaking stated in the declaration is all important, for being charged with neglect in that part of his professional duty which belongs particularly to his character of attorney (strictly speaking), he cannot upon any principle be liable, if he were only employed at a late hour to argue the cause. For altho' the duties of an attorney and counsel belong in this state to the same lawyer where he is engaged generally to conduct a suit, yet they are certainly
208 distinct, *if he be employed after the pleadings are concluded. This observation will serve still farther to illustrate an argument which I now mean to urge. It is undoubtedly true, that a demurrer to evidence must not only shew that the plaintiff has a cause of action, but that he has also a right to recover in that very action. This declaration is upon a special contract to conduct the cause, from its commencement to its final determination, and the breach laid is in the non-performance of that special undertaking. It was therefore necessary to prove such a contract because the appellant might have been injured by neglect or want of skill in some part of the management of the cause, and still it might not be imputable to the appellee. Now what facts are stated in this record from which an inference could have been drawn by the jury, or can now be drawn by the court, that the appellee was engaged at any time prior to July 1784? There are certainly none which in the most distant manner lead to such a conclusion.

It is said that Mr. White, though employed at a late hour, might have moved for leave to file a declaration. The answer is, that this forms no part of the charge against him. If this had been really the appellant's case, the declaration ought to have stated "that he was employed after the cause was at issue, and that he failed to make such a motion." But in the present case, the negligence complained of preceded the contract as the evidence proves, whereas it is subsequent to it, according to the charge in the declaration.

Lee in reply. The objection to the form of the declaration, is that it does not aver what damages the appellant had sustained. But the statute of Jeofails cures the omission of all averments, which must necessarily have been proved to warrant the verdict; and as the jury in this case have ascertained the damages which the appellant had sustained, he must have proved to them the extent of the injury which those damages intended to compensate, or else it is not presumable that such a verdict would have been found.

As to the variance discovered by Mr. Ronold, it is not real. The declaration states the amount of the debt due to the appellant by Chambers and that in consequence of the appellee's neglect that debt was lost, but the amount of the judgment is not stated at all, and it does not follow necessarily, that the judgment was for the precise sum which the appellant supposed was due to him.

209 *It is strongly insisted by the counsel for the appellee, that it was essential to the support of this action, that the appellant should have proved the precise time when the defendant was retained in the cause. This is in most cases impossible, since warrants of attorney are never made in this country. But the jury might have concluded from the facts proved, that the defendant was employed early enough to have filed the declaration, and if so, this court will presume every thing against the person offering the demurrer. The essential fact of his having been retained being proved, the jury might well have inferred that he instituted the suit, and that, from the following considerations, viz; that it is most usual in this country to engage attornies generally to conduct a suit from its commencement to its termination; that there was no proof that any other attorney was engaged, a fact which, if true, the defendant might have established; that the cause was not of that difficult nature to require an attorney to conduct the pleadings, and an assistant counsel to argue it; that some evidence of a special engagement ought to have been produced, in order to repel the presumption arising from the general custom of employing but one lawyer in plain cases, whose duty it is to conduct the cause throughout. From these, and many other considerations which might have weighed with a jury, the circumstance of time might well have been presumed.

This is by no means so special an action, as to have rendered it necessary for the appellant to prove the undertaking as laid, because the appellee being in the ordinary employment of an officer of the Court, the law implies a promise to do his duty.

ROANE, J.—The motion in arrest of judgment upon which the District Court alone gave an opinion, presents us with two questions; 1st, whether the omission to lay damages in the declaration, be fatal or not? And 2dly, whether the not laying of a consideration will vitiate the judgment?

I think that the first error may, upon the true exposition of the act of Jeofails be considered as cured, which declares 1st, that no judgment shall after verdict be reversed for any variance in the writ from the declaration, nor 2dly, for any mistake of the christian name, surname of either party, sum of money, &c. in the declaration or pleading, the same being right in any part of the record or proceedings, or 3dly, for omitting the averment of any matter, without proving which, the jury ought not to have given such verdict. The Eng-
210 lish statute of the *21, James I, C. 13, differs from the first member of this clause in this respect; that statute declares, that no judgment after verdict shall be reversed for any variance in form only, between the original and declaration &c. The omission of those words in our statute, will justify us in going farther than to cure a variance merely in form, because that statute being before our legislature, it is fairly to be presumed from the difference of expression, that greater liberality was intended by the framers of our law.

I also think that the 2d member of the clause applies to this case, and that we can-

not properly distinguish between a mistake and the omission of a sum of money, since the same reason applies with equal force to either case.

I have great doubts whether this error could be cured under the construction of the third member of this section. This provision in our law is not taken from any English statute, but is the adoption of a principle established by the courts of that country. The principle as understood there, is, that where the plaintiff has stated his title or ground of action defectively, or inaccurately, it is a fair presumption after verdict, that all circumstances, necessary in form or substance to complete the title so imperfectly stated, were proved to the jury, because to entitle him to recover, they must, have been proved. Rushton v. Aspinall, Dougl. 658. But I question if the omission of damages can come within the above principle, since they form no part of the plaintiff's title; however I give no decided opinion as to this, since it is unnecessary.

The second point arising out of the motion in arrest of judgment is, that no consideration is laid in the declaration. It is stated that the plaintiff then and there employed the attorney, which is tantamount to stating that the plaintiff was then and there bound to pay him for what he had undertaken to perform. But the most compleat answer to the objection is, that the appellee undertook to conduct the suit, and in his management of it, was guilty of such a neglect of his duty as to subject the plaintiff to a loss; after this, it is not competent to him to alledge a want of consideration.

The third point respects the demurrer to evidence. The judgment to be given is, that the evidence is, or is not sufficient to maintain the issue joined on the part of the appellee. Of this, the jury are the only competent judges, and therefore if the case be withdrawn from their decision by this mode of proceeding, the court must presume any and every fact, which the
211 *jury might out of complicated testimony have infered. But those conclusions of facts must be such, as the jury might from a just and reasonable construction have made, and not arbitrary inferences, or such as might be drawn from a part only of the whole evidence.

The charge is, that the defendant commenced and mismanaged the suit. The evidence of the first witness, if it stood alone, might correspond with this charge, since a jury might consider the message sent to the appellant, as having reference to an engagement before made to commence and prosecute the suit. But the appellant not satisfied with this, produced the dockets of the court, which prove strongly, if not satisfactorily that the appellee was not retained in the cause until July 1784, and thus every presumption of an engagement at a prior period, arising out of the first piece of testimony, is completely demolished. With an accurate attention to the whole evidence, a jury could not reasonably and properly infer an original engagement, and consequently could not consider the charge laid in the declaration as being sustained. I therefore think, that the District Court was wrong in the opinion given upon the motion in arrest of judgment, but that the judgment upon the demurrer to evidence is correct.

CARRINGTON, J.—Upon the two first points, I entirely concur in opinion with the judge who has just spoken.

It is undoubtedly true, that an attorney is liable for neglect of duty, and that he is bound to make retribution to his client for the injury which he may thereby sustain. That there has been mismanagement in this case, is not denied; the instance stated and proved was in the failing to file a declaration; but there is no evidence, that the appellee was originally employed in the cause, so as to be properly chargeable with this neglect, nor are there any facts stated, from which such a conclusion could with any propriety be made. On the contrary, it is fairly to be infered, that he was not engaged until July 1784, and we all know, that it is very usual to introduce new counsel into a cause during its pendency, sometimes to conclude what another has begun, and at other times to assist in the management of it. It would be monstrous, if in those cases, the blunders of one attorney should be imputed to his successor, who was not privy to, or assisting in the commission of them.

LYONS, J.—As to the point of consideration, the rule is well laid down in the case of Coggs and Bernard, 2 Ld. Ray, 909.

That though a man is not bound to do
212 an act for another *without a reward, yet if he will voluntarily engage, and enter upon the peformance of it, he is liable for the consequences of his improper management.

The second point is, the omission to lay damages in the declaration. In actions which found entirely in damages, it is absolutely necessary at common law to lay them in the declaration; but in debt it is otherwise. The plaintiff ought to know what are the damages he has sustained, and if he lay none, he cannot say that he has sustained any. If he recover more than is laid, he is not entitled to the excess, and in that case he can only help himself by releasing the excess. But where no damages are laid, the plaintiff cannot remit so as to cure the error. In Pilford's case, 10 Co. 116, it is laid down, that where damages are the cause of action, the plaintiff must declare for them, or else cannot recover; but it is said to be otherwise in real actions.

In cases where damages are the cause of the action, it was formerly the practice upon a demurrer to enter up judgment for the damages laid in the declaration: besides they give jurisdiction to the court, as is laid down in Hardwick's cases, page 6, where it is determined, that in actions founded in damages, those laid in the declaration are considered as the cause of action.

Thus the case would have stood independent of the act of Jeofails; but now, the declaration may be amended by the writ, since the mistake may be corrected by another part of the record where the sum is rightly stated. For although you cannot have advantage of the writ to

plead a variance, without craving oyer of it, yet you may apply to it to amend by, though oyer was not taken. In England, it was formerly usual to stay proceedings in error until the amendment could be made below, and then to award a certiorari; but at this day, the court consider the amendment as being made, in cases where it would be proper to allow it to be made.

As to the variance spoken of by Mr. Ronold, it does not appear in the record as he supposed.

Respecting the merits of the case, as presented to us by the demurrer to evidence, I feel no difficulty. To make an attorney liable upon a charge of this sort, gross negligence should be proved. It is also necessary for the plaintiff to shew, that the attorney was employed at a time when he might have been guilty of the charge; if it he for failing to file a declaration, it should appear that he was engaged at a stage
213 of the cause, *when he ought to have filed it. If a tradesman be employed to complete a piece of work already begun, will any man say that he is responsible for the blunders and mistakes of another who had preceded him? Surely not. It is evident from this record, that the appellant was not employed before the year 1784, and of course after the cause was at issue.

The PRESIDENT, concurred in the opinion delivered by the other judges, and the judgment was affirmed.

Bogle and Scott v. Fitzhugh.

October Term, 1796.

Motion—Rehearing at Subsequent Term—Consent of Parties.—The second scire facias against the special bail issued on the 3d of April, 1771, returnable to the October term, and was returned non est. At June Court, the bail moved to surrender the principal, which was refused. Afterwards, at a Court held in July 1773, the motion was renewed, by consent of parties, when the Court allowed the render. The second motion being by consent, was properly before the Court, and the decision of it was correct, since the writ being made returnable to an improper term, (October instead of May) it was merely void, and consequently the first motion was made in time.

Jurisdiction—Consent of Parties.*—Consent of parties cannot give jurisdiction where the Court has it not. But this rule is applicable only to a case of original jurisdiction.

The appellants having recovered a judgment against B. Grymes in Spotsylvania County Court, issued a capias ad satisfaciendum, which was returned "not found."

The second scire facias against the appellant, the special bail, issued on the 23d of April 1771, returnable to the October court following, which was likewise returned "not found."

At June court, in the same year the special bail brought the principal into court, and delivered him up in discharge of his recognizance. The plaintiffs refused to receive, or to charge the principal in execution, alledging, that it was then too late for the special bail to make the surrender, of which opinion was the court, the appellee then put in a plea which was joined.

Afterwards at a court holden in July 1773, the appellee again moved to surrender the body of the principal, in discharge of his undertaking as special bail, and the motion coming on to be reheard by consent of parties, the court were of opinion, that the render might then be made; whereupon the principal rendered himself up in discharge of his special bail, who was thereupon discharged from his recognizance, and it was further ordered, that the defendant should pay costs. From this order and judgment, the plaintiffs appealed and the same was affirmed in the District Court of Fredericksburg from whence an appeal was prayed to this court.

ROANE, J.—The only doubt which I have had respecting this case was, whether the District Court did right in affirming
214 the *last judgment of the County Court? It occurred to me upon the first impression of the case, that the County Court, having once decided the question finally, even the consent of parties could not give them jurisdiction, to rehear and redetermine it at a subsequent term. But upon further reflection, I am satisfied, that if the first judgment of the court was wrong, we may correct it, and now give the judgment, which ought then to have been given. That there is error in it, there can exist no doubt; the writ was made returnable to the October instead of the May court, as it ought to have been, and the offer to surrender, was prior to the return day improperly named in the writ. I think the proceedings ought to be reversed, and the first judgment of the County Court corrected.

CARRINGTON, J.—I discover no objection to the last judgment of the County Court.

It was a renewed motion; brought on and reheard by consent of parties, and it is every day's practice to reinstate suits, which have been dismissed, or tried, with the consent of parties, and thus to give jurisdiction to the court to rehear and determine them. The return day of the second scire facias as stated in the writ, was proper, or it was not; if the former, then the surrender was made before the return day, and consequently in good time; if the latter; then the court should have quashed it, in which case also, the bail was in time: So that either way, the first judgment was erroneous.

The objection as to jurisdiction, goes only to original jurisdiction; such, as for a Court of Chancery to try a cause for assault and battery, or the like. But in this case, the court had complete cognizance of the subject matter, and might properly rehear the motion which was brought before them.

The judges were formerly very strict, respecting the privilege of the special bail, to discharge himself after a return of non est inventus, upon the capias against the principal. The recognizance in strictness became forfeited by this return, and the plaintiff was, and still is at liberty to proceed immediately against the bail.

At first, the bail was allowed to discharge himself by bringing in the body before, or upon the return day of the first scire facias. afterwards greater liberality prevailed, and the indulgence was extended to the return day of the second writ.

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*See monographic *note* on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

In this case, the motion to surrender the principal, was made before the return day of the second scire facias, and though overruled upon the first attempt, no objection could exist against the 215 *repetition of it at a subsequent day. The scire facias being made returnable to an improper court, is merely void, and though it could not be amended, it ought to have been quashed. But being void, the bail had a right to take advantage of it, and deliver up the body of the principal. I am for affirming the judgment.

The PRESIDENT. It is apparent, that the County Court acted in the first instance under a mistake, supposing the scire facias to have been returnable to May court, as it ought to have been, instead of October. If this had really been the case, their judgment would have been proper. Afterwards, the defect in the writ was discovered, and to prevent a writ of error, the consent to rehear the motion was probably accorded.

It is very true, that consent of parties cannot give jurisdiction, where the court has it not. But this principle is only applicable to a case of original jurisdiction. I think the judgment of the District Court right, and that it should be affirmed.

Judgment affirmed.

Burk's Executors v. Tregg's Executors.

October Term, 1796.

Record—Proof of—Production of Original Record.*—Upon the plea of "no such record," if the record be of the same Court, a copy of it ought not to be given in evidence, but the original ought to be produced for inspection.

In March 1788, the appellees sued a writ of scire facias against John Burk and Joseph Cross, executors of Henry Burk, upon a judgment recovery by the testator of the appellees, against Thomas Burk, and the said Henry Burk the security for his appearance. The defendant John Burk, to whom alone the writ was made known, appeared, and after craving oyer of the scire facias, pleaded, 1st, no such record; and 2dly, "payment by Henry Burk, of the only debt recovered against him by the said Tregg, whereof there is any appearance of a record." Upon both pleas, issues were joined.

Both issues being found in favor of the plaintiffs, the former by the court, upon inspection of a copy of the judgment, and the latter by the jury, judgment was given for him. At the trial of the cause upon the first issue the defendant filed a bill of 216 exceptions *to the opinion of the court, allowing a copy of the record of the judgment only, without the pleadings, to be given in evidence.

At a subsequent court, viz, in November 1789, the matters of law arising upon the bill of exceptions were argued, and decided in favour of the defendant, and judgment was entered for him, with costs against the plaintiffs.

An appeal was prayed to the District Court of Fredericksburg, pending which the appellee John Burk died, and a scire facias to revive, was awarded against Thomas Burk executor of the said John Burk.

The District Court reversed the judgment of the County Court and gave judgment, that the appellant might have execution against the appellee Thomas Burk, for the amount of the original judgment and costs of the scire facias, to be levied of the goods and chattels of the said Henry Burk in the hands of the said Thomas Burk to be administered if so much &c. If not then of the goods and chattels of the said John Burk deceased in the hands of the said Thomas Burk to be administered, if so much thereof he had.

From this judgment an appeal was prayed to this court.

ROANE, J.—The District Court did right in reversing the second judgment of the County Court, and by doing so, it in effect affirmed the first judgment of that court. Against that judgment it is objected, that a copy of the original judgment ought not to have been given in evidence. It is certainly a well established rule in England, that upon the plea of no such record, if the record be of the same court, it ought to be inspected, and it is not sufficient to produce a copy in evidence. I do not know that in this country, that rule has ever been changed, nor do I think it ought to be. There are many imperfections in the record, but as I am clear that the judgment of the District Court, which affirms the first judgment of the County Court is wrong, and must for that reason be reversed, it is unnecessary to take notice of any other error.

CARRINGTON, J.—I concur in the opinion just delivered although it has been common in this country to give copies of judgments in evidence, because the practice has never been controverted, yet I am clear, that the record itself, where it is of the same court, should be inspected.

LYONS, J.—It was irregular in the court to try the plea of payment, before it had been established whether there was such a record as the one set forth in the 217 pleadings. I agree with *the other judges, that where the record is of the same court, it is not proper upon a plea of "no such record," to give a copy in evidence. The record itself should be inspected; if there be a variance, the minute book may be resorted to, if it be of the same court; if of another court, there should be a full and complete record produced. Whether in this latter case, the seal of the court should be annexed, I will not say, as many courts have no seals, though they are required by law to provide them.

There are many other errors in this record. The judgment should have been against both executors, although the scire facias was made known, to only one of them; but the costs in that case should have been awarded against him only who appeared and pleaded. The County Court were also wrong in reversing at a subsequent court, the judgment they had given at a former one. But as the court are agreed upon the point of evidence, it will be unnecessary to give any opinion upon any other part of the record.

Judgment of the District Court reversed with costs, to be levied of the goods and

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*See *foot-note* to Anderson v. Dudley, 5 Call 529. The principal case is cited with approval in Digges v. Dunn, 1 Munf. 59; Dykes v. Woodhouse, 3 Rand. 314.

chattels of the testator William in the hands of the appellees to be administered, if so much &c. but if not, then of their proper goods and chattels. And the court proceeding to give such judgment as the said District Court ought to have given, is of opinion, "that the said John Burk having pleaded, that there was not any such record of the judgment as set forth, and supposed in the writ of scire facias in the proceedings mentioned, and the record denied by the said plea being the record of the said County Court of Caroline, as the appellees in replying, said they were ready to verify by the records of the said Court, the copy of the record of the said judgment in the bill of exceptions mentioned, ought not to have been allowed to go in evidence to the jury, on the trial of the issue, but that the original record ought to have been produced in court for inspection, and that the judgment of the said County Court is erroneous."

Judgment of the County Court reversed, with costs of the appeal in the District Court to be levied of the goods and chattels of the testator Henry in the hands of the appellant to be administered, if so much thereof he hath. Verdict set aside and a new trial awarded.

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218 *Drummond v. Crutcher.

October Term, 1796.

Variance—Assignment of Bond—Case at Bar.—Declaration on a bond given to A. and by him assigned to the plaintiff. The bond produced in evidence had had an assignment indorsed to B. which was stricken out, except the signature of the obligee, above which was indorsed the assignment to the plaintiff. There is no variance between the declaration and the bond.

This was an action of debt brought in the County Court of Caroline, by Drummond, assignee of H. Crutcher, against the appellee upon an assigned bond. The defendant put in the plea of payment, and at a subsequent term being allowed to amend, pleaded that the debt was due to a British subject and not recoverable in any court of this commonwealth, issue was joined upon both pleas.

At the trial of the cause, the plaintiff filed a bill of exceptions, stating, that the defendant had been permitted by the court to give in evidence to the jury, that a certain James Fletcher, who was then dead, (and who it was discovered by an indorsement erased by the stroke of a pen, had been an indorsee) had said, that he had put a bond of H. Crutcher senior, to H. Crutcher junior, into the hands of Wallace & Co. to which evidence the plaintiff objected, but was over-ruled by the court: That the plaintiff moved the court to instruct the jury, that the mere possession of a bond, without indorsement, did not give a complete right to the same, to the possessor, but the court determined that the possession did vest the right.

The judgment of the County Court which was for the defendant, being upon an appeal to the District Court reversed, and the verdict set aside, the cause was retained in that court for a new trial.

At the trial in the District Court, the plaintiff filed a bill of exceptions, stating, that the plaintiff had offered in evidence, a bond, given by the defendant, to H. Crutcher, upon the back of which had been endorsed, an assignment by H. Crutcher to James Fletcher, which said assignment had been stricken out by the mark of a pen, except the signature of H. Crutcher, and an endorsement to the plaintiff substituted in its place, just above the name of the assignor H. Crutcher, in a different hand writing from the first endorsement. That the court refused to suffer the bond with the endorsements to go in evidence to the jury.

Verdict and judgment for the defendant, from which the plaintiff appealed.

219 *ROANE, J.—The only question is, whether the evidence offered by the plaintiff, corresponded with the case alledged in the declaration, or not? If it did, then it was proper, and should have been admitted by the court; if otherwise, it was rightly rejected.

The declaration states a bond given by the defendant, to Henry Crutcher and an assignment thereof to the plaintiff. It was therefore necessary, that the bond produced in evidence should answer this description. I think it did so, notwithstanding the appearance of a prior assignment, which being erased, produced in itself no variance between the case alleged, and that proved.

The bill of exceptions, states, that this endorsement had been erased; but when, or by whom does not appear. It may have been made by the obligee himself, who might never have parted with the possession of the bond, until the assignment made to the appellant. If indeed it had appeared, that there had been foul or improper conduct in the transaction, on the part of the appellant, it might have been otherwise.

But as the case comes up, the only question is, as to the fitness of the allegation to the evidence.

CARRINGTON, J.—I entirely concur in the opinion just delivered. It is a naked case which exhibits no other poin than what respects the correspondence between the proof and the case stated; and as it appears to us, there is no variance between them.

LYONS, J.—Concurred.

Judgment reversed and a new trial awarded with costs.

Mackie's Executor v. Davis, &c.

October Term, 1796.

[1 Am. Dec. 482.]

Assignment—Liability of Assignor—Due Diligence—Province of Jury.*—The assignor of a bond is liable to the assignee, who, after having used due diligence to recover the money from the obligor, has

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***Assignments—Liability of Assignor—Due Diligence.**—In West Virginia, the assignor of a bond is liable to the assignee, who having used due diligence to recover the money from the obligor, has failed to do so. Thomas v. Linn, 40 W. Va. 130, 20 S. E. Rep. 880, citing the principal case.

The principal case is cited in Dent v. Ashley, 7 Fed. Cas. 497, for the proposition that the assignee of a bond or note, not negotiable, must, before he can resort to the assignor, prosecute the payor or obligor to insolvency.

Same—Same—Same—Suit Excused When.—As a general rule, the assignee cannot recover from the assignor the amount paid for the assignment, unless due diligence is used, without effect, against the debtor; but it is in no case necessary to pursue the debtor, if it be clear that such pursuit would be unvailing; as if the obligor be insolvent at the time of the assignment; or when the note falls due; or

failed to do so. What is due diligence, is a question proper for the determination of the jury.

Assignor of Promissory Note—Liability—Statute of Ann.—The assignor of a promissory note was liable to the assignee before the Statute of Ann. in case payment was not made by the maker, when demanded.

This was an action on the case brought by the appellees against the appellant, in the District Court of Williamsburg. The declaration contained three counts. The first stated that the testator Mackie, being indebted to the plaintiffs in the sum
220 *of £1000, for money laid out and advanced for his use, and being possessed of a bond of one M, to that amount, a conversation was had between them &c. whereupon it was agreed, that Mackie should assign over the said bond to the plaintiffs, and that the plaintiffs should receive the same, and should demand payment of the said bond from the said M, and on failure to pay, that they should bring suit upon the said bond, and should prosecute the same in a reasonable time to judgment and execution, and that the said Mackie should be discharged from the sum of money then due as aforesaid, but in case all or any part of the said bond should be undischarged on demand, and suit as aforesaid should be prosecuted and judgment obtained and execution should thereupon be sued out, and on return thereof there should not be wherewith to satisfy the same, that then the said Mackie should make good the whole, or such part of the said bond as should then remain due: that in consideration of the plaintiffs promise to perform their part of the said agreement, the defendant promised to perform his part of the agreement. That the plaintiffs did demand payment of the said bond according to the tenor of the said agreement, of which they received £100, in part thereof, and no more, and on refusal to pay the balance, they had in a reasonable time brought suit upon the said bond, recovered a judgment, and sued out an execution in due form of law, on which execution, it was returned, that there were not effects wherewith to satisfy the said debt, and that the plaintiffs have discharged the said Mackie from the debt first due. 2d count, That the said Mackie being indebted to the

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where the note is a forgery; or where the maker is a married woman. Morrison v. Lovell, 4 W. Va. 350, citing *Mackie v. Davis*, 2 *Wash.* 219; Violett v. Patton, 5 Cranch 142; Brown v. Ross, 6 Munf. 391; Caton v. Lenox, 5 Rand. 31; Burrell v. Smith, 7 Pick. 291; Erwin v. Downs, 15 N. Y. 575.

In Slifer v. Howell, 9 W. Va. 397, the court said: "A suit is not always necessary to entitle the assignee to recover back, but he must show that a suit would be unproductive of good, and that the assignor has suffered no loss for the want of such suit; such as the notorious insolvency of the debtor, or some reason why a judgment could not be had. *Mackie's Ex'or v. Davis*, 2 *Wash.* 219; Caton v. Lenox, 5 Rand. 42."

Same—Same—What is Due Diligence.—As to what is such due diligence on the part of the assignee of a bond or note to recover from the obligor or maker, as will entitle him to resort to the assignor, see the principal case cited in Smith v. Triplett, 4 Leigh 597, 599; Saunders v. Marshall, 4 Hen. & M. 456; Barksdale v. Fenwick, 4 Call 502, 503, 504, 506, 508, 510; Dunlop v. Harris, 5 Call 55; Bronaugh v. Scott, 5 Call 88; Hopkins v. Richardson, 9 Gratt. 495; Goodall v. Stuart, 2 Hen. & M. 113, 115; M'Williams v. Smith, 1 Call 126. See Lee v. Love, 1 Call 497, and *note*. For a full discussion of this subject, see monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

Same—Recovery from Assignor—Assumpsit.—That recovery may be had by an assignee against an assignor of nonnegotiable paper on the common counts for money had and received, in *indebitatus assumpsit*, see the principal case cited and approved in Hughes v. Frum, 41 W. Va. 447, 23 S. E. Rep. 605; Drane v. Scholfield, 6 Leigh 396; Walker v. Henry, 36 W. Va. 110, 14 S. E. Rep. 443. See *foot-note* to M'Williams v. Smith, 1 Call 123. See monographic *note* on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 183.

But see the principal case cited in Wood v. Luttrel, 1 Call 238, 240, where the court said that there should be special counts setting forth the nature of the demand, besides the common money counts. See the principal case cited in Barksdale v. Fenwick, 4 Call 505; Walker v. Henry, 36 W. Va. 107, 14 S. E. Rep. 442.

Same—Same—Grounds of Recovery.—The principal case is cited in Cunningham v. Herndon, 2 Call 532, for the proposition that an assignment presupposes a property in the assignor, and a recovery may be had against him on the failure of the obligor, on the ground of a debt due by him to the assignee; of which the draft, called the assignment, is an evidence.

Same—Same—Same—Proof of Mesne Endorsements.—The principal case is cited in M'Williams v. Smith, 1 Call 125, as authority for the proposition that the action by the assignee against the assignor is founded principally on the privity which exists between them, and, therefore, the mesne endorsements need not be proved.

Same—Recovery by Assignee against Remote Assignor.—Prior to the statute authorizing a recovery from an assignor, an assignee had the right, upon the principles of the common law, to recover from his immediate assignor under the contract implied from the assignment, that the assignor would repay the consideration he had for the chose in action assigned, if payment thereof, by the use of due diligence, could not be obtained from the obligor or maker. This implied promise was not considered, however, to extend at law to any other than the immediate assignee, and consequently no assignee could recover at law from a remote assignor. Long v. Pence, 93 Va. 587, 25 S. E. Rep. 593, citing *Mackie v. Davis*, 2 *Wash.* 219; Caton v. Lenox, 5 Rand. 31, 42; Mandeville v. Riddle, 1 Cranch 290; Yeaton v. Bank of Alexandria, 5 Cranch 49. The principal case is cited in Drane v. Scholfield, 6 Leigh 396; Walker v. Henry, 36 W. Va. 110, 14 S. E. Rep. 443; Dunlop v. Harris, 5 Call 43, 44, 51, 53, 57. But see Va. Code 1887, § 2861; W. Va. Code, ch. 99, § 15, authorizing a recovery by an assignee against a remote assignor.

Same—Same—Measure of Recovery.—The assignee of a note, not negotiable, can only recover from a remote assignor the consideration paid such assignor by his immediate assignee for such note. Goff v. Miller, 41 W. Va. 683, 685, 24 S. E. Rep. 644, citing 1 Tuck. Com. 336, 337; *Mackie v. Davis*, 2 *Wash.* 219; Whitworth v. Adams, 5 Rand 377; Drane v. Scholfield, 6 Leigh 397; Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 878. The principal case is cited with approval in Thomas v. Linn, 40 W. Va. 122, 20 S. E. Rep. 881; Gibson v. Fristoe, 1 Call 75.

Same—Warranties of Assignor.—In Bronaugh v. Scott, 5 Call 94, PRESIDENT LYONS said it was decided in the principal case that the assignor warrants that the debt is due, and the debtor solvent. For a collection of authorities on this point, see monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409

Assignment of Bonds and Notes—Effect of Statutes.—In Caton v. Lenox, 5 Rand. 42, the court discussed the effect of certain early statutes on the assignability of bonds, notes, etc., and after citing the principal case and Norton v. Rose, 2 Wash. 233, it was said: "These cases decided, that it was not the intention of the legislature, to place bonds and notes on the footing of commercial paper; but merely so far to change the common law, as to enable the assignee to sue in his own name; taking the paper subject to all the equity of the obligor or maker."

Leading Case on Doctrine of Assignments.—In Merchants' Nat. Bank v. Spates, 41 W. Va. 27, 23 S. E. Rep. 682, the court said: "The case of *Mackie v. Davis*, 2 *Wash.* (*Va.*) 219, was decided in 1796, and has been a leading case in Virginia and in this state on the general doctrine of the assignment of nonnegotiable instruments, and the general doctrine there discussed has from that day to this, been followed, expanded, and applied in many cases." See generally, monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409. See 2 Va. Law Reg. 559.

Debt—Acceptor of Bill.—As to whether an action of debt will lie against the acceptor of a bill of exchange, see the principal case cited in Smith v. Segar, 3 Hen. & M. 397; Regnault v. Hunter, 4 W. Va. 269.

plaintiffs in another sum of £1000, did in consideration that the plaintiffs would release him from the said debt, assign to them another bond for the same amount due from one M, which assignment was made according to the act of assembly in that case made &c. whereby the defendant became liable on default of the said M, to pay the plaintiffs all such sums of money as should remain due on the said bond; the breach is, that the said bond except £100 is yet due, and that the plaintiffs are unable to recover the same, and the defendant being so answerable did assume to pay the plaintiffs the balance of the said bond yet due. 3d count for money had and received to the use of the plaintiffs.

Upon the pleas of non assumpsit, and the act of limitations, the jury found a verdict for the plaintiffs, subject to the opinion of the court, "whether an action can be 221 maintained against *the endorsor of a bond, or his executors, without any special undertaking on his part to insure the payment thereof.

Judgment for the plaintiffs in the District Court, from which the defendant appealed.

Washington argued the case for the appellant. I am not concerned in this cause; but as it involves a question which may arise in another case before the court, in which I am engaged, I will beg leave now to state my sentiments upon the subject.

I shall consider the question generally, whether the assignor of a bond, without a special contract, is liable, in case of inability in the obligor to pay?

The material grounds of the action of assumpsit arising from an implication of law, are, 1st, To recover back money paid under a mistake, or through deceit. 2dly, To recover money paid for a consideration which happens to fail. 3dly, To recover money paid to one acting under a void authority. 4thly, For money obtained by extortion &c. 5thly, For money embezzled, of which a person has been defrauded by cheating, and 6thly, For money received on a judgment which is afterwards reversed. If the present question can be brought within the principle of any of these cases, it must be the second.

I shall here make a concession, which will at once shew the full extent of the application which, I suppose, may be made of the principle authorised under this head. If the assignor have no interest in the thing assigned, as if he be not entitled to the bond, or if the same hath been before satisfied, whether with, or without his knowledge. I will not question his liability in this form of action; for in either of those cases, there is a total failure of the consideration. He receives a consideration upon the avowed sale of something, namely a debt due, when in fact, there is no debt due at all, or if due, he has no title whatever to receive, or to dispose of it. So, if a man sell any other chattel, to which he has no title, this action will lie to recover back the money paid for it, upon the principle, that the consideration had failed. The reason is, that in all sales of personal property, there is an implied contract on the part of the vendor, that he has a right to make the sale, and for a breach of this implied contract, assumpsit to recover back what was paid will lie.

But the implied contract goes no farther. If the assignor have a title to the debt of which the bond is the evidence, there is at the time, an existing, and valid con- 222 sideration given. A future *diminution or loss of the debt, can never upon any principle relate back to the contract, so as to destroy it, any more, than the subsequent death of a horse would, or the burning of a house in the possession of the vendee. I will go farther, and admit, that if the assignor be guilty of fraud, as by mistating the circumstances of the obligor, or even by concealing them, (if known to him) he might be liable; not because the consideration had failed, but on account of the fraud.

There is certainly no ground to create an implied assumpsit that the assignor will pay, if the obligor cannot. An implication of this sort must be a necessary one, or such as grows essentially out of the justice of the case. If the consideration fail, it is a just and natural implication that the money should be repaid; but if it turn out to be less valuable than the vendee or assignee supposed, (the vendor being clear of fraud,) it is only an unfortunate speculation, which the vendee must bear. Such an implication is inadmissible on another ground; because it being in the power of the parties to stipulate for such a responsibility, their silence on the subject, is strong evidence that it was not intended.

Bonds are as much articles of traffic as any other personal property; their value depends upon the ability of the obligors to pay, and of the assignee to wait for his money. They never command their nominal amount. Consequently, in bargains of this kind, the purchaser will inform himself of all those circumstances, which may enable him to decide upon the value of the bond; if he deceive himself, he has no person to blame. If the obligor be able to pay at the time of the assignment, but from an unexpected accident become afterwards disabled, ought the loss to fall upon the assignor, who if he had retained the bond, might in some way have got satisfied? If the assignor can be made liable under an implied assumpsit, in case the obligor cannot, with equal propriety, would he be liable in case the obligor would not pay, and this would assimilate the case of bonds to bills of exchange without the custom which regulates this liability in the latter case, as I shall presently shew.

There is a much stronger reason, why the assignor of a debt not legally transferable, should in such an event be made liable, than in a case of this sort; for in that, it might with some plausibility be contended, that since the debt could not be sold, or transfered, the assignment, which must be construed to mean something, could only mean that the assignee should receive the money. But the assignment of a bond being 223 necessary to transfer *a legal right to the money, its use is apparent, and leaves no room for presumption.

I have thought proper to consider this question upon common law principles, be-

fore I notice those cases which may seem to have an influence upon it.

As there are two instances, in which the assignor of a negotiable paper may be made liable in default of payment, they must be noticed, and examined; these are the cases of bills of exchange, and of promissory notes. The right of recovery in the first is created, not by the common law, but by the custom of merchants. The common law only provides the remedy. An implied contract between the assignee and the assignor is created by the law of merchants, which when once established, brings the case within those common law principles where the action of assumpsit is warranted. By the very act of drawing, a man, by the mercantile law, is understood impliedly to engage, not only with the payee, but with every subsequent holder, that the drawee is to be found at the place at which he is described to be, that if the bill be duly presented he will accept it, and when due, that he will pay it, if presented in proper time.

In default of any of these particulars, his implied contract is broken, and if the holder perform the implied conditions on his part, the drawer is liable. But what law, what custom has sanctioned the presumption of a like implied contract in the case of bonds? And without such a supposed engagement, there is no common law principle to warrant a recovery. The law of merchants is in commercial matters, what municipal law is in the common transactions amongst men. We cannot fairly reason from cases governed entirely by that law, to others not under its influence. As to promissory notes, the right of recovery against the endorser is expressly given by the statute of 3d and 4th Ann. C. 9, and from this provision, an invincible argument is to be drawn in favor of my position; for if in a commercial country, like England, it was necessary for the legislature to provide a remedy against the endorser of a promissory note, it is obvious, that no such right existed at common law.

Another, and a still stronger argument to prove the same conclusion is furnished by our laws. The act of 1748, in express terms, provides a remedy against the drawer or endorser of a bill of exchange, authorises the assignment of bonds and notes of hand, and yet is silent as to the liability of the assignor.

224 *The same subject is taken up in the revision of the laws but a few years past; the importance of this sort of negociation was better understood; the statute of Ann was before the legislature, to prove that legislative aid was necessary to produce this liability, and yet no such provision was made.

I hold it that legislative interference is necessary; that if bonds are in this respect to be likened to bills of exchange, some system should be established similar to that enacted (if I may use the expression) by the law of merchants. For I would ask, upon what conditions, and at what time is this responsibility to commence? When does the action accrue? Is a demand and a refusal sufficient; Must there be a judgment and execution? Must there be an actual insolvency in the obligor proved, or will a return of nulla bona suffice?

If the court determine that the assignor is liable, there will be a necessity, to complete the system, that all these points be fixed; for else, the difficulties which attend this question will be rather encreased than diminished.

The mercantile law respecting bills of exchange is perfect upon this subject; the drawer or endorser is liable, but upon certain conditions; the bill must be duly presented, then protested, and afterwards, notice thereof given immediately to the persons who are to be charged, which gives them an opportunity to save themselves. If we adopt the same principle, it behoves us to borrow the same regulations; and the question is, if this be the work of a legislative, or of a judiciary body? I think it cannot belong to the latter.

Wickham for the appellee. The act of Assembly, by authorising the assignment of bonds, does in effect put them upon the footing of other negotiable papers, except in one particular instance, which is specially provided for; I mean, the right of the obligor to discount against the assignee, payments made to the obligee before notice of the assignment.

It is admitted, that in the case of a bill of exchange, the indorser is liable; but it is contended, that this is by the custom of merchants. I believe no case can be produced to support this idea; for in the action against the drawer, it is not necessary to set out the custom, as it is in an action against the acceptor, 3 Bac. ab. 614. The custom of merchants regulates the steps necessary for the holder to pursue, and annexes conditions which if not performed, may defeat his right to recover. But the right itself is founded in common law principles.

The indorser sells to the indorsee, the 225 money, of which the bond is but *the evidence, and impliedly undertakes that it shall be paid; if not, that then he will make it good. The assignment, like an order drawn, is evidence of so much due from the assignor, in case the money is not paid by the obligor, or drawee. The assignment of a bond is in the nature of an order drawn by the creditor upon his debtor, directing him to pay to the assignee the contents of the bond, with this single difference; that if it had been an independent order, not transferring at the same time a right to the evidence of the debt, as well as to the debt itself, a demand upon the drawee and his refusal, would entitle the payee to recover of the drawer; for without acceptance, the payee could maintain no action against the drawee. But the assignment of the bond itself, conveying not only a right to the debt, but a legal right to sue, the assignee ought to pursue the obligor as far as he can, before he resorts back to the assignor, because such would naturally be the understanding of the parties at the time of the transfer.

When bonds are endorsed for valuable consideration, it is always to be presumed, that a precedent debt was intended to be thereby discharged. That they may sometimes be sold, I shall not dispute, but there

are so many cogent reasons against such a traffic, that it is never to be presumed, unless the contrary appear. A bond is but the evidence, or representative of money, and therefore may properly discharge a pre-existing debt. This was undoubtedly the use which the legislature supposed would be made of bonds, when assignments of them were permitted. It was never contemplated, that they were to become a subject of speculation. If a bond be assigned in consideration of a precedent debt, it will be admitted that the debt is not thereby discharged without a special agreement for that purpose. The reason of this will apply with considerable force, even to the case of bonds actually sold. It is the payment of the money, not the bare assignment which forms the consideration in either case; if the money be not paid, the consideration fails, as completely, as if no such debt had in truth existed. Where is the difference to the assignee? The question in substance is always the same, namely, has the assignee received the consideration, for which he paid his money? For unless he has, the vendor cannot ex æquo et bono retain what he has received.

This case is assimilated (tho' I think not very aptly) to that of the sale of personal property. But admit the likeness for a moment, and the argument on the other side will not be thereby strengthened. One man then sells to another a horse, or so 226 *many bushels of wheat in the possession of a third person, and sends an order for the delivery; the person on whom the order is drawn, has the property actually in possession, but afterwards sells it, destroys it, or refuses to deliver it up. Will not the vendor be liable, upon his implied contract, not only that the property was his, and in existence, but also that the holder would deliver it on demand? Such is the nature of an assignment of a bond, which in truth, is the mere transfer of so much money of the assignor's lying in the hands of the obligor; it is not the sale of the paper and wax, for that might have been sold without the aid of the legislature.

No argument of weight can be drawn from the statute of Ann, the professed object of which, was to assimilate promissory notes to bills of exchange; to ascertain the time, and terms of the endorser's liability.

The argument, that an implied agreement on the part of the assignor, cannot be presumed, because the parties might have expressed it, proves too much; for it would defeat such an implication, in cases where it is admitted to exist; such as the implied warranty upon the sale of personal property; and in cases, where the consideration happening to fail, a promise to repay the money, is implied.

As to the difficulties apprehended by the counsel for the appellant, they are not insurmountable. It is not necessary for the court to specify, at what period, or upon what conditions the remedy against the assignor may be pursued. It is sufficient, if it be laid down, that due diligence to recover the money from the obligor must be used; and what is due diligence, must always be a fact fit for the determination of a jury, upon the whole evidence submitted to them.

Randolph on the same side. I shall endeavor to shew, that the liability of the assignor is founded in common law principles. The examples of implied assumpsits mentioned by Mr. Washington, are entirely correct, but I cannot perceive, why they were enumerated, unless for the purpose of diverting our attention from a general principle, not coming literally within either of those mentioned by him, but which must decide this question. This principle is laid down by lord Mansfield, in the case of Moses v. M'Farlane, 2 Burr. 1008, in answer to an objection against the defendant's being obliged to refund money, which he had improperly recovered in an adversary suit. I will quote his words: "If the defendant be under an obligation, from the ties of natural justice, to refund, the 227 *law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract." Again, he lays it down, that this action will lie, if in conscience and justice, the defendant ought not to keep the money. Now for the application of the principle; if the debt had not been due to the assignor, it is admitted that he would have been liable. Why? Because the consideration having failed, the assignor ex æquo et bono ought not to keep, what he had received, and he is presumed to have contracted to refund it. But is the situation of the assignee better, or is his equity less cogent if the obligor be unable to pay? In both cases, he loses the thing purchased, and paid for, land consequently, in both, the consideration has failed. Nor is the situation of the assignor made worse, so as to create in him an equity, strong enough to repel that of the assignee; for the debt might as well have been lost in the hands of the former, as of the latter.

The only difference between the assignment of bonds in England, and in this country, is, that in the former, the right to sue in the name of the assignee is not transferred, and therefore it is accompanied with a power of attorney. If the money cannot be recovered, it is not questioned but that the assignor is liable, whether he sold the claim or paid it away in discharge of a precedent debt. And why is he not equally liable, where by the assignment, he puts it in the power of the assignee to use his own name, instead of that of the assignor?

It is supposed, that we must seek to shelter ourselves under the likeness, which bonds, when assigned, bear to bills or statutary notes. I disclaim the comparison, and shall consider this case as standing upon the same ground, as notes of hand did before the statute of Ann. It is not true, that the right of recovery against the indorser, was created by that statute; for prior thereto, the assignee had only to demand the money from the drawer of the note, and on refusal he was at liberty instantly to sue the indorser, Lambert v. Oakes 1 Ld. Ray. 443. It may possibly be said, that notes were within the custom of merchants, as well as bills; but this is not the case, Kyd on bills 12.

I do not consider it necessary, that a suit should be brought at all against the obligor;

for if upon demand, he refuse to pay, the assignee may pursue his remedy against the assignor, as in the case of promissory notes at common law. It is like the case of a covenant to make a good title to lands, where, if it be not in the power of the vendor to do it, the vendee may sue
228 immediately *upon the covenant, without waiting the issue of a previous suit to try the title.

Many difficulties have been suggested, and thrown into our way, which tho' they may embarrass us, can never change well established principles. I will attempt to answer them, tho' it is certainly not necessary. What is the degree of diligence which the assignee is to use, in demanding, or (if a suit be necessary), in suing for the money? The answer is, that the jury will always determine that question upon the circumstances of each case; there are a variety of instances in which the law has determined what is convenient time.

It is asked, can all the assignors be sued, separately or together? I think they cannot. There is a privity of contract between the assignor and his immediate assignee, and consequently, the latter can go no farther back. It is like the case of a warranty, where the covenant can extend only to the parties immediately contracting.

Washington in reply. The argument, that the plaintiff may recover, where the defendant has received money, which ex œquo et bono he ought not to retain, may prove any thing, or nothing in this case. In the application of it, the counsel are compelled first to beg the question. Is the assignor bound in conscience to refund? If the consideration has failed, he is; but if a real consideration were given, he is not. It is contended, that the consideration has failed, and so it would have done, if it had been a sale of a horse, which instantly after died. If the thing sold had a real existence, and the vendor had a right to sell, the subsequent loss of the debt could no more bind the conscience of the assignor, than it would that of the vendor of a horse, in the case supposed.

The assignment is resembled to an order upon the obligor to pay. The likeness might be more easily discerned, if it were the case of a paper not negotiable; for then, it could only be construed as a direction how the money should be paid. But being assignable, the obligee sells his right to the bond, in the same manner as he might dispose of his right to any personal chattel whatever; the implied contract is the same.

The case of Lambert v. Oakes, as reported in Salk. 127—12 Mod. 244, and Holt. Rep. 117, appears to have been that of a bill of exchange. So that nothing can be thence inferred, to do away the strong presumption, to be drawn from the statute of Ann; namely, that legislative aid was necessary to subject the endorser.

229 *ROANE, J.—This is an action on the case, brought by the assignee of a bond, to recover of his immediate assignor, compensation on account of the non payment of the bond by the obligor. The first count states a special agreement of the assignor to be liable on failure of payment. The second, states the liability, as a legal inference from the assignment for valuable consideration, and the non-payment by the obligor. The third count is for money, had and received. But the case as stated by the jury, allows no ground to presume a special agreement, and therefore, we must decide this as a general question. That question is, whether an action can be maintained against the assignor of a bond, without a particular undertaking on his part to insure the payment? That due diligence was used by the appellees to recover the money from the obligor, is admitted by the verdict, and therefore, this circumstance will be considered as forming a part of the case.

In the cases of bills of exchange, it is admitted on all hands, that an action will lie against the drawer or endorser, if payment be not made by the drawee; but it is contended, by the counsel for the appellant, that this arises out of the custom of merchants. As against the acceptor, the argument is correct. He undertakes to pay the debt of another, and consequently, can only be charged in a special action on the case, founded upon the custom of merchants. But against the drawer or indorser, indebitatus assumpsit will lie, because the draft in itself imports a debt to be due. Promissory notes, stand in the same situation, the indorser being considered as a drawer. It is on account of the privity between the indorsee and the indorser, that this action may be maintained. The action is not founded on the bill or note, but upon the implied undertaking, and the bill or note, is evidence only of that undertaking. These principles owe their existence, not to the custom of merchants, but to the common law.

Let us pursue these principles, and they will give light to the further investigation of this question. The case of promissory notes will be an important guide, and therefore it will be proper to see, how they stood, previous to the statute which it is supposed created the liability of the indorser of them. Lambert v. Oakes, is most correctly reported in Ld. Ray 443, as the observations made by Kyd in his treaties on bills of exchange, page 109, incontestably prove. This case was decided antecedent to the statute of Ann, and was consequently governed by the principles of the common law. It was there
230 *determined by lord Holt, that the indorsee of a promissory note, might recover against the indorser, if payment of the note had been demanded and refused. It would seem as if this case decided the question. Bonds in England, are not assignable, and therefore stand in the same situation as notes of hand did at the time when this case was determined. I can see no reason, why the assignor of a bond should not be liable in the same manner, even in that country, though I do not at present recollect any such case.

In this country, the assignee of a bond acquires a legal right to bring suit upon it, and to receive the money, discharged from any controul of the assignor over the subject; it is therefore his duty to bring suit. The assignment does in itself import a debt due to the assignee, and there is

the same privity of contract between the two parties, as exists in the cases of bills and notes. They are all governed by the same common law principle, and consequently, an indebitatus assumpsit will lie in this country against the assignor of a bond, in the same manner, as it will in England against the indorser of a bill or note. The object of our law was not to defeat this common law remedy, but merely to give a right to the assignee to sue in his own name, which otherwise he could not have done.

The same common law principle will extend much farther than the case now before the court. I have no doubt, but that it will reach the case of a transfer of a bond without an assignment, and that the transferee having used due diligence to recover the money, may maintain an action against the person from whom he obtained it, for money had and received; the assignor can defend himself only by an express stipulation to the contrary. In the case of bills, transferred by delivery only, it is laid down in 1 Ld. Ray, 442, that the person making the transfer ceases to be a party to the bill; that it is a sale, and the seller not bound to refund, if the bill be not paid. But Kyd in his treatise on bills of exchange page 60, very properly observes, "that this is only true in the case of a demand by a subsequent party, when several have intervened between him and the person against whom the demand is made; it can never apply as between the immediate parties to the transfer; for though the person who has given the money for the bill or note cannot recover against the person who received it, as indorser, he may recover in an action for money had and received for his use, as the transferer must be un-
231 derstood to undertake for the *bill being duly paid." This is certainly sound doctrine. I am for affirming the judgment.

CARRINGTON, J.—Independent of those principles of the common law, which create on the part of the assignor of a bond, an implied undertaking to pay, if the obligor does not, the general understanding of those who enter into negociations of this sort, would be sufficient to make the assignor liable. The assignee, purchases principally upon the credit of the person from whom he receives the bond. He is not always acquainted with the obligor, or with his circumstances.

The difficulties which were mentioned at the bar, are not insurmountable. Whether due diligence had been used by the assignee to recover against the obligor would necessarily be a matter in issue between the parties, and would upon all the circumstances of the case be decided by the jury.

As to the extent of the assignor's liability, I think it can only reach the sum actually received, in case the obligor is able to prove it. If he cannot do this, it is to be presumed that he received an equal sum with that due upon the bond. If incautiously, the consideration actually received be not stated in the assignment, and it can no otherwise be proved, a court of equity is open to the assignor, and he may there seek a discovery of that fact.

As to the lengths which it behoves the assignee to go in pursuit of the obligor before he can resort to the assignor, it is unnecessary to lay down any general rule; it may suffice to say, that in the present case, he went far enough.

LYONS, J.—There is in this case, but a single question propounded by the jury; which is, can the assignee of a bond maintain an action against the assignor, without a special undertaking by the latter to insure the payment? No facts, or circumstances are stated, from which it can be presumed, that the assignment was conditional, or that it was such, as in any manner to discharge the assignor from all recourse against him.

To get at the real point in this and similar questions, we should first settle, what is the essence of the contract which the parties enter into? what is it that is disposed of by the one, and acquired by the other?

In the sale of lands, the vendee purchases soil, not parchment. If it be a bill of exchange, a note of hand, or bond, it is money in the hands of a third person, which is given in exchange, by the person to whom it belongs, for another sum of money, of for something else which he deems
232 equally valuable. *The paper, is only the evidence of his right, and in itself has no intrinsic worth. In this case, we are to presume, that a full consideration was given, which could not have been for the paper and wax, but for the money, which the bond imports to belong to the assignor. If a full consideration had not been paid, that might have been a circumstance, from which the jury might have inferred a special agreement on the part of the assignee, to take the bond without recourse.

The right of the assignee to resort back to him from whom he acquired the bond, is bottomed upon principles of common law. There is an implied agreement by the assignor, that the money which he sells, and for which he receives an equivalent, shall be received by the purchaser, as much so, as if any personal property whatever were the subject of the contract. There is no reason, why an implied warranty should not exist in the sale of bonds, as well as in the sale of other property.

If this right then existed antecedent to the act of 1748, which made bonds assignable, how is it affected by that law? New rights are acquired under it, and the inconveniencies of the common law, which obliged the assignee to use the name of the assignor, are removed.

But this is obviously intended for the benefit of the assignee, and cannot be construed consistently with the spirit of the law, to deprive him of preexisting rights. The legislature could not mean to provide him with a new remedy, and at the same time to lessen the security which he before enjoyed, nor does such a consequence grow out of the law. It was strongly insisted upon at the bar, that such a conclusion was fairly to be made, because a remedy against the assignor was not given. The answer to this is, that it was not necessary; and since it is not expressly taken

away, it still continues to exist as it did before the statute was made.

Upon the whole I am of opinion, that the assignor is liable, unless there be some special circumstances to shew that it was not so intended by the parties, at the time the assignment was made.

Judgment affirmed.

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233 *Norton v. Rose.*

October Term, 1796.

Assignments—Assignee Takes Subject to Equities.†—The assignee of a bond, though for valuable consideration and without notice, takes the same, subject to all the equity of the obligor against the obligee.

This was a bill exhibited in the High Court of Chancery by the appellant, to be relieved against a judgment at law recovered against him by the appellee, upon an assigned agreement for the payment of money.

The equity stated was, that the plaintiff had bound himself to pay to George Anderson, £450, being the balance supposed due upon a settlement of account; that he had insisted upon certain credits for money paid by Charles Harris, to George Anderson, to a part of which, he, the plaintiff, was entitled. But that the plaintiff, relying upon Anderson's assurances, that no payments had been made to him by Harris, and that he was insolvent, executed the following agreement viz: "We John H. Norton and George Anderson, have this day entered into a final settlement of all our accounts of every denomination whether in bonds, open accounts, bills, money, or traffic of all and every kind, from the earliest period to this day, and we agree, that there shall be paid to the said George Anderson by the said Norton, (as soon as he can possibly effect the same) £450, which is to be considered as full payment for every debt that may have been due, and is due at the present date from the said Norton to the said Anderson, as also for all and every transaction the said Anderson has had with any person in which the said Norton held an interest in any manner whatsoever. The above payment to be made on, or before the 1st of January next." This agreement was signed and sealed by Norton, who at the same time received a counterpart thereof, sealed by Anderson.

The bill further states, that after the execution of the above deed, the plaintiff drew an order upon Wilson and John Nicholas, in favor of Anderson, for £450, in discharge of the sum mentioned in the above deed, but that it was neither accepted, paid, nor returned to the appellant.

The bill prayed an injunction against a judgment obtained upon the aforesaid agreement by the defendant Rose, as assignee thereof, to be allowed all discounts which he could make appear
234 *against Anderson, and for general relief. An injunction till further order was awarded.

The defendant Rose by his answer denied any notice of the plaintiff's equity, at the time of the assignment made to him, and insisted that he was a bona fide purchaser of the debt in question for valuable consideration paid to Anderson.

The depositions in the cause established the receipt of a sum of money by Anderson from Harris; but no proof of the plaintiff's title to any part of it, or respecting the order drawn upon Nicholas, was exhibited.

The cause being set down as to the defendant Rose, (Anderson not having answered,) the court delivered the following opinion, "that the order stated in the bill to have been drawn by the plaintiff upon Wilson and John Nicholas, payable to the defendant George Anderson, could not have been legally discounted against the debt claimed by the other defendants in virtue of the deed acknowledged by the bill to have been executed by the plaintiff; and that the plaintiff cannot set off against the said debt any equitable demand which he may have a right to claim from the said defendant George Anderson." The bill was dismissed as to the defendant Rose, and the cause continued as to Anderson.

From this decree, Norton appealed.

Wickham for the appellant. The question is, whether a bond, in the hands of an assignee without notice, is discharged of an original equity existing against it? I shall contend, that it is not. 1st, Upon general principles of law, and 2dly, upon the just construction of the act of Assembly which permits bonds to be assigned.

The assignment of a chose in action, cannot so far change the subject of negotiation, as to make it the evidence of a debt in the hands of an assignee, when in truth, no debt exists. If it were originally void, the assignment cannot give it validity.

The case of Turton and Benson, 1 P. Will. 497, is conclusive upon this point to prove, that the equity which was originally attached to the bond, follows it into the hands of an assignee, with, or without notice.

235 *The ground upon which this court relieves is, that the plaintiff, ought

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*Picket and Morris, was first argued, and one of the points discussed in that cause involving the only question in Norton and Rose, the latter was brought on before a decision was given in the former.

†**Assignments—Assignee Takes Subject to Equities.**—The assignee of a nonnegotiable chose in action takes it subject to all the equities of the debtor against the assignor existing at the date of the assignment or which arise after the assignment and before the debtor has notice of it, although the assignee has taken the assignment for value, *bona fide*, and without notice of the equity. The principal case is cited, in support of this proposition in Etheridge v. Parker, 76 Va. 252; Stebbins v. Bruce, 80 Va. 397; Stoner v. Harris, 81 Va. 456; Feazle v. Dillard, 5 Leigh 34; Garland v. Richeson, 4 Rand. 269; Mayo v. Giles, 1 Munf. 536, 537; Vanscoy v. Stinchcomb, 29 W. Va. 275, 11 S. E. Rep. 931. The principal case is cited in Upham v. Brooks, 28 Fed. Cas. 830; Cabell v. Rogers, 6 Rand. 582. See monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409. See Stockton v. Cook, 3 Munf. 68.

Same—Construction of Statute—Suit in Assignee's Own Name.—The principal case is cited in Gordon v. Rixey, 76 Va. 704, as authority for the proposition that the statute authorizing the assignee of common-law obligations to sue in his own name, was not intended to abridge the rights of the obligee, or to enlarge those of the assignee beyond that of suing in his own name. The principal case is cited in Caton v. Lenox, 5 Rand. 40, 42.

Same—Bills and Notes—Bonds—Distinction between.—See the principal case cited in Barksdale v. Fenwick, 4 Call 502, 509; Dunlop v. Harris, 5 Call 53.

not in equity to recover, because no debt was due. The assignment can only transfer the right of the obligee, and will not create a right.

Thus the question stands upon general principles; but 2dly, upon the just construction of the act of 1748, Ch. 27, § 7, there is less room for maintaining a contrary opinion. The law after authorising the assignment of bonds, and permitting the assignee to sue in his own name, provides, "that in any suit upon such bond, bill, or note, so assigned, the plaintiff shall allow all discounts that the defendant can prove, either against the plaintiff himself, or against the first obligee, before notice of such assignment was given to the defendant."

The act makes no distinction, between legal and equitable discounts. The word discount, is much broader than payment, and was intended to let in the obligor to any defence against the assignee, which he might have set up against the obligee. Would it not be strange, that the obligor should be protected against the assignee, as to partial payments made to the obligee, and yet, that he should be left exposed to his entire demand, where in equity no part of the bond was due? As to discounts, the assignee buys at his peril, and consequently, it becomes his duty to be satisfied upon that subject, before he concludes the negociation. At the same time, and with equal convenience he may, and ought to know from the obligor, if he hath any, and what objections to the payment of the bond. This observation is intended to anticipate the argument of inconvenience, which may probably be insisted upon, and to shew, that bonds were not considered by the legislature in the same light with those negociable papers, which on account of their use in mercantile transactions, are rendered as current as possible, and are on that account, subject to different rules. There is a wide distinction between bills of exchange and bonds; the former are drawn for the transmission of money from one country to another; they pass through many hands, and if every person who became an assignee, were under a necessity of applying to the drawer and indorsers to know whether they had objections to paying the bill, it would stop their circulation altogether. It is on this account, that an equity originally attached to a bill, does not follow it into the hands of an assignee without notice. On the other hand, bonds seldom circulate out of the neighborhood in which they were created; they scarcely ever travel into foreign countries, and there is therefore little or no inconvenience, *in gaining all necessary information respecting them, from the person who is to pay. Whoever therefore takes a bond without enquiry, takes it upon the faith of the assignor, and if he be deceived, he must suffer in the mean time for his misplaced confidence, and seek for reparation from the person who had deceived him.

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Washington for the appellee. I shall make two points; 1st, That the appellant has not established an equity of any sort, against Anderson. 2dly, if he had, that that equity would not follow the bond into the hands of an assignee, for valuable consideration, and without notice.

The first point depends upon the evidence which is contained in the record. The bill states, that the appellant was entitled to a proportion of the sales of certain goods, which were put into the hands of Charles Harris, by Anderson. The proof is complete as to the delivery of the goods, and the amount for which they were sold; but there is no evidence, that the appellant had any interest in them, and consequently, this important fact rests altogether upon the allegations in the bill.

As to the order upon Nicholas, it is exposed to the same observation; there is no evidence respecting it, and if there were, the appellant by his own shewing could set up no equity on that account: for he admits, that it was neither accepted, nor paid by the drawee, and that he had no funds in his hands belonging to the drawer. So that notice of the refusal, or the return of the order was immaterial to the appellant.

The second point is new in this court, and of great importance to this country, in whatever manner it may be decided. It is admitted, that in the case of bills of exchange, the indorsee is not chargeable with any original equity attached to the bill. It is equally indisputable, that this principle applies to all negociable papers in England; and the law of this state, which makes bonds assignable, brings them within the reason an influence of the same principle. The application of this rule to bonds, is to be defended, 1st, upon the policy of the thing, and 2dly, upon long established maxims which prevail in this court.

As to the first, it is not difficult to foresee, that if the assignee of a bond must take it subject to any concealed equity which may be attached to it, the negociability of such papers, would be at an end. The design of the legislature, in making bonds assignable, was to create a kind of circulating medium, in order to supply the want of real money, and to accommodate the *planters of this country. But if it be necessary for the person who is about to purchase a bond, to go from one part of the state to the other, in search of the obligor, in order to obtain information concerning its validity, he would rather relinquish it altogether.

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As to the principle itself, it is interwoven with the best established maxims which prevail in courts of equity. The assignee of a negociable paper, acquires a legal right to the money, of which the paper is the evidence; of course, he has the law in his favor. The obligor, may oppose the demand, by the equity which was originally attached to it. But the assignee being a purchaser for valuable consideration, and without notice, has at least as much equity to receive, as the obligor or drawer has to withhold payment. The equity then being equal, the law must prevail, nay, so far does this principle go, that in contests of a merely equitable nature, if either has obtained an advantage, tho' not a legal one, the court will not deprive him of it, but

will leave him to make such use of it as he can. Brow. Ch. Rep. 301. This court, when applied to for relief against a judgment obtained by the assignee at law, must be assured that there is superior equity on the side of the person asking its aid. But if the parties stand equal in point of equity, it will not interfere between them. It is admitted, that this principle applies to bills of exchange. When notes of hand were made assignable, they became of course subject to the same rule, not on account of commercial considerations, but because they were thereby brought within a rule of equity, which in its operation is universal. Cunning. Bills 119. But where the assignment transfers no legal right, there, if the equity be equal, he who has the prior equity must prevail. Upon this latter rule, the cases of Turton and Benson, 1 P. Will. 496, 10 Mod. 450, and Hill and Caillovel, 1 Vez. 123, were decided. The assignment of a bond, in England, can only pass an equity; the meaning of it is, that the assignee is to have all equitable advantages from it, which the assignor possessed. But if he had no equitable right to the money, he could transfer none.

Observe how the principle runs through all cases coming within it, tho' totally unconnected with commerce.

If a trustee sell land to a third person, for valuable consideration, and without notice of the trust, the purchaser is discharged from the claim of the cestui que trust, because he has the law in his favor, and has also equal equity. As to the inconvenience of this doctrine to the 238 obligor, it is easily avoided; he *may give notice of his equity in the public news-papers, or he may institute a suit against the obligee, which would be notice to the whole world, and would thereby render any subsequent assignee, a lite pendente purchaser.

Wickham. It is admitted, that in equity, bonds were assignable before the act of 1748; and that the equity originally attached to them, followed into the hands of an assignee. What then was the object of this law? Not to render bonds subjects of commercial negotiations, nor to make them an article of traffic. No merchant would purchase a bond, unless for usurious purposes, since they could never answer the end of transmitting money to a foreign country, as bills of exchange do. The obvious intention of making bonds assignable was, to prevent circuity of action, and to do away the necessity of accompanying them with powers of attorney, as formerly. It enabled men more easily to settle with each other, the debts which they respectively owed. A, being indebted to B, and C, to A, the assignment of C's bond, prevents the necessity of more than one suit.

But what I principally rely upon is, that the act of Assembly, by allowing the obligor to avail himself of all just discounts against the obligee, as well as the assignee, before notice of the assignment, forms a most decided difference between the case of bonds, and bills of exchange. In the first place, it affords a complete answer to the inconvenience which is so much relied upon by the counsel for the appellee, if the assignee should be compelled to make enquiry before he receives it, and which it is supposed, would tend to prevent their negociability altogether. For since every shilling of the bond may have been paid, if the assignment be accepted without enquiry, as to that point, the assignee must suffer for his neglect. The statute therefore, imposes it as a duty upon him, to make the enquiry, let the inconvenience be what it may; or if he do not, he acts at his peril. What is to prevent him from extending his enquiries to other circumstances, respecting the validity of the bond? When it is considered, that this very law, speaks also of bills of exchange, without making similar provision as to discounts, I cannot fail to deduce this principle from it; that the legislature considered the two cases as entirely dissimilar, and by making bonds assignable, they did not thereby intend to regulate their negociability, by rules which by the law of merchants were applicable to bills of exchange. It is fair to contend, that if the case of an original objection to the 239 bond, be not within *the letter of this law, which permits discounts to be claimed, it is within the spirit and equity of the provision. If the obligor be suffered to defeat the assignee of a part of his claim, by proving that so much hath been discharged, what should prevent him from a similar advantage, if instead of its having been discharged, it had never been justly due? It is not an unusual thing, to consider cases which are not strictly within the letter of a statute, to be within the equity of it. Thus the act of limitations, does not literally apply to an equitable demand, since it speaks only of actions known in course of law; yet the court of Chancery has adopted the statute by analogy, because suits in that court, are equally within the equity of the statute. If no good reason can be assigned, for distinguishing between legal, and equitable discounts, can it be supposed, that the legislature intended a distinction?

As to bills of exchange, they are in every respect different from bonds, and the principle which is contended for as applicable to them, may be supported by strong reasons. They are always remitted to foreign countries; they there pass through many hands, and answer all the purposes of actual money. To subject them to legal, or to equitable discounts, would defeat their use entirely, and of course, they are protected, by the law of merchants, from all objections on the part of the drawer and indorsers, whether they be such, as were originally attached to them, or such, as might afterwards have arisen. The reason, that notes in England are considered as being within the same principle, is, that the words of the statute of Ann, strongly assimilate them to bills of exchange. But above all, there is no provision in that statute, similar to that, which so evidently distinguishes the case of bonds from bills by our law, and which prevents a construction, which could tend to assimilate them to each other.

It is attempted to remedy the inconver ience which the obligor must labor unde

if the principle contended for be correct, by saying, that he may give notice of his equity in the public news-papers.

But surely, this would seldom better the situation of purchasers, it would seldom afford actual notice to any person, and it would certainly never be considered as implied notice.

The rule that where equity is equal, he who has the law in his favor must prevail, is in general correct, but in this case, it is inapplicable. The equity is not equal, because it being the duty of the assignee to inform himself, whether the bond 240 *be justly due, before he throws away his money, he can never be permitted to found an equity upon his own negligence. If he might have had notice, and ought to have sought it, he is as culpable as if he had actually obtained it. As to Norton, the same charge is not imputable to him. It is necessary that there should be confidence between man and man. He was himself deceived by Anderson, and was of course a stranger to the injustice which had been done him. I admit, that if a trustee sell land without notice to a stranger, the rule is as it has been stated. But if on the face of the deed, or from other circumstances, the purchaser might have ground to suspect that a trust existed, he would be chargeable with the equity of the cestui que trust, on account of his neglect. The case of assignees of a bankrupt, is more analogous to this, than any which the opposite counsel has cited. The legal estate is vested in them by the assignment; they may bring suits in their own names, and being generally, if not always creditors, they are assignees for valuable consideration. Yet it will not be questioned, but that a debtor who has an equity against the bankrupt, may set it up against the assignees.

Randolph on the same side. I will not bottom the arguments which I shall use, upon the policy or convenience of extending, or of limiting the negociability of bonds; but at the same time, it will not be improper that this should be considered. We see that, whilst in Great Britain notes of hand are made negociable, it is not deemed a wise measure to render bonds so. The former were introduced for the purposes of internal commerce, and having been preceded by Goldsmith's notes, which circulated like bills of exchange, it was thought wise to place notes of hand upon the same footing, and to assimilate them to the two former. But can it be supposed, that at the time when bonds were made assignable in this country, it was intended to increase the circulation of paper credit? The very reverse was the policy which governed that country, to whom we owed the liberty of passing laws. In the year 1705, notes of hand in England, assumed, by legislative authority, the high ground upon which they now stand. Yet the Assembly of Virginia, with that law before them, did not think proper to exalt bonds to the same station. And yet this law of our own country, will answer all the beneficial purposes for which it was made, although our construction of it should be found to be accurate.

241 *If the equity be subsequent in time to the creation of the bond, it is admitted, that it attaches itself to it, and accompanies the bond into the hands of an assignee. Suppose it to be coeval with the bond; the English cases prove that the same consequences follow: Suppose A gives his bond to B, and B gives a like bond to A: though I shall assign the bond of B to a third person, yet would it be contended, that B might not offer A's bond as a discount, notwithstanding it was coeval with his?

The legislature of 1786 revise this subject, and pass a law similar to that of 1748; that still hold out protection to the obligor, against all just discounts which he can establish against the obligee, as well as against the assignee, and they again subject the latter, to the necessity of enquiring into the nature of the debt which he is about to purchase. With a full knowledge that bills of exchange were exempt from this clog, no disposition to assimilate the one to the other is to be discovered. Could language have expressed, more decidedly, the legislative construction of the former law, and their present determination to distinguish these negociable papers, from each other? They say, that the assignment of bonds, notes &c. shall be valid; meaning, that the assignee shall thereby gain a legal right to sue in his own name: and this was the sole object of the former, as well as of the latter law.

But it is particularly worthy of observation, that though notes of hand, according to the statute of Ann, were placed upon the same ground with bills of exchange, and of course governed by the same rules, that the legislature of 1748, by assimilating them in every respect to bonds, rendered them unlike to bills of exchange in this country, and thereby gave a convincing proof, that it was not their intention, to suffer bonds to be governed by those rules, which applied to bills. And after such proofs of the legislative mind, can the court by any principles of sound construction, suffer a case, which is so evidently within the spirit and meaning of the law, to be without the operation of it; or permit the obligor, to avail himself of a discount against part of the debt, and yet leave him unprotected, if he set up a well founded objection to the whole.

It may not be improper in me to mention, that a similar question with this has been determined by the supreme court of Pennsylvania, upon a law of that state, similar to the statute of Ann, by which notes of hand were made assignable; but the strong words in that statute, "like to bills 242 of exchange" were omitted *in the act of the Pennsylvania legislature; the court determined, that the assignee of a note was chargeable with the equity originally attached to it. Dall. Rep. 23.

This case, though not authority here, still deserves our respect, as being the decision of the supreme court of a sister state, and as shewing the opinions entertained in other parts of the union, respecting the former policy of this country, upon the subject of negociable papers.

If we ask, what have been the British

decisions upon this subject, in cases of bonds, it is agreed on all hands, that the situation of the assignee is in no respect better than that of the obligee. Turton and Benson, is an express authority, that the assignee is considered as standing in the shoes of the obligee, because, say the judges, it is his fault if he do not enquire into the validity of the bond, and the nature of the debt, before he takes the assignment.

But it is insisted that the principle of that case is inapplicable to the present, because the assignment of a bond in England, does not transfer a legal right to the money. It is obvious, that the distinction is not a sound one, for since by the rules of equity in that country, and by the laws of this, the assignee is expected to enquire into the nature of the debt before he obtains an assignment: his negligence in not making that enquiry forbids him in either case to say, that he has equal equity with the obligor. Of course, the assignee's legal right will not avail him, since by his negligence he has deprived himself of that equity, which would have counterbalanced the equity of the obligor.

If this case be considered upon principle, independent of authority, nothing can be more clear, than that the rule laid down in Turton and Benson, is bottomed upon the soundest reason. For what could be more absurd or unjust, than that a bond, however fraudulently obtained, should acquire a binding quality by passing into the hands of an assignee, when, at the moment of the assignment, it was invalid or ineffectual? Even in the case of a bill of exchange, (the peculiar favorite of British courts,) if it be drawn for a gaming, or usurious consideration, it is void, as well in the hands of an indorsee, as in those of the original payee. And altho' in other instances, where the same principle of justice prevails, it is compelled to yield to reasons of policy founded in commercial considerations, yet, where those reasons do not apply, the principle can never be done away.

If bonds be not essential to commer-
243 cial negociations, as *they certainly are not, there can be no reason for applying the same rules to them which prevail in cases of bills of exchange; and if so, why should a bond which has been paid off, which was obtained by duress, or fraud, be more binding in the hands of the assignee, than it was previous to the assignment? In every point of view it seems clear, that not only English decisions, but the municipal regulations of our own country, favor the doctrine, that an original or subsequent equity against a bond, follows it into the hands of an assignee.

Washington in reply. The principle, that where equity is equal, he who has gained a legal advantage must prevail, is admitted. But it is denied to be applicable for two reasons:

1st, That the assignee has not equal equity:

2d, That under the equity of the act of Assembly, the rule is in this case to be rejected.

1st, The assignee it is said has not equal equity, because he is guilty of culpable negligence, in not enquiring of the obligor before he takes the assignment, into the nature of the debt. This however is a petitio principii. That he is obliged to make the enquiry is proved by no case, except that of Turton and Benson, which can only apply, where, by the assignment, a merely equitable right passes. In such a case, the assignor can only dispose of a naked equity, and of course, the assignee can acquire no greater interest. If the former has not an equitable interest in him, he can dispose of none. The posterior equity of the assignee, unsupported by a legal right, cannot prevail against the prior and equal equity of the obligor. It is this, and not the neglect of the assignee which defeats his equity: in a case of that sort, the principle of caveat emptor applies in its full force.

But why is not the indorsee of a bill of exchange obliged to enquire? The answer is, that for the sake of commerce, the law of merchants does not require it.

I must allow the entire credit of this reason to the counsel, since there is no case in which it is assigned as the cause of the decision. But if it were, it will apply with almost equal force to bonds. Though bills are used for the purposes of remittance, and are therefore paid in foreign countries, yet they are drawn, and generally endorsed in this country; so that, it will be as easy to enquire, of the drawer in the one case, as of the obligor in the other, into the circumstances of the debt. But why should inland bills, and notes of hand be governed by the same rule
244 of *law, when it must be admitted, that the reason assigned as to foreign bills, cannot apply to these cases, more than to bonds?

It was observed by one of the court, that the reason for applying the rule I contend for to the case of bills of exchange, might be, that every indorser is considered as a new drawer; consequently, a new contract arises which might discharge the pre-existing equity. With submission, I cannot think that this will furnish a sufficient reason. If the indorser claimed an equity, it might be so; but surely, his assignment could not discharge the prior equity of the drawer, merely because that assignment created a new contract on the part of the indorser. The indorser is so far a new drawer, that he obliges himself to pay the amount of the bill, in case the drawee do not. But the drawer is not privy to this latter contract, and cannot therefore lose his prior rights, because the indorsee has gained a new security. I should rather suppose, that if this consideration could have any influence, the indorsee, having obtained additional security, will have less reason for defeating the equity of the drawer.

But why does the principle I am attempting to maintain, extend to other cases, than the transfer of choses in action? For example, an absolute conveyance by a trustee, to a third person, without notice; a sale by a mortgagee, having an absolute conveyance, though in fact intended only as a security for money, to a stranger, without notice; a conveyance by the vendee

of land, where the vendor has a lien upon it, for the consideration money; in these cases, the equitable rights of the cestui qui trust, mortgagor, and vendor, are defeated, and yet the purchaser, might have enquired, particularly in the two latter cases, of the mortgagor and vendor, if they had any equitable claims to the land. But this is not necessary; and yet in all those cases the grantee takes the land discharged of the equity, because, having acquired a legal title, and being a purchaser for valuable consideration and without notice, he must prevail.

For what reason should the enquiry be made? The bond upon the face of it furnishes no cause for suspicion; the obligor could but confirm by parol declarations, what he had before solemnly acknowledged under his hand and seal. Suppose the enquiry in this case had been made, and Norton, had made parol declarations similar to those expressed in the bond, he being still under the deception which his counsel impute to him: could he set up an after-discovered equity? If he could, then
245 *the enquiry would be unavailing to the assignee; if otherwise, then, the obligor could not be benefited by it. The equity which the obligor may have, is always coeval with, or posterior to the bond. If coeval with it, it is either then, or afterwards known to the obligor; if then known, it is a fraud upon the public to send into circulation a negociable paper, which may deceive others, and therefore, every principle of equity is stifled by the fraud: if not known, but suspected, the case is the same; for then, the bond should express what is suspected, that third persons may not be imposed upon. In this case, Mr. Norton states in his bill, that he knew of the credit, now made the ground work of his application for relief in equity, and insisted upon its being allowed; but that he was deceived by Anderson, into a belief, that he was not entitled to it. Why then did he not reserve the right of claiming this credit, in case he should afterwards discover that he was entitled to it, and by a memorandum on the bond, give notice to the world, of this latent equity? The charge of neglect therefore, is returned upon Mr. Norton's hands, and his counsel very well know the influence it will have in defeating an equity. If the equity be neither known, nor suspected at the time the bond is given, then the principle which applies in all contests de damno evitando, must be resorted to: it is, that wherever one of two innocent persons must suffer, by the act of a third, he who hath enabled such third person to occasion the loss, must sustain it. Lickbarro v. Mason, 2 Durnf. and East 63. As soon as the equity is discovered, the obligor should immediately give notice of it; this may easily be done in the public prints, or by suit. Amb. Rep. 66. But the answer to this remedy is, that the bond may have been previously assigned, if so, then the enquiry would not have bettered the situation of the assignee, or of the obligor, for the latter, must then have acknowledged, what he had before done with more solemnity, that he knew of no equity against the bond: If not previously assigned, then the notice would prevent its transfer.

On the other hand, the trouble and inconvenience of making the enquiry, and the difficulty of proving the re-acknowledgment, would put a stop to the negociability of bonds, & would entirely defeat the intention of the law which made them assignable.

It is contended, that it is essential, that the parties to a bond should have confidence in each other. Be it so; but let it also be conceded, that he who places the confidence, should take the consequences of having misplaced it, and not seek to throw
246 *it upon a third person, who was not privy to the transaction. In commercial matters, confidence is peculiarly necessary; and yet this court determined in the case of Hooe and Harrison v. Oxley and Hancock, (ante vol. 1, p. 19,) that if an agent, who is authorised to draw bills for special purposes, abuses the trust, and misapplies the money, the principal who gave the confidence must suffer.

It is said, that the statute of Ann, assimilates notes, to bills, by the expressions it uses. It declares, that they may be assigned like bills, but it does not assimilate them in any of their consequences, or collateral points.

It is then contended. 2dly, That this case is within the equity of the act of Assembly, which, it is said, essentially distinguishes it from the cases which have been cited respecting bills, notes &c.

There is an apparent inconsistency in the arguments respecting this law. It is obstinately insisted upon, that the equity originally attached to a bond, would follow it into the hands of an assignee, upon principles unaffected by this law; if so why was this law made?

The legislature, when engaged in the business of altering a general principle of law, are not to be supposed ignorant of the full extent of that principle. If without legislative interference the obligor could not have protected himself against an assignee even for actual payments made before notice of the assignment, (and that he could not, was evidently the sense of the legislature, otherwise their interference was unnecessary,) much less could he set up an original, and concealed equity; for the former case, an express provision is made. There is no ambiguity in the language of the proviso, nor is it even contended, that the case of an original equity comes strictly within it. But it is contended to be with the spirit of the proviso. There are cases, I admit where it is justifiable to take liberties of this sort, with the words which the legislature uses: but there should be an apparent necessity for it, and I hold it to be always unwarrantable, if a reason for excluding the case which is sought to be constructively included, can be assigned. A little reflection, will furnish, a satisfactory reason for the discrimination, between posterior discounts, and original equity.

In the first, the obligor has done what by the terms of his contract he had stipulated to perform. He has made partial payments, or has entirely discharged the debt; it was

his duty to do this; and therefore, he who is about to purchase, ought to
247 *suppose that to have been done, which the contract stipulated to be done; here, there is a cause of suspicion growing out of the instrument itself, strong enough to prompt an enquiry, and if the assignee be hardy enough to calculate against this reasonable presumption in consequence of the confidence he may repose in the obligor, it is perhaps not improper to leave him to his recourse against the person who has deceived him.

But it is far otherwise with respect to an original equity. To presume that the debt was never due, would be to form a conclusion against the words of the contract itself, which import the contrary. The obligor has declared the debt to be due, and that he will pay. This solemn acknowledgment of its justice, he has confirmed with his signature and seal. If it were not due, he would not, and certainly ought not to have obliged himself to pay it, and that too in a manner calculated to deceive those who trust in this declaration. It is not enough to say that he was ignorant of the objections to the claim at the time he gave the bond, or was imposed upon by the obligee; it was his duty to investigate the subject, before he sent forth a negociable paper, which in every change it underwent, possessed the power of deceiving, and of injuring fair purchasers. In this case, the assignee could have no cause to suspect an original equity contrary to the express letter of the contract. To enquire of the obligor, if he meant the reverse of what he has declared, would be an absurdity, which the legislature could never mean to require of the assignee. The difference between discounts, and an original equity, is this; in the first, the assignee purchases upon the faith of the obligee, since nothing but his assurances could repel the natural conclusion, that payment had been made; in the latter, he purchases upon the faith of the obligor, that the debt was due when the bond was executed, because he has said so, and that in the most solemn manner.

The legislature therefore, were influenced by the strongest motives to make the discrimination.

If the legislature state a particular case, and might by apt language have expressed themselves generally, if they had meant to do so, it is too much like legislating, for the court to make a construction broader than the words which are used will warrant.

If an original equity had been intended, the proviso would have permitted the obligor, "to make any defence in law or equity, which he might have made, in case no assignment had been made," and it is contended, that the court should construe the word discount, so as to mean the same thing.

248 *It is said, that the act of limitations, though it does not extend to the courts of equity in express terms, is nevertheless adopted by analogy. This is true; and I do not object to courts of equity permitting the obligor, to avail himself of discounts against the assignee, in the same manner, as he might at law; what I contend is, that neither courts of law, nor of equity, can extend the construction of the proviso, beyond the fair meaning of it. The act of limitations is restricted, or rather disregarded in equity in many cases; but it is never extended beyond the periods prescribed by the law.

No two cases can be more unlike, than this, and the case of assignees of a bankrupt; in the latter case, the assignees are merely trustees, and are no more entitled to avoid an equity against the bankrupt, than the bankrupt himself would have been.

ROANE, J.—There are some points in this cause, which are not controverted by either side. It is admitted, that upon the principles of the common law, a chose in action is not assignable; that is, the assignment does not give to the assignee, a right to maintain an action in his own name.

It is also conceded, that in England, the assignee of a bond, takes it charged with every species of equity, which was attached to it in the hands of the obligee. If a different principle prevail in this country, it must grow out of the acts of Assembly, which authorised the assignment of bonds. The acts of 1730, and 1748, upon this subject, are precisely the same as to the present question. I should have been glad to have seen the act of 1705, but I have not been able to meet with it. This case, depends upon the just construction of the act of 1748. The intention of it, was to alter the common law, so far as it prevented bonds from being assigned, and to give to the assignee, a right to sue in his own name, in the same manner, as the obligee might have done.

It was not intended to abridge the rights of the obligor, or to enlarge those of the assignee, beyond that of suing in his own name; and since it is clear, that prior to this law, an original equity attached to the bond, followed it into the hands of the assignee, this law, does not expressly, nor by implication, destroy that principle. Notes of hand are now assignable in England, and it is admitted, that the assignee is discharged of any equity, which existed against the assignor, unless the note was given for an usurious, or for a gaming consideration.

249 *The reason of this, is not that the principle attached to them as a legal consequence of their being made assignable, but because this rule for commercial purposes, applied to bills of exchange; and the statute of Ann, declaring notes assignable, in like manner as bills of exchange, shewed an intention, as it was supposed, to render the former, as highly negociable, and as current in internal, as the latter was in external commerce. The act of our Assembly, embraces equally the subject of bonds and notes, but contains no expressions tending to induce a belief, that the making them assignable, was intended for purposes of commerce. The design certainly was, to make them transferable to a certain extent; the provision points out the limits of their negociability, and fixes a strong mark of distinction between them, and bills of exchange. As to the latter, they were always assignable, and the indorsement transferred a legal right to the in-

dorsee. They did not owe this quality to statutory provisions, and of course, they continued within that principle which had attached to them, and of which they were not deprived by any statute.

Lord Mansfield lays it down in the case of Peacock v. Rhodes, Dougl. 636, "that the holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule applied to bills and promissory notes, it would stop their currency." So in Cunningham's laws of bills of exchange, p. 65, the Chancellor refused to relieve against the assignee of a bill, "because it would tend to destroy trade, which is carried on every where by bills of exchange, and he would not lessen an honest creditor's security." And we are informed by Domat, 131, Tit. 16, § 4, p. 231, that the covenant which passes between the person who gives the money, and him who undertakes to remit it to another place, hath in it some particular character which distinguish it from other kinds of covenants, that seem to have some resemblance with it.

It is therefore, not because the indorsee is an assignee of the legal right to such bills and promissory notes, that the equity is bared by the indorsement, but because of their quality as a currency, and from the necessity of adopting such a principle, for the convenience of trade and commerce with respect to such currency. But bonds, are not to be considered as a currency, and within the reason of the principle laid down in Peacock and Rhodes; for that principle is founded upon commercial consider-
250 ations *altogether, and not upon a distinction between legal, and equitable assignments.

With respect to the proviso in the act of 1748, it contemplates legal discounts only. The words, "the plaintiff shall allow all discounts which the defendant can prove," were meant to extend those discounts beyond the credits which might be endorsed on the bond; and the latter words, "before notice of such assignment was given to the defendant," were meant to restrain the discounts to such as existed prior to notice of the assignment. This enlarging and restraining proviso was necessary, in order to express clearly the meaning of the legislature; but neither the proviso, nor any other part of this act, was intended to extend to, or to abridge equitable discounts, which were not in the contemplation of the legislature who made this law.

The inconvenience, which it is apprehended will result from rejecting the application of the principle contended for, is certainly not real, or if it be, it was not so considered by the legislature. The assignee, it is admitted, takes the bond at his peril, so far at least, as the possible claim of the obligor to discounts may extend. If he chuse not to encounter this risk, or to repose entire confidence in the obligee, he must enquire of the obligor, and from him obtain information, respecting (at least) this part of the subject. With the same convenience, may the enquiry extend to any equitable objections attached to the bond. The two cases are precisely within the same reason, and I can discover no principle of policy or justice, which should so widely distinguish them. The assignee of a note given by an infant, feme covert, or for a gaming, or usurious consideration, does not take it discharged of those objections, but the contrary. In those cases, as well as in respect of discounts, he must take care what he purchases; he acts at his peril, and must therefore act with caution. For what reason then, shall an equity, originally incorporated with the bond, and which should destroy its obligation, be discharged in the hands of an assignee? The provision of this act has long governed the assignment of bonds, and it is but of late years that the existence of such a principle as has been contended for in this cause, has been thought of, as applicable to bonds and notes. This consideration, though it would not direct, has much weight in confirming the opinion which I clearly entertain upon this subject. The appellee may suffer in consequence of it; but this is preferable to the establishment of a principle, which may produce great public mischief, and injustice.

251 *Although I am clear in the opinion, that an equity existing against a bond, is not lost or extinguished by an assignment for valuable consideration and without notice, yet it may be lost by length of time or other circumstances. In this case however it does not appear, when the deception practised by Anderson was found out by Norton, or that Norton delayed an unreasonable length of time, in coming forward to assert his equity. It is true, that his interest in the goods sold by Harris is not established in the proof, but the ground of the Chancellor's decree, being wrong, it must be reversed, and the cause remanded for further proceedings, so as to let in Mr. Norton to the proof of his equity. The decree so far as it respects the order on Nicholas, with reference to the present appellee, I think is right.

CARRINGTON, J.—To consider this case upon general principles; the question is, whether an equity, originally attached to a bond, follows it into the hands of an assignee without notice. In England, notes of hand were not assignable, until the 3d and 4th of Queen Ann, so as to enable the assignee to bring a suit at law in his own name. Courts of Equity were of course resorted to, where the maker of the note was not precluded from setting up any equitable defence, which he might have. Frequent attempts were made by the bankers and traders, to bring them within the custom of merchants, and to place them upon the same footing of negociability with bills of exchange. But the judges still considered them merely as evidences of debt. At length, the statute was procured, conformably with the wishes of the trading part of the community, making them assignable, in like manner as bills of exchange. The likeness thus strongly sanctioned by legislative authority, produced similar decisions in cases, where their negociability were concerned.

But no efforts were made in favor of

bonds, and they remain in the same situation in England, as they stood at common law.

This country was then a part of the British empire, and our legislature, assimilated its laws, to those of the mother country, so far, as our local situation and state of society authorised it. In 1705, shortly after the English statute passed respecting notes of hand, the Assembly, passed a law, authorising the assignment of bonds and notes. This law, I cannot meet with, but it was repealed by proclamation in 1730, and in the same year, another law was enacted, exactly similar to the act of
252 *1748. With the English statute before their eyes, the legislature did not chuse to adopt it altogether, or to introduce into it a principle, which should defeat the equity of the obligor, as it was secured to him at common law. Those expressions in the statute, which assimilated notes to bills of exchange, were omitted in our law, and in the room of them, others were introduced, which established an opposing principle. The negociability of bonds and notes, was qualified and restricted within bounds, consistent with the commercial station of this country. There was no necessity for exalting those kinds of paper to the high ground, on which the commercial world had placed bills of exchange, and the whole complexion of the law shews, that it was intended to be avoided. The doctrine which has been stated and relied upon, as applicable to foreign bills of exchange, is consequently inapplicable to the present discussion. These considerations have produced conclusions in the public mind, as to the construction of the law in question, the very reverse of what has been contended for by the counsel for the appellee. I should be unwilling to unsettle these long formed opinions, unless the expressions of the law rendered it absolutely necessary.

That a bond fraudulent and void in its creation, cannot be cleansed of its impurity, and rendered valid by assignment is settled by the case of Turton and Benson and has uniformly been so decided in the courts of this country. No man can by the mere act of assignment transfer a greater interest than he holds; dispose of an interest where he has nothing, or make good and valid, that which was originally vicious and void. In this enlightened age though former decisions are rejected, and a new mode of attaining justice is discovered. But is it true, that the means are adequate to the object? It is urged as a reason for the rejection of former opinions upon this subject, that they tended to impose deceptions upon the public, and to cramp commerce, by destroying the negociability of bonds and notes. As it strikes me, they rather tend to prevent, than to countenance those frauds, and if the other consequences will follow, it is preferable to sacrificing a majority of the public, to the averice and injustice of a few. But I cannot perceive, how commerce, or that sort of it which is most useful to society can be injured. That their negotiability will be restrained I admit, but they will answer the purposes for which the law intended them, by facilitating the collection of debts and thereby affording a convenient, and desirable accommodation to the people of this country.

253 *The case now under consideration, comes fully within those principles which seem to me correct. Norton and Anderson were concerned together in trade, and upon a settlement of accounts, Norton claimed a credit for the proceeds of a quantity of goods in the hands of Harris. But Harris assuring him that he had received no part of those proceeds, Norton, unsuspicious of the truth, gave his bond for the balance as it stood. Rose, it is admitted, was a fair, bona fide purchaser of the bond. He is chargeable only with neglect; he might and ought to have satisfied himself, that the debt was justly due before he received it. If upon an enquiry, Norton had assented to the payment, or acknowledged he had no objections to it, this would have deprived him of his equity against Rose. It was easy for any person wishing to take an assignment of the bond, to make the enquiry; they would know at once, where to make the application. On the other hand, Norton could not give a special notice to the person who was about to obtain it and the public papers would afford a very uncertain channel of information.

Upon the whole I am clear that the decree is erroneous and ought to be reversed.

LYONS, J.—This has been truly said, to be a cause of considerable importance, on account of the precedent to be established. In order to discover the legislative intention, when the act of 1730 (of which that of 1748 is an exact copy, as to this question,) was passed and to comprehend more clearly the consequences of the construction contended for by the appellee, I shall consider this case as if it had been to be decided upon at that time. If Norton had given this bond before assignments were sanctioned by legislative authority, it is admitted to all hands, that his equity would have followed the bond, into the hands of an assignee. If so, is it possible that the legislature could have meditated so much injustice, as to exclude him from setting up an objection to the debt, which but for the law, he might have made? Could it mean to protect fraud, and to give validity to an instrument, which was originally void and founded in deception? Whatever would then have been the construction of the law, must be the construction of it at this day. I mention this to shew that the legislature by making bonds assignable, did not thereby mean to deprive the obligors of any equitable objections, which they might have to them. Until this act passed, bonds were not assignable. Bills of exchange could not answer the purposes of
254 internal negociation, *between the planters and the merchants; the former from their situation, were under a necessity of having credit from the latter, and to secure this, it was deemed proper to make bonds assignable, by which means, the factors, who often took them in their own names, were enabled to pass them away in the purchase of commodities, or might, when necessary, transfer them over to their principals. This history of bonds will evince, that as there was no necessity,

so it never could have been the legislative intention, to give to them all the high privileges attached to bills of exchange, and particularly that, which has been contended for by the appellee. Independent of this, the law upon the face of it, repels a construction, calculated to deprive the obligor of his equitable objections. It saves to him the right of opposing the claim by all just discounts which he can make, and consequently could not mean to deprive him of an equity, strong enough to invalidate the whole claim. The law, so far from being designed to grant favors to the assignee, is calculated to protect the obligor; the former, is obliged to admit all discounts against the obligee, and at his peril to give notice of the assignment, under the penalty of being bound by payments made, after the obligee has parted with his right to receive them.

The accuracy of the principle laid down by the appellee's counsel is not questioned; its application to this case is. For since it is admitted, that if the law had not permitted the assignment of bonds, an equity existing against the obligee would have accompanied the bond into the hands of an assignee, the single enquiry which remains is, does the law take away this right, previously possessed by the obligor? I have endeavored to shew, that so far from doing this, the law itself displays a careful attention to the rights and interest of the obligor.

The arguments which were used to assimilate this, to the case of a bill of exchange and promissory note, are totally without foundation. The reason of the law as applicable to those cases, is not founded upon the principle stated by the counsel for the appellee, but upon considerations altogether of a commercial nature.

Upon the whole, I concur in opinion with the other judges.

The opinion and decree of the court, was entered as follows: "The Court is of opinion, that an assignee of a bond or obligation, takes the same, subject to all the equity of the obligor, and that the appellant ought to be allowed to set off
255 *and discount against the debt claimed by the appellee as assignee of George Anderson, the other defendant in the decree named, any equitable demand respecting the said debt, which he had a right to claim from the said George Anderson, the original obligee." Decree reversed with costs, and the cause remanded to the High Court of Chancery for further proceedings to be had therein, according to the principles of this decree.

Picket v. Morris.

October Term, 1796.

Practice—Instructions—Refusal—Error.*—If the Court be applied to by either side to instruct the jury, or to reserve a point, or to direct a special verdict, it is error in them to refuse.

Assignment—Discount†—Waiver—Case at Bar.—L being indebted to M., afterwards obtains, by assignment, the bond of M. to an equal amount. He offers a discount, which M. declines, supposing he had an equitable objection to the payment of his bond in the possession of S. S. assigns over that bond to P. for valuable consideration, and without notice, under all the circumstances of the case, the conduct of M. was not a waver of his right to discount, and he was at liberty to off-set the bond of S. against his bond assigned to P.

Equity Jurisdiction—Relief.‡—Wherever a case is fully and fairly tried in a Court of Law, the decision is so far binding, that it can only be examined by an appellate Court.—Chancery cannot interfere. But if the Court of Law refuse to decide points of law, or to reserve them, it will submit such points to the jury, and they decide inequitably, Chancery may interfere.

In the year 1785, Morris, purchased from Littlepage, the moiety of two thousand acres of land in Kentucky, at the price of £600, and give his bond for £400, payable at a future day, and a note of hand for £200, which has been discharged. Johnson, had an equitable title to the other moiety of this land, under a former contract, but upon this condition, that he should allow Littlepage, or those claiming under him, to take choice of either of the two tracts on paying the difference in value between them. In 1786, Littlepage, assigned this bond to Stockdell, at which time, Morris, was a creditor of Stockdell by bond, in a sum, very little short of the amount of the one which he had given to Littlepage. Stockdell, proposed a discount of the two bonds to Morris, which the latter refused, in consequence of the pendency of a suit against him, Littlepage and others, by Johnson, in the state of Kentucky, claiming a conveyance of an undivided moiety of the 2000 acres of land, instead of a separate tract, with the difference in value between such tract, and the first choice which Morris, by his contract with Littlepage had a right to make. After this refusal, Morris instituted suit against Stockdell upon his bond, and recovered a judgment. Stockdell, assigned Morris's bond to Picket, but whether before, or after the judgment obtained by Morris, does not certainly appear.

Picket, instituted a suit upon this bond against Morris, in the County Court of Henrico. At the trial of that cause, the counsel of Morris offered Stockdell's
256 bond as a discount, and moved *the court to instruct the jury upon the law arising from the facts in evidence before them, or by other means to reserve the points for their future decision, and for this purpose, tendered a statement of the facts, requesting the court to alter them if necessary, so as to reserve the case. The court declined, or neglected giving any opinion upon either point.

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*__Practice—Instructions—Refusal—Error.__—To refuse relevant instructions which rightly propound the law, is error in the court below, for which the judgment must be reversed. 4 Min. Inst. (3d Ed.) 1084, 1085, citing *Picket v. Morris*, 2 *Wash.* 255; Brooke v. Young, 3 Rand. 106; Dimmett v. Eskridge, 6 Munf. 311; Wells v. Washington, 6 Munf. 532; Early v. Garland, 13 Gratt. 9, 14; Baltimore & O. R. R. Co. v. Laffertys, 14 Gratt. 486-87; Smith v. Carrington, 4 Cranch 62.

The principal case is cited with approval in Gordon v City of Richmond, 83 Va. 439, 2 S. E. Rep. 729; Brooke v. Young, 3 Rand. 112; Osborne v. Francis, 38 W. Va. 323, 18 S. E. Rep. 595. See Shelton v. Cocke, 3 Munf. 191, and monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

†__Assignment—Assignee Takes Subject to Equities.__—The assignee takes the bond, not only subject to all discounts, according to the terms of the statute, but to all equities to which it was subject in the hands of the obligee. Garland v. Richeson, 4 Rand. 269, citing Norton v. Rose, 2 Wash. 233; *Picket v. Morris*, 2 *Wash.* 255; Stockton v. Cooke, 3 Munf. 68. The principal case is cited in Cabell v. Rogers, 6 Rand. 582. See *foot-note* to Norton v. Rose, 2 Wash. 233, and Wythe, p. 50.

‡__Equity Jurisdiction—Relief.__—The principal case is distinguished in Terrell v. Dick, 1 Call 550, 551.

The legality of the discount; the equity of Morris against the bond in question; and the subject of notice to Picket of both or either of those objections, were subjects discussed before the jury; and the court refusing to interfere, they found a verdict for Picket, the plaintiff at law.

The defendant Morris, moved for a new trial, (this being the second trial of the cause,) but the court were divided in opinion. Afterwards, a fifth magistrate, who had sat during the trial, came upon the bench and the motion was renewed, but was soon afterwards dropt. The defendant then exhibited a bill to the same court praying for an injunction, at which time, Picket, agreed to stay execution for a month, that the defendant might have an opportunity of applying to the Chancellor, for an injunction, which he afterwards did.

Morris filed his bill in the High Court of Chancery, praying to be relieved against this judgment, principally upon the ground of the debt due to him from Stockdell, which had not been allowed him as a discount in the trial at law.

Picket, in his answer to this bill, states himself to have been a fair, bona fide purchaser of the bond in question, without notice of any disputes relative thereto, or of the appellee's right to any discounts. That he paid Stockdell for the said bond, in money certificates and other public securities, a sum exceeding the value of this bond, which excess, created a debt from Stockdell to him, which has been considerably encreased by other advances.

Whether the County Court refused to grant the injunction applied for by Morris, or whether the motion was withdrawn in consequence of the offer made by Picket, of staying execution for a month, does not certainly appear from the record.

One witness proves, that the appellant applied to him to know what objection the appellee had to the payment of this bond; the witness informed him that the appellee had discounts against it, and also mentioned the dispute about the Kentucky land: upon which the appellant replied, "that he would have nothing to do with the bond." The witness does not state whether this conversation took place before or after the
257 assignment, *but concludes from Picket's reply, that it was prior to it. It does not appear when the assignment was made. The High Court of Chancery, upon a hearing of the cause, dissolved the injunction as to £36: 13: 3, with interest thereupon from August 1786, after deducting therefrom the costs of that court, and decreed the injunction to stand and be perpetual as to the residue, and that Morris should assign to Picket the judgment obtained by him against Stockdell; the bill as to Littlepage was dismissed with costs. From this decree Picket appealed.

Marshall for the appellant. The first question which I shall consider is, whether the appellant could at law, have set up his judgment against Stockdell, as a discount against the appellant. 2dly, Whether he can resort to a court of equity for the relief sought for by this bill.

1st, The assignee of a bond, by the law of this state, is bound to allow all just discounts against himself, or against the obligee before notice of the assignment. The discount offered by the appellee, is a judgment obtained against a mesne assignee, which I contend is not a case provided for by the act of Assembly. Morris's bond, coming by assignment into the hands of Stockdell, could not be considered as being ipso facto discharged, in consequence of the latter being the debtor to the former to an equal amount. The reciprocal possession of each others bonds, did not amount to a payment of both, or of either. The one may be discounted against the other, unless the conduct of the parties hath prevented it.

This is the difference between the actual payment, and off-setting mutual demands; in the first, the bond, is discharged by the silent operation of law; in the latter, both debts subsists, until they are opposed to each other; for the parties may wave the discount if they please.

In this case, Morris, evinced his determination not to discount, expressly, as well as impliedly. He refused it expressly, when Stockdell applied to him for that purpose; and impliedly, by bringing suit against Stockdell upon his bond, in which, if the discount had been offered, he must have been nonsuited. And Stockdell, by assigning Morris's bond to Picket, evinced a similar disposition in himself not to discount.

After this, will it be contended, that Morris can reclaim his right of discounting, and that too, against a bona fide assignee? But suppose Morris, was not deprived of this right by his own conduct, let us consider.

2dly, Whether he can be relieved in this court.

258 *Every point in this cause, has once been before a court of competent jurisdiction, and without a possible objection to the fairness of the trial, the jury have decided in favor of the appellant. If the County Court gave an erroneous opinion upon the points submitted to them, or if they erred in refusing to give any opinion at all, the power of correction belonged exclusively to an appellate court. But a court of equity has no jurisdiction in such a case. It cannot correct legal errors in an inferior court, or rehear and rejudge the judgment of a court of law. If Morris was aggrieved by the judgment of the County Court, he might have excepted and appealed. If the justices refused to sanction the bill of exceptions by their signature, the law marks out a plain redress for the injured party. But instead of pursuing those steps, the appellee voluntarily abandons them, and now seeks relief in a court of equity, upon the very points, which had been fully discussed, and fairly decided upon in a court of law. If he can hope to succeed, it must not be by asserting the law to be in his favor, for that has been determined against him by the proper tribunal, and therefore, the law is with his antagonist, until that decision be reversed. He must then rely altogether upon his claim to superior equity.

Let the pretensions of the two parties upon this ground be compared. Picket, is a fair purchaser, for a valuable and full consideration, without notice of any objection,

upon the part of Morris. On the other hand, Morris, had by his own conduct, completely discharged the bond in question from the danger of being discounted, against the debt due from Stockdell, to him. He refused the discount, as one of the depositions proves, for the unfair purpose of discharging his own bond in warrants, at a reduced price, and consequently for less than the real amount. He institutes suit against Stockdell, as an additional evidence of his having disclaimed the discount, after which, his bond is assigned. Can he now talk of equity, who by his own conduct has been the cause of the very loss, he is unwilling to bear himself, and now seeks to throw upon Picket? If he had done at that time, what he now insists upon, the bond in question would long since have been cancelled, and deprived of its ability to deceive the world.

Perhaps an attempt may be made to excuse this conduct of Morris, on account of the equity against his bond, which is faintly relied upon in the bill. If this had been any thing more than a pretence, Morris, instead of waving the discount by bringing suit upon Stockdell's bond, 259 would have instituted a suit *in equity to be relieved against the payment of his bond, by which means, third persons would have been warned not to purchase it. But the decree of the Chancellor, by directing the difference between the two bonds to be paid by Morris, necessarily disallows his claim of equity on account of the Kentucky lands.

I say nothing about the bill of exceptions, because not being signed, it contains no facts which this court ought to regard.

Wickham for the appellee. I cannot agree, that Morris, has by any part of his conduct waved his right of discounting Stockdell's bond against his own, or that he is precluded from asserting that right, as well as his prior equity against this bond, in a court of chancery.

Morris purchased from Littlepage his choice of two distinct tracts of land, of a thousand acres each. He is afterwards sued in the state of Kentucky, by Johnson, who claims an undivided moiety of both tracts. Should he succeed, no two contracts can be more unlike, than the one made with Littlepage, and that which would be thus forced upon him. The bond which he had given in part of the purchase money, comes by assignment into the hands of Stockdell, his debtors, charged with this equity against it, and therefore, when Morris was applied to by Stockdell to discount one bond against the other, the former, very properly objected. He was not bound to offset a debt justly due to him, against one, which in equity he did not owe. Under this impression, Morris brought suit upon Stockdell's bond as he certainly had a right to do.

It cannot be denied, that Morris had originally an equity against Littlepage; but it was not necessary for him to disaffirm the contract, unless he pleased to do so; for if the damages to which he was entitled, should be equal to the debt due from him to Littlepage, the one would discharge the other, and yet the contract remain valid.

The next question then is, whether Morris, can in a court of chancery set up this equity, as well as the discount, against Picket, the assignee. As this point has been fully discussed in the case of Norton and Rose, it will not be necessary to repeat those arguments.

But it is contended, that cross bonds do not discharge each other; that they only give an election to discount, the one against the other. This position may be very questionable. The words of the law are general enough to make any discount, a pay- 260 ment. *But if this be not the case, Morris may offer Stockdell's bond as a discount against Picket, because it would have been a good one against Stockdell. The time when the discount may be made is not limited by the law, and therefore, may properly be offered when payment is demanded. The conduct of the parties in the mean time cannot defeat this right to discount, unless it amount to an express waver. I have endeavored to prove, that the refusal of Morris, did not amount to a waver. On the other hand, he retains Stockdell's bond in his possession, and as soon as he was properly called upon by Picket's suit to make his election, whether to discount or not, he then offered Stockdell's debt as an offset. The institution of the suit upon Stockdell's bond, was not an implied waver; by giving to the debt the security and dignity of a judgment, he did not thereby render it unfit to be made an offset.

But it is contended, that however the general question may be decided, a discount against a mesne assignee cannot be set up against the plaintiff in the action. I can see no good reason for this distinction; if it be correct, it is apparent that the most palpable injustice must follow. The obligor, knowing that his bond has come by assignment into the possession of a particular person, goes on to sell him property, or to make payments; will it be contended, that a subsequent assignment of the bond, will discharge it of those discounts which had once fairly attached upon it?

If we must give to the law a construction so strict as to produce this effect, it will follow from the same mode of interpretation, that the negociability of a bond is at an end after one assignment, and of course, that Picket could not recover at law. The words of the law are, "that any person or persons may assign," which if taken strictly, will only apply to obligee or obligees. But if under a liberal construction of the law, assignees may assign, the proviso as to discounts must be so far extended in its interpretation, as to be commensurate with the right to assign.

The next question is, whether we can be assisted in a court of equity, after what has happened in the trial at law?

It is objected, that the errors which the court committed, were only examinable by a court of appellate jurisdiction. But in the case of Ambler and Wyld, (ante p. 36,) this court determined, that the Chancellor might relieve against a mere error in the court of law. In that case, the court improperly refused to admit certain testimony which was offered; the party ag- 261 grieved *by that decision might have excepted and appealed, but he did not.

Your honors determined, that the inferior court were wrong in refusing the evidence, and that the party who was injured by the mistake of his counsel, in not excepting, might seek relief in equity. But this is a much stronger case than that. We do not complain of an erroneous opinion given by the court, but that they refused to give any opinion at all when applied to for that purpose. Instead of instructing the jury as to the law, they left a question of nicety and difficulty to be decided upon by them. If the jury undertook to determine upon a question which involved equitable matter, and were wrong in their opinion, surely their decision does not oust the court of chancery of its jurisdiction over the subject. It is obvious, that the counsel for Morris were misled, and the jury confounded by an enquiry into Morris's equity against the bond, and Picket's knowledge of it, before the assignment; whereas the single point to which the attention of the jury ought to have been directed, was, the propriety of discounting the bond due from Stockdell. As to the notice, the jury had nothing to do with it; it was a merely equitable question. The defendant was prevented from obtaining a new trial, from a mere accident, which it was not in his power to controul. It is every day's practice, for the Chancellor to relieve against an injury, resulting from a mistake of counsel; as where he neglects to offer discounts, and the like.

Having, I trust established the jurisdiction of the court of equity. I will proceed to examine the facts in this cause, and apply them to the principles which I have endeavored to maintain.

If Stockdell had been the plaintiff at law, no question would exist as to our right to relief against him. It will also be conceded, that whether the equity goes along with the bond into the hands of an assignee, or not, he is liable, if he had notice of it before he has paid the consideration money. Nay, if he received it at a time, when it was in his power to save himself, he will be considered as a purchaser with notice.

If Mr. Picket can be in a better situation than Stockdell would have been, he must not only be a purchaser without notice, but he must prove, that he gave a full bona fide consideration, and that he has paid the whole of it.

I say, he must have paid a full consideration; for if the assignor of a bond be liable to the assignee in case he cannot receive payment from the obligor, and less is paid for the bond, than its real nominal amount, it is usurious.

262 *I admit, that the answer of Picket contains strong general averments, that he paid the whole consideration before notice of Morris's equity. But this general assertion is qualified by other parts of the answer, and when he is called upon to state the exact consideration paid for the bond, he refuses to do so, and contents himself with a round declaration that it was adequate. In opposition to this evasive denial of those material points, there is one witness, who thinks he gave notice to Picket of the equity of Morris, before the assignment was made. Independent of this, it appears by the answer that long after the assignment was made, and when it is not denied that Picket had notice, he went on to encrease the debt due from Stockdell, instead of saving himself and Morris with Stockdell's property in his hands, which it was in his power to have done.

There is then the testimony of one witness, opposed to the answer. Let us see if there be not circumstances in aid of the former, sufficient to outweigh the latter. In the first place, the enquiry which the witness states Mr. Picket to have made would have been more naturally thought of before, than after he had paid his money. 2dly, The silence which the answer observes as to the date of the assignment. 3dly, The appellant's having property of Stockdell's so long afterwards in his possession. 4thly, The judgment, which Morris had obtained against Stockdell in the very town in which Picket resided, which as to the discount, is strong presumptive notice. The judgment specifically bound the very subject in which Picket was dealing.

Randolph on the same side. Morris has a two fold equity against Picket; 1st, his right to discount against Stockdell, and 2dly, his equity against Littlepage on account of the Kentucky land. I shall not notice the first point here, as the subject has been fully discussed in the case of Norton and Rose. But I will make this observation as to the fact of notice; that where an answer is to prevail against the testimony of a single witness, it should be plain, candid, and clear of every appearance of concealment. This answer denies that the defendant knew of any disputes about the bond, instead of being responsive to the interrogatory, whether he knew of any objections to it by Morris?

The question then, which is now to be considered is, whether Picket is liable to the discount claimed by Morris? It is admitted, that Morris knew of his bond

263 having passed into the *hands of Stockdell; he had therefore a right to keep up Stockdell's bond, for the purpose of a discount.

If Morris had once a right to oppose Stockdell's claim, it should be shewn by what means he has lost it. It is said, that he has waved the right; first, by an express refusal, and secondly, by an implied waver. The reason which induced the refusal to discount was entirely justifiable. He had no objection to the discount in case he was really indebted to Stockdell. But the fact was otherwise; the bond which he held was charged with in equity against it, which might have destroyed its force altogether.

As to the implied waver of his right to discount, I would ask whether the debt due from Stockdell was less binding, because the dignity of it was encreased? Or will it be contended, that a judgment cannot be set off against a bond, as well as one bond against another? The only proper time at which Morris could make an election which could be obligatory upon him, was when Stockdell, or his assignee should bring suit, and when that opportunity did occur, it was made in favor of the discount.

But it is contended, that the act of Assembly does not apply to discounts against

mesne assignees. The word plaintiff which is used by the legislature, obviously expresses the same thing as assignee would have done; and if this latter word had been used, it would have run through the whole string of assignees, however numerous they might be. The reason of allowing discounts, being to avoid multiplicity of suits, it applies as well to mesne assignee's as to the one, in whom the right to the debt ultimately rests.

The next question respects the jurisdiction of the court of chancery. Morris, as I before observed, had a two fold equity; one, which might properly have been decided upon at law; but the other, which respected the Kentucky land, was a question, which, belonged exclusively to the court of chancery. If the latter had been the only ground of the application to that court, no one could have denied its jurisdiction. But it is well known, that if that court will entertain the suit at all, it will decide the whole case, though involving points properly determinable at law.

Discounts, are not less a subject of equitable jurisdiction, because they may also be determined at law. Until the statute, the parties were driven into that court to obtain the benefit of discounts, and the jurisdiction is not ousted by its being
264 concurrent *with the courts of law. Independent of these considerations, there was not only mistake, but accident in this case. The counsel were evidently led off from the true point of discussion, into an enquiry about notice, which was entirely unimportant, and from this cause it probably was, that they neglected to file exceptions to the opinion of the court. It was accident alone which prevented a new trial from being granted upon the first application, and the offer of Picket to wait a month, until Morris could have an opportunity of obtaining an injunction, allured the latter from his purpose of renewing the motion.

Marshall in reply. Whether the equity attached to a bond follows it into the hands of the assignee or not, is a question I mean not to argue, because, I consider it to be unimportant in his cause. If Littlepage himself had been plaintiff, he could not have been opposed by this equitable objection. The only evidence of his equity is, the answer of Littlepage, a bill filed in Kentucky concerning this land, and a paper signed by Johnson, who contests the right of Morris to a fulfilment of Littlepage's contract. But none of these papers can be considered as evidence of the fact.

If then Morris had in reality no equity against this bond, his refusal to discount, was an absolute waver of his right. It is said that there is no time limited, within which the election to discount, or to wave it, is to be made, and that he might use it at the trial. I do not contend that he was bound to make it sooner, but if he expressly refuse before the trial to make it, and in consequence of his doing so, his bond is assigned away to a fair purchaser, he is bound by it, and cannot afterwards reclaim his right to discount. The reason assigned by Morris for his refusal was not real, but a mere subterfuge, used for the purpose of enabling him to purchase up his own bond for less than its value, and therefore it cannot qualify that, which I term an express waver.

I do not say, that the bringing suit upon Stockdell's bond was of itself a waver, or that the judgment could not be made an offset; but it is evidence of his mind upon the subject, that the discount was not to take place; for if it had, Morris must have been nonsuited, as the bond due from him to Stockdell, amounted to a greater sum than what was due to him.

I have contended, that by the literal words of the act, the defendant cannot set up a discount against an intermediate assignee; to which it is answered, that
265 if the law be thus strictly *interpreted, a bond can be assigned but once. I cannot clearly comprehend the justness of this conclusion, for it is plain from the words of the law, that any person or persons having the legal title may assign, which must mean, more than one assignment.

If payments be made, or if property be sold to an intermediate assignee, this would be an actual discharge of so much of the bond, and might be given in evidence without the aid of the proviso; but this is very different from a discount, which could not be made were it not for this law.

If Morris could not have set up the discount at law, there is an end of the cause. But if he could, he cannot now resort to a court of equity to get the benefit of it. The whole case has once been tried and decided upon before a competent jurisdiction. I contend, that the same question cannot be re-examined and rejudged in any but an appellate court. I am now speaking of the discount alone. The case of Ambler and Wyld, does not sustain the jurisdiction of the court of chancery as now contended for. In that case, material testimony was not permitted to go to the jury, and of course, the whole case was not before them, nor decided upon by them. This court declared, that if the whole evidence had been laid before the jury, the decision would have been otherwise. In this case, nothing was kept back; the question which we are litigating here, is the very same which was contested and decided by the jury with the very same evidence which is exhibited to this court.

It is said, that the counsel and jury were entangled with a question which was unimportant, and by that means they were reduced from the true point in the cause. This is mere conjecture, and is not warranted by any part of the record. But if it were, I do not agree, that the mismanagement of counsel, or the misconceptions of the jury will give jurisdiction to a court of equity, over a subject which has been fully examined and decided upon by a jury.

It is said, that the court of chancery had an original jurisdiction as to discounts which is not ousted by the statute. This is admitted, and it then follows, that the courts of law and equity have concurrent jurisdiction upon that subject.

It will I presume be admitted, that those courts have also concurrent jurisdiction in matters of account; but because this is the

case, will it be contended, that if a suit be brought at law upon an account, and a decision be there had, the very same subject may be re-examined in a court of
266 equity? As well *might a court of law rejudge a case decided upon in equity, under the plea of concurrent jurisdiction.

As to all the other pretences for giving jurisdiction to the court of chancery, they are mere conclusions of the counsel, without being warranted by the record; such are the supposed blunders of the counsel in discussing the equity, instead of the law of the case; in their being dazzled by Picket's offer of waiting a month, and being thereby put off from their first intention of moving for a new trial.

It is contended, that Picket had notice of Morris's discount. This is not proved; but if it were, and if he also knew that Morris had rejected the discount, he certainly would not have been bound to admit it. Neither is there any evidence, that Picket had it in his power to save himself; or that there was any thing like usury in the transaction. These, are points not stated in the bill, and therefore could not be noticed by the court, even if they were proved by the evidence.

As to Morris's judgment, it could not be even implied notice to Picket, who was not privy to, or bound by it. But there is the strongest reason to believe, that the judgment was obtained after the assignment; for if it had been otherwise, it is highly probable, that Stockdell would have offered Morris's bond as an offset.

The Court desired this cause to be spoken to again, upon the point of jurisdiction.

Duval for the appellee. The conduct of the court in refusing to seal the bill of exceptions, prevented Morris from appealing, and produced an injury, against which a court of equity may relieve. I admit, that the statute points out a mode of proceeding where the court refuse to seal a bill of exceptions; but it does not follow from thence, that equity may not exercise a concurrent jurisdiction over the subject, and prevent the injustice which must result from an unfair trial, or one, where the parties have not been fully heard, and where the judgment is apparently wrong. 3 Morg. Ess. 291, proves, that a court of chancery will interfere, if the jury be misdirected. So if the court refuse to direct the jury, and they find an inequitable verdict, the Chancellor may with propriety interfere. After many new trials have been granted at law, this court will for the furtherance of justice grant another. 3 Morg. Ess. 91.

267 *Wickham. I think, that the jurisdiction of the court of equity in this case may be maintained, as well upon the general principle and constitution of that court, as upon the decisions of this court on similar cases.

If a want of jurisdiction appear upon the face of the record in proceedings at common law, the judgment may be arrested, or reversed. But in chancery causes, the jurisdiction must be specially objected to by plea. It may be said perhaps, that this bill gives jurisdiction to the court, and that therefore no plea to the jurisdiction could have been properly put in. But since all the material allegations in the bill are proved, the court must retain its jurisdiction, if the bill gave it; if it did not, then it ought to have been objected to by plea.

If the appellant had meant to oppose the relief prayed for, because of the judgment at law, he should have pleaded it in bar, and by answer denied the equity stated in the bill. The County Court when called upon to instruct the jury as to the evidence, and to determine whether the discount which was offered by Morris, was legal or not, refused to give any opinion at all, improperly submitting to the decision of the jury, a legal question which it was the duty of the court to have determined.

The case of Ambler and Wyld, comes fully up to this. The question in that cause was whether the referees had valued the house in specie or in paper money. The original valuation could not be found, and therefore the referees were examined upon that point, who declared, that they had a specie valuation in view. The whole case turned upon their evidence, and Wyld, was prepared with testimony to prove, that the valuers had made declarations on the subject, the reverse of what they then deposed. But the County Court before whom the cause was tried, refused to suffer the witnesses to be examined, this court determined that they were wrong in that opinion, and that where the decision of the inferior court was manifestly erroneous, the omission of counsel to file a bill of exceptions, should not bar the jurisdiction of the chancery. The Chancellor said, that if this evidence had been heard, the verdict might have been different. But the ground of the injunction could have been no other, than the error committed by the court, in refusing the examination of the witnesses.

If we refer to British decisions, they will abundantly prove, that equity may grant relief, although the matter has been decided at law.

268 *In the case of Graham v. Stamper 2 Vern. 146, the defendant in equity pleaded the verdict and judgment at law and that the defendant had insisted upon the same matter at law, where it was ruled against him, and demurred. But this was not thought sufficient to bar the relief prayed for, and the plea was overruled. So in the case of Robinson v. Bell 2 Vern. 146, the ground of the bill was, that the plaintiff's attorney had by mistake, and contrary to instructions, pleaded a general, instead of a special plene administravit. The court relieved against this mistake although the bill did not state, that the discovery was made before the judgment.

If such be the decisions in England, there is a much stronger reason, why a court of equity should be more liberal in granting relief in this country, in cases, which have been decided in the County Courts. The want of legal knowledge in those courts, and the loose manner in which business is generally conducted there, will frequently produce improper and unjust decisions of cases, which in many instances could only be remedied in a court of equity. A distinction of this sort is even warranted by English cases. In Finch Ch. cas. 472, we find that

relief was granted against the judgment of an inferior court, on account of improper conduct, and a distinction is taken between the decisions of such courts, and those of the superior courts.

Another ground of jurisdiction is the mistake of the jury. The only question was if the debt had been paid: and if the court had determined as they should have done, that the discount offered by the appellee was proper, the verdict must have been different from what it was; yet this opinion of the court was withheld. The jury were led to believe, that the material point in the cause was whether Picket was a purchaser, with or without notice, and not being satisfied that he was the former, they found for him. I know, that in Ambler and Wyld it was said by the court, that if the whole evidence had been left to the jury, the decision would have been otherwise. But it will be noticed, that in this case, the error committed by the jury was in the law of the case.

A court of equity will relieve against an award, if there be an evident error on the face of it, or if the arbitrators have mistaken the law of the case. A verdict is not more solemn nor more obligatory upon the parties than an award. This court have gone into the recesses of a jury room, to get evidence of the irregularity and mistake upon which the verdict was given. (Cochran v. Street, ante vol. 1, p. 79.) In 269 (M'Rae *v. Woods ante p. 80) the jury considered the plaintiff as entitled to half the ticket; but from the evidence, it was clear, that if he were entitled to any part, it could not be to more than a fourth; yet this court sustained the decree of the Chancellor, which awarded a new trial.

It may be contended that Morris's attorney might have renewed his motion for a new trial. There is some obscurity upon this subject, and it can only be cleared up by supposing that his counsel was led off from his purpose of doing so, by Picket's offer to stay execution until he could apply for an injunction. It appears, that after a fifth magistrate came upon the bench, the motion was renewed, and then abandoned. But to make the most of this, it was a mistake of counsel, against which this court may relieve.

Randolph. Let us consider this as an original case in the court of chancery; that Morris had there filed his bill against Picket, calling upon him to surrender the bond, on the ground of his original equity against it, or because of the discount; or if the ground of the bill had been, that Picket might have saved himself out of Stockdell's property, and had failed to do so; in all these cases, the court of equity would have had compleat jurisdiction. So it would, if the bill had called upon Picket to discover how much he had paid for the bond; For if Stockdell could have sought relief against an unconscionable, or usurious bargain, (which will not be denied,) it is equally clear that Morris possessed the same right.

What then is to bar us from this equitable relief after a decision at law? If a verdict be rendered after a full and fair trial upon the law of the case, I admit, that the interference of the court of chancery would be improper. But if the cause be mixed with a question of equity, where the jurisdiction is concurrent, as in cases of fraud discounts and the like, and a wrong decision has been given, Chancery will interfere and relieve, although the same points have been pressed at law.

A court of equity will entertain a suit in the case of a lost bond, although there is also a remedy at law, 3 Durnf. and East 151.

The case of Kent v. Bridgman Prec. in Ch. 233, establishes this principle; that where there is concurrent jurisdiction, tho' the party at law attempted to avail himself of a point proper for the determination of that court, and failed, yet he might seek relief in equity. Now, although the whole case in Kent and Bridgman was not submitted to the jury, and therefore an 270 attempt *may be made to distinguish that case from the present, yet it is obvious, that the ground of the decision was not the failure to produce the judgment, but the fraud, which was examinable in equity as well as at law. The Chancellor sustained the cause upon the ground of a concurrent, and not of an appellate jurisdiction.

Marshall. The principle which I have endeavored to maintain is this; that when the whole question has been completely before the jury, accompanied by no circumstance which could prevent a full and fair decision of the case, by that body, there is no remedy but in an appellate court. If the party apply for relief to a court of equity, he must rely upon other ground than legal errors in the decision complained of. Let all the cases which have been cited be examined, and it will be found in each of them, that the whole case was not decided upon by the jury. In 2 Morg. Ess 291, the jury did not decide upon the discounts. 3 Morg. Ess. is no ways applicable.

In the case of Kent and Bridgeman, there was an equity which was not determined at law; there was a fraud practised and proved, but still the party could not recover at law, without a copy of the judgment; of course, the subject of the fraud was not tried at all, and the jury were directed to find for the plaintiff, because the judgment was not produced. This is precisely within the rule I have stated.

It is then contended, that if it were intended to object to the jurisdiction, it should have been done by plea. This is founded I suppose upon the act of 1787, which declares, "that after answer filed, and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made &c."

The construction of this law must necessarily be restrained to cases, where the bill shews a right in the plaintiff to recover. For where the plaintiff has no right at all, and if he be barred by a judgment at law, it is not necessary, nor would it be proper to plead to the jurisdiction. Such a plea admits the right of the plaintiff, but denies the power of the court to decide upon it. Thus, if a suit in chancery be brought upon a bond; the plaintiff having a right to recover, the defendant must apprise him in

an early stage of the cause, that he means to object to the jurisdiction of the court. But if by the plaintiff's own shewing, or otherwise, it appears that the bond has been paid off, or that he had brought a
271 suit at law upon it, and a verdict *and judgment had passed against him; would a court of equity be bound to decree in his favor, because there existed an objection to its jurisdiction, which had not been taken advantage of by plea?

It is said, that the defendant should have pleaded the judgment in bar. But this is not necessary, where the same matter is stated in the answer, and is also relied upon in bar; or if (as in the present case, the plaintiff himself states the judgment in his bill. In Ambler and Wyld, the whole case was confessedly not before the jury; for the court would not permit them to hear all the testimony which was offered.

In the case cited from Finch. Ch. Cas. 472, the court had no right to decide at all for want of jurisdiction, so that in fact, there was no judgment.

In 2 Vern. 146, there was a secret equity, of which the defendant could not avail himself at law; for the court was not at liberty to enquire into the legal error, whilst the question was depending in a superior court. In the case now before the court, there is no equity unmixt with law, since the discount might have been made at law. In the case last cited, the mistake was not triable at law, and of course, it was not enquired into nor decided upon by the jury. The case of Bosanket and Dashwood, Talb. 90. was a suit to be relieved against an usurious contract.

If the jury mistook the law as to the discount, it does not from thence follow that a court of equity can interfere; for if so, every error of the common law courts may be re-examined and rejudged in this court. In the case of Cockran and Street, this court did not set aside the verdict because it was wrong, but because a part of the jury had been imposed upon by the others.

As to the power which it is said Picket had to save himself, there is no proof of it.

I am at a loss to comprehend the distinction which is taken between cases of a merely legal nature, and such as are mixed with equity. I admit that in the latter case, the two courts have concurrent jurisdiction, but if the whole subject be decided in the court of law, equity can no more re-examine it, than the courts of law in a similar case could re-examine a decree of the court of chancery.

I admit, that a suit may be brought either at law or in chancery, where a bond is lost. But if it be decided in either court, the other cannot interfere.

272 *ROANE, J.—Wherever a case is fully and fairly tried in a court of law, the decision is binding upon the parties, and a re-examination of the cause in a court of equity is certainly improper. The parties, by submitting to the decision of that tribunal, must be governed by it, whether it be right or wrong. But this principle will extend to no case, where there has not been a fair trial, as well as a full discussion of the cause.

In this case, the appellee at the trial in the County Court, offered the bond of Stockdell, as a discount against the demand, which ought certainly to have been allowed. For I cannot consider any part of Morris's conduct, as amounting to a waver of his legal right to insist upon the offset. His refusal at one time to admit the discount, is satisfactorily accounted for. He had strong reasons for believing, that he might oppose the payment of his bond to Stockdell, by the equity growing out of the original contract for which that bond was given.

It appears that the counsel for Morris, moved the court to instruct the jury, that the discount was proper; this they refused to do, as well as to recommend a special verdict. In consequence of this improper conduct in the court the jury found a verdict most obviously against the very right of the case. For I hold it most clear, that either party has a right to demand the opinion of the court, upon questions of law which may arise during the trial of a cause. Their superintendence in explaining and deciding legal questions, is essential to the proper administration of justice, and ought to be exercised, when either party require their interference.

The second motion which was made for a new trial, was not over-ruled by the court, but for some reason or other which does not certainly appear, it was abandoned by the defendant. Although there is no testimony in the cause leading to a suspicion that Picket's offer to stay execution until an injunction could be applied for, proceeded from an improper motive in him, yet it is highly probable, that it tended to divert Morris, from his purpose of persevering in the motion.

I think the decree ought to be affirmed.

CARRINGTON, J.—It would perhaps seem strange, that a court of equity should not possess the power of relieving against a judgment at law, obviously unjust, and against the right of the cause. In cases of fraud, surprise, accident, trust and the like, where that court has complete jurisdiction, it is within its peculiar province to grant relief, where the parties can-
273 not *obtain it at law. It is true, that the party asking for its interposition must shew himself entitled to equity superior to that of the person who has unconscientiously obtained the advantage at law.

I admit, that the courts of law and equity should be confined within their proper spheres, and that the line which separates their respective jurisdictions should be carefully guarded. With equal jealousy would I watch over and preserve from violation the trial by jury. But it is not less important, that the court should exercise those functions which properly belong to them. To the former, belong the uncontrouled power of deciding upon facts and even upon the law if it be submitted to them. The province of the latter, is to determine upon those legal points which come properly before them. It is therefore the duty of the court to instruct the jury upon the law when they are required to do so, or to reverse the point if either party desire it. If the opinion of the court be wrong, there is then a way to get it corrected. If

the opinion be right, and yet the jury disregard it, the court may preserve its privilege by setting aside the verdict.

Can it be contended, that this cause was fully and fairly tried, when the only important part of the appellee's case was not decided upon by the jury? When the court refused to state to the jury the law as it respected the discount, they as effectually excluded it from the consideration of the jury, as if they had done it in express terms; for though it was laid before the jury, yet it was a question proper for the decision of the court, and their refusal to give that decision, kept it out of the view of the jury as the verdict evidently proves. The jury were then mistaken in the law, and being involved in unimportant discussions upon points no way relative to the cause, they were allured from the only one which was material.

Independent of this, it is clear that the parties were surprised into the abandonment of their first intention of moving for a new trial, by the offer of Picket to stay execution until an injunction could be applied for. It cannot be questioned, but that equity may relieve against the mistakes of a jury, as if they miscalculate, or omit to allow discounts to which the party injured can prove himself entitled.

I think that the case of Ambler and Wyld, is not distinguishable in principle from this. That cause was determined before a court of competent jurisdiction, but it was determined improperly. The party aggrieved might have appealed, but he
274 did *not; yet this court decided, that equity might relieve him against this erroneous judgment of a court of law.

In this case, it is apparent, that there was a struggle for a general verdict, and that the law and right of the case was stifled in the conflict.

I think the decree right and that it should be affirmed.

LYONS, J.—There have been three questions made in this cause; the 1st, has been decided in the case of Norton and Rose. The 2d is, whether the conduct of Morris has not deprived him of the discount, of which he now endeavors to avail himself. 3dly, Whether, if he be entitled to the discount, he can have the benefit of it after the verdict and judgment against him.

Upon the 2d point, it is contended, that Morris having once refused to admit the discount, he has thereby waved his right to assert it against a bona fide assignee. How far an unqualified refusal might have bound him, it is unnecessary to decide, because I am clear that his conduct did not amount to that. Whether the equity under which he sheltered his refusal to discount was well founded or not, is not material; it was evidently the cause of his refusal, and it cannot from the circumstances which attended it, be considered as a mere pretext to avoid the discount. There was at the time, a suit depending in the state of Kentucky, the event of which he could not possibly foretell. This is sufficient to repel the presumption of an intention to wave. Under these circumstancs, it was a fraud in Stockdell to assign the bond without giving notice of the discount which Morris had against it. Whatever may be the equity of Picket, that of Morris was prior, and equal to it, besides which, he had a legal right to set up his discount. But in fact, Picket must be considered as standing in the shoes of Stockdell, since it was his duty to have enquired of Morris respecting the bond, before he took the assignment of it.

There can be no doubt then of Morris's right to relief, unless he be barred of it by the verdict and judgment at law, which brings me to the consideration of the third point.

If what I have before stated be correct, it is clear that Morris has a sufficient discount against the claim of Picket, both at law and in equity. But it is contended, that he cannot now obtain the benefit of the discount, because he has lost the opportunity which he once had of availing himself of it at law. But I would ask, when it was, that this opportunity presented itself? At the trial of the cause at law, he claimed the discount and it was rejected. Considering the question as a legal one,
275 *he prayed the opinion of the court upon it, or if they doubted, that they would recommend a special verdict; they refused to do either. He then tendered a bill of exceptions, which they would not sign. He was equally unsuccessful in obtaining a new trial. What more could he have done? The Superior Court could not relieve him, because nothing was spread upon the record which could avail him there. If he had applied for a mandamus, or pursued any other method of obtaining relief save the one he did, an execution might have issued, and he must have experienced in the mean time the effect of an unjust and inequitable verdict. And is it possible that a right thus clearly established, should be destitute of a correspondent remedy? I thought it was the peculiar province of a court of chancery, to afford relief, in cases where competent remedy could not be afforded some where else.

I admit, that in this case the party had complete remedy at law and if the cause had been fully and fairly decided there, equity would not have interfered. But this was not the case. The refusal of the court to decide upon the points which were properly submitted to them, prevented a just determination upon the only important question in the cause; and their subsequent refusal to seal the bill of exceptions, shut out the parties from the proper tribunal to have corrected them. Suppose the jury should obstinately decide against the opinion of the court upon a point of law, or should disregard their recommendation to find a special verdict; there could be no relief in a court of law against two improper verdicts, as a second new trial could not be awarded. Would it not be monstrous to say, that in such cases, a court of equity could not afford relief?

The Chancellor was not bound to grant a new trial, because being in possession of the whole case, there was nothing to prevent a final decision.

The case of Burrows v. Jemino, 2 Str. Rep. 733, the Chancellor relieved against a judgment, upon a point, which he was of opinion the court of law ought to have de-

cided in favor of the plaintiff in equity; but he observed, "that other judges might have been of a different opinion."

Ambler and Wyld is nearly parallel with this, for in that case, as in this, the mischief complained of arose from the error of the court. But there is this difference between them which renders this a stronger case; in that, the party might have appealed; in this he could not, because the bill of exceptions was not sealed.

276 *This is certainly a hard case upon Picket, but he who trusts most, must submit to bear the consequences of his misplaced confidence.

Decree affirmed.

Lee v. Tapscott.*

October Term, 1796.

Evidence—Best Evidence Rule—Title to Land.—The rule that the best evidence which the nature of the case admits of, ought to be produced, though generally true, is, in some cases, inapplicable as it respects title to lands in this country. A copy of a patent, either from the records of the Register's Office, or of a County Court, is as good evidence of title as the original would be.

Same—Copy of Patent†—Case at Bar.—The copy of a patent, signed, "Samuel Matthews, William Claiborne," dated 1658, and recorded in a County Court, together with an assignment of it, (which assignment was acknowleged and admitted to record, but it did not appear that the patent was proved or acknowledged,) admitted as evidence of title, though it did not appear that the patent was signed by Mathews, as Governor.

Same—Private Survey.‡—A private survey may be admitted as evidence of boundary between those who were parties to it, or who claim under them; but not as to strangers.

Illegal or Improper Evidence.§—Illegal or improper evidence, however unimportant to the cause, should never be confided to the jury.

Recordation—Paper Not Required to Be Recorded.—The recording of a paper which is not required by law to be recorded, especially if no notice be given to those whose interests may be affected, is not binding upon them, nor can it charge them with implied notice.

This was an appeal from the District Court of Fredericksburg. It was an ejectment brought by the lessor of the appellee against the appellant.

At the trial, the plaintiff in support of his title, offered in evidence a writing in the following words to wit: "To all &c. whereas &c. now know ye, that I the said Samuel Mathews Esq. do with consent of the council of state accordingly give and grant unto Henry Roach 1700 acres of land, situated and being in the county of Westmoreland, bounded &c. [and so describing the bounds] 850 acres part thereof, being formerly granted unto the said Henry Roach by patent the 13th of September 1654, and 850 acres the residue, by and for the transportation of 17 persons into this colony &c. yielding and paying &c. dated the 10th of October 1658."

(Signed) Samuel Mathews,
W. Claiborne.

"Know all men by these presents, that I Henry Roach, do make over, alien, and assign for me my heirs &c. all my right title and interest in the within patent and whole portion of land therein specified and contained unto Mr. John Hoskins of Bristol, his heirs &c. In witness whereof I have set my hand this 13th of Feburary 1660."

(Signed) Henry Roach,

and attested by two witnesses. On the 14th of February 1660 this assignment was acknowledged in court and then recorded.

[Note, the record does not state, that this assignment was endorsed upon the writing first mentioned.]

277 *There is also in the record a deed from Roach to Hoskins, dated in 1660, conveying to him the above mentioned tract of 1700 acres. This deed is set forth in the bill of exceptions.

The plaintiff, alledging that this was a patent, whereby the land in question was granted to Henry Roach, under whom the plaintiff claims, the defendant objected, that it was not a legal and sufficient grant, and that it ought not to go in evidence to the jury, and being overruled by the court, he filed an exception to the opinion.

The defendant below offered in evidence to prove the boundaries of the land in controversy, a plat and survey made in the year 1737, by the order of Samuel Atwell and Henry Fitzhugh under whom the defendant derived a title to part of the land in controversy, and according to which plat and division, the lands therein described have been since held by those claiming under the said Atwell and Fitzhugh which plat and survey were recorded in the County Court of Westmoreland in the year 1739 also a partition of the said land made by referees

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*For monographic note on Evidence, see end of case.

†**Evidence—Copy of Ancient Deed.**—In Ben v. Peete, 2 Rand. 548, the court said: "In *Lee v. Tapscott*, 2 *Wash.* 281, and Rowletts v. Daniel, 4 Munf. 478, it is said, that the copy of an ancient deed, where possession has followed the deed, and (in the latter case), where the deed was recorded on the acknowledgment of the grantor, shall be received, without any proof, that the original is lost or destroyed. I do not consider these cases as in point; for, though ours is an ancient deed, it wants that corroboration arising from possession."

The principal case is cited and approved in Baker v. Preston, Gilm. 285; Van Gunden v. Va. Coal & Iron Co., 52 Fed. Rep. 845.

See Maxwell v. Light, 1 Call 117, and monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

‡**Evidence—Private Survey—Strangers.**—The principal case is cited in Jones v. Carter, 4 Hen. & M. 195, as authority for the proposition that a private survey is no evidence against those who are strangers to it.

§**Illegal or Improper Evidence.**—Illegal or improper evidence ought never to be confided to the jury, however unimportant it may be to the cause. In support of this proposition, the principal case is cited and approved in Brown v. May, 1 Munf. 291; Hooe v. Wilson, 5 Call 74; Pasley v. English, 10 Gratt. 243; Payne v. Com., 31 Gratt. 859; Lovell v. Arnold, 2 Munf. 174.

See also, the principal case cited and approved in Moss v. Moss, 4 Hen. & M. 308; Harrison v. Brock, 1 Munf. 34.

Ejectment—Title to Support Action—Previous Possession.—The principal case is cited in Suttle v. Richmond, etc., R. R. Co., 76 Va. 284, as authority for the proposition that a person in peaceable possession of land, who is entered upon and ousted by a stranger without title, may recover in ejectment upon the strength of his mere previous possession. See Tabscott v. Cobbs, 11 Gratt. 172, and monographic *note* on "Ejectment" appended thereto.

Same—Variation between Verdict and Judgment.—As to what variation between a verdict and judgment in ejectment, will be permitted, see the principal case cited in Camden v. Haskill, 3 Rand. 465.

Hearsay Evidence—Admissibility—Private Rights.—The principal case is cited in Winter v. United States, 50 Fed. Cas. 352, for the proposition that tradition of a particular fact, as that a post or stone was put down, or turf dug at a particular spot, is not competent evidence to establish a private right, because it is not a matter of public concern in which the community are interested.

The principal case is also cited on page 355 of Winter v. United States, *supra*.

appointed by the said Atwell and Fitzhugh. To this evidence the plaintiff objected, and the objection being sustained by the court the defendant excepted. Verdict for the plaintiff for the lands laid down in the survey made in this cause, as comprehended within certain lines described by the jury. Judgment that the plaintiff recover his term yet to come of and in the lands with the appurtenances in the declaration mentioned.

CARRINGTON, J.—The first point relied upon by the appellant's counsel was, that the writing signed "Samuel Mathews" could not be considered as a patent, and could not transfer the right of the crown to the lands therein described. It is certainly very informal, as it might well be expected to be at a time, when this country was in its infancy. But I am satisfied, that it possesses all the substantial parts of a grant, and that it was sufficient to convey the land. The case of Birch v. Alexander (ante vol. 1, p. 34) is expressly in point upon this question.

The next objection was to the authenticity of the paper. It has the signature of Samuel Mathews with that of W. Claiborne, who is not stated to be the clerk.

I might be induced to suspect the authenticity of the grant, if it stood unaided by circumstances; but there are two in the case, which have weight with me. The first is, the length of possession which has accompanied the grant; and the 2d is that a forgery is not to be presumed, where the grant was immediately offered and admitted to record.

278 *The third objection made to the opinion of the District Court is, that they refused to admit the survey made in 1737, as evidence.

A private survey made by persons who were strangers to the parties in this cause, cannot upon any principle of law be evidence against either of them, though it might have been proper as between those, who were parties to the survey, or who claimed under them. The case of Sir John Bridgman v. Jennings, 1 Ld. Ray 734, which was cited by the appellant's counsel is entirely against him. Lord Chief Justice Holt, was of opinion, that a survey made by A of two manors during his seisin of both, might after a length of time be given in evidence in a dispute about the boundaries between A, and B who had purchased one of the manors.

The case of Underhill v. Durham, in Freeman's Rep. 509, is inapplicable, as it relates only to the copy of a survey where the original was proved to have been burnt.

Upon the whole, I am clearly of opinion, that the judgment of the District Court upon the points suggested in the bill of exceptions was right, but as there is a clerical error in entering up the judgment generally, for the lands in the declaration mentioned, instead of pursuing the verdict, it must be reversed, and corrected.

LYONS, J.—I am always sorry when constrained to differ in opinion from the rest of the court. That which has been delivered may be, and probably is agreeable to the real equity of this case, but I must decide according to my own sentiments of the law.

The first objection is to the patent. It recites a former patent for 850 acres dated in 1654, and includes 850 acres more, for which entire quantity the grant is made. It also appears, that in the year 1660, Roach assigned this patent to Hoskins, and also by a deed pole in the same year conveyed the whole of the 1700 acres to the same person. Now what necessity was there for producing the patent at all? The deed, accompanied with the length of possession was title sufficient for the appellee. But not contented with this, he insists upon the admission of the patent, and relies upon it as proof of his title. This brings me to the question, whether such evidence was proper or not?

It is a sound and well established rule of law, that the best evidence which the nature of the case admits must be produced.

279 *This is a safe rule, for the security of property, and should be adhered to. Inferior evidence may be resorted to, where from the nature of the case better cannot be had.

Where it is necessary to rely upon the patent, the original must be produced if it can be had; if it cannot, a copy may be admitted. If the books in which the patent was recorded be lost, or destroyed, evidence still inferior to that may be permitted; such as a memorandum, particularly where the right has always been accompanied by possession.

The bill of exceptions states, that the appellant offered this paper as a patent whereby the lands in question were granted to Roach. Now let us examine this evidence of title; what is it? A piece of paper signed by Samuel Mathews, who is not stiled Governor in any part of it; there is no seal to it, nor is it even stated to have been sealed. It is stiled a patent in the assignment; but this did not make it one. If the assignor had been examined as a witness, and had declared upon oath that it was a patent, it would not have been sufficient, because he could not have been a witness for himself, and the patent could not have been admitted to record upon such evidence. Much less can the party give it the effect of a patent, by naming it one in his assignment. The assignment was acknowledged and admitted to record, but this patent, as it is called, never was. For though the clerk has officiously recorded it, yet it is not more authentic on that account, since it was not the act of the court.

Upon what ground then can I feel satisfied as to the authenticity of this paper? The answer to all this is, that it was recorded 130 years ago, and that it has been accompanied by possession; that instead of presuming a forgery, the antiquity of the patent ought to satisfy us of its reality. There is one thing clear; which is, that as it must have the aid of presumption to support it, that presumption is completely repelled by its having been in the power of the plaintiff to produce better evidence.

If the record book could be procured, and no such patent were to be found there, the presumption would be, that no such patent was ever issued. I do not object to the authenticity of the patent; upon a suspicion that it has been forged, but because it is incumbent upon the party who produces

and relies upon it, to prove it authentic. The assignment does not in my opinion strengthen the proof of the reality of the patent, because it has no greater weight than the recital of one deed in
280 *another, which is only binding between the parties to the deed, or those claiming under it. The antiquity of the instrument, tho' it might have its due weight, if no better evidence could be had, can have no effect when brought within that rule of law, which requires the best evidence which the nature of the case admits of to be produced. If the deed were of recent date, an inferior degree of evidence would be equally admissible, if better could not be had.

But if this had been the best evidence in the power of the appellee, I should still think, that the court erred in the opinion they gave respecting it. They ought to have suffered the evidence to have given as ground for the jury to presume a grant, leaving the weight of such evidence entirely to them; instead of which, they determined, that the evidence was sufficient to prove, that a patent had issued.

As to the survey which was offered by the appellant, I had considerable doubts at first; but I am now satisfied that the court did right in rejecting it. It might be very dangerous, if private surveys were to be admitted as evidence of boundary, between persons not parties or privies to them. The one in question is entirely ex parte, authorised by no judicial act whatever, and not even strengthened by notice to those persons who might be thereby affected. Neither do I think, that the recording of it can be considered even in the light of presumptive notice, because there was no person who could be regularly cited to contest it.

The recording of a paper which is not required by law to be recorded especially if no notice be given to third persons whose interests may be effected, can never be binding upon them, nor charge them even with implied notice of the fact. If in this case, there had been notice to the neighbours of the survey, or any other evidence tending to create a presumption of assent in the persons interested, I would in that case have left the evidence to the jury.

The PRESIDENT. — The appellant's counsel considered the objection to the patent under two heads; the first went to the imperfection of the grant; but he afterwards relinquished that point, and of course I should not now notice it, but to observe that the court were unanimously against him.

The second branch of this objection, relates to the authenticity of the grant. I admit the rule of law as it has generally been laid down to be correct. The
281 best evidence *which the nature of the case admits of, ought to be produced, and if it may be produced, inferior testimony is inadmissible.

But the rule as it applies in England to titles respecting land is inapplicable in this country. In that country, patents are not registered, in this they are, and copies from the registers office may as well be admitted in evidence as the originals themselves. The question then, is not whether the copy of a patent may be given in evidence, but whether a copy from the records of a County Court may? Because I take it for granted, that the paper offered in evidence by the appellee, and to which the exception is taken, comprehends the patent as well as the assignment, and proves, that both of them were admitted to record in the year 1660. Upon this point, I am clearly of opinion, that the attested copy of a patent recorded in the County Court, is equally authentic, as if, it were obtained from the records of the register's office. The latter, is under no other controul than that of the officer of that department, whereas the former, is under the superintendance of a court of justice.

I admit it to be possible, that a forged bond or patent, with an assignment, might be admitted to record; but after such a length of time, and under the circumstances of this case, I cannot presume it. On the contrary, I must presume that the real patent was recorded. Neither do I think, that the court went too far in the opinion they gave respecting this evidence. They did not determine that the evidence was sufficient to establish the grant but they over-ruled the objection of the appellant taken to the admission of the evidence.

The next question respects the survey which was offered on the part of the defendant. The exception is not to the authenticity of the survey, for if it were, and no other objection appeared to it I should consider the evidence as being proper. But it is objected, that it is inadmissible evidence as between those who were strangers to it. The case of Sir John Bridgman v. Jennings, is a compleat authority in support of the opinion of the District Court, and it stands unopposed by any other adjudged case within my recollection. This survey was certainly improper evidence to establish the boundaries of the land in question, and therefore ought not to have been left to the jury. Illegal, or improper evidence, however unimportant it may be to the cause, ought never to be confided to the jury; for if it should have an influence upon their minds, it will mislead them; and if it should have none, it is useless and may at least produce perplexity. Although the acknowledgment, of
282 *the acts of a party may be evidence against him, yet it can never under any circumstances be used in his favor.

A majority of the court being of opinion, that the error in the judgment in not pursuing the verdict, cannot be considered as a misprision of the clerk, the judgment must be reversed with costs, and entered for so much of the land with the appurtenances in the declaration mentioned, as shall be comprehended within the marks and lines described by the jurors in their verdict, together with the damages and costs &c.

EVIDENCE.

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Cross References to Monographic Notes.

Bonds, appended to Ward v. Churn, 18 Gratt. 801.
Confessions, appended to Schwartz v. Com., 2 Gratt. 1025.
Consideration, appended to Jones v. Obenchain, 10 Gratt. 259.
Deeds, appended to Fiott v. Com., 12 Gratt. 564.
Depositions, appended to Field v. Brown, 24 Gratt. 74.
Dying Declarations, appended to Jackson v. Com., 19 Gratt. 656.
Expert and Opinion Evidence.
Frauds, Statute of, appended to Beale v. Digges, 6 Gratt. 582.
Homicide, appended to Souther v. Com., 7 Gratt. 673.
Insurance, Fire and Marine, appended to Mutual, etc., Soc. v. Holt, 29 Gratt. 612.
Mortgages, appended to Forkner v. Stuart, 6 Gratt. 197.
Payment.
Res Gestæ, appended to Jordan v. Com., 25 Gratt. 943.
Witnesses, appended to Claiborne v. Parrish, 2 Wash. 146.

I. SCOPE OF NOTE.

In a few instances, as will be seen by the table of cross references, it was seen fit to treat certain subjects of evidence in separate notes. Except, however, where this has been done, it is the purpose of this note to embrace, in a general way, the whole subject of evidence, and to omit from discussion only such points of evidence as come more properly within the purview of the particular subject in connection with which they arise. For example, under the head of "Deeds" will be found discussed all such matters of evidence as have arisen in connection with that subject, and, consequently they are omitted from this note. Reference, therefore, is made to the table of cross references and the various titles throughout this series for the precise scope of this note.

II. JUDICIAL NOTICE.

A. GENERAL RULE.—Facts which are so generally known that every well-informed person knows them or ought to know them, will be judicially recognized without proof. Richmond, etc., Ry. Co. v. Richmond, etc., R. Co., 96 Va. 670, 32 S. E. Rep. 787; Hart v. Baltimore, etc., R. R. Co., 6 W. Va. 339.

B. SUBJECTS OF JUDICIAL NOTICE.

1. CENSUS AND POPULATION OF COUNTY.—Judicial notice will be taken of the population of a county as established by the last United States census. Welch v. County Court, 29 W. Va. 63, 1 S. E. Rep. 337.

2. COURTS, COURT OFFICERS, SEALS AND SIGNATURES.

Courts of Sister States.—The supreme court of West Virginia will take judicial notice that the corporation court of Lynchburg, Va., is a court of record, and will consult the Virginia Code or other law book to impart to it information, under § 4, ch. 13, W. Va. Code. Heffernan v. Harvey, 41 W. Va. 766, 24 S. E. Rep. 592.

Clerk of Court.—And a court will take official notice of who is its clerk. Cent. Land. Co. v. Calhoun, 16 W. Va. 362.

Seal of State—Signature of Heads of Departments.—So also, it is a rule of evidence that the courts of a state take judicial notice of its seals, and of the signature of the heads of departments. Com. v. Dunlop, 89 Va. 431, 16 S. E. Rep. 273; Va. Code 1887, ch. 164, § 3332; W. Va. Code, ch. 130, § 3.

3. DOMESTIC ANIMALS.

That Mules Are Domestic Animals.—It was held in State v. Gould, 26 W. Va. 259, that the court will take judicial notice that mules are domestic animals.

4. ELECTIONS.

Local Option Election.—An indictment for violation of Acts Va. 1885-86, p. 259, § 5, forbidding the sale of intoxicating liquors within any magisterial district voting against license, need not allege that the magisterial district in which the offense occurred had voted against license, since the court will take judicial notice of such a vote. Savage's Case, 84 Va. 582, 5 S. E. Rep. 563; Thomas v. Com., 90 Va. 92, 17 S. E. Rep. 788; Hargreave v. Com., 2 Va. Dec. 139.

5. INTOXICATING LIQUORS.

Effect of Apple Brandy.—A court will take judicial

notice that apple brandy is intoxicating. Thomas v. Com., 90 Va. 92, 17 S. E. Rep. 788.

6. HISTORICAL EVENTS.

a. Matters of General History.

Facts Concerning Confederate Currency.—Courts should take judicial notice of such facts as are matters of general history, affecting the whole people, such as the pendency at a particular time, of the late war; that Confederate notes were issued early in the war by the Confederate government, and these notes in a short time became almost the exclusive currency of the Confederate states, that during the first year of the war these notes were but slightly depreciated and were then received throughout the Confederate states in the payments of the debts, and all the channels of trade, without doubt or question; but these notes were never made a legal tender in the payment of debts, by an act of Confederate congress; that a particular county, at a particular time, was *de facto* within, or without the jurisdiction of West Virginia. Simmons v. Trumbo, 9 W. Va. 358; Hix v. Hix, 25 W. Va. 481; Hale v. Wall, 22 Gratt. 428. See Gregory v. Baugh, 4 Rand. 611.

The fact that Confederate states notes was the only currency in circulation in Virginia in March 1863, is so notorious, that it may be taken notice of judicially by the courts, as a matter of current public history. Walker v. Page, 21 Gratt. 636; Crockett v. Sexton, 29 Gratt. 57.

Safety of Person.—But the court should not take judicial notice of such facts as are not matters of general history, such as that a person entertaining certain political views was not safe in his person or property, in some particular county at a particular time. Simmons v. Trumbo, 9 W. Va. 359.

Military Orders and Occupation.—And the court cannot take judicial notice of the military orders extending the time for a stay of execution on judgments. Johnston v. Wilson, 29 Gratt. 379.

Military Occupation.—On the other hand, the court will take judicial notice of the fact, that Greenbrier county was within the Confederate lines during the war, and that Confederate money was the currency of the county. Hix v. Hix, 25 W. Va. 481.

And that the county of Kanawha in January, 1865, was within the lines of the federal army. Dryden v. Stephens, 19 W. Va. 2.

Also, Richmond and Mercer county are judicially known to the court not to be in territories, which were hostile to each other during the war. Kent v. Chapman, 18 W. Va. 485.

7. LAWS AND STATUTES.

a. Public Acts.—The courts take judicial notice of all public laws or acts of the Legislature of the state, and they need not be proven. Hart v. B. & O. R. R. Co., 6 W. Va. 338; Blankenship v. Chesapeake, etc., R. Co., 94 Va. 449, 27 S. E. Rep. 20.

Acts Incorporating Banks.—Thus, it has been held in several cases that acts of the legislature incorporating banks are public acts, of which the courts will take judicial notice; and in an action by the bank it is not required to prove its incorporation. Stribbling v. Bank of the Valley, 5 Rand. 132; Hays v. Northwestern Bank, 9 Gratt. 127; Farmers' Bank v. Willis, 7 W. Va. 31; Northwestern Bank v. Machir, 18 W. Va. 271.

Acts Incorporating Railroads.—So also, it has been held that the statutes of a state, creating railroad corporations, or licensing and authorizing them to exercise their franchises within the state, are public acts, of which the courts of the state will take judicial notice, without proof. Hart v. Baltimore, etc., R. R. Co., 6 W. Va. 338; State v. B. & O. R. R. Co., 15 W. Va. 363; Douglass v. Kanawha, etc., R. Co., 44 W. Va. 267, 28 S. E. Rep. 705; Baltimore, etc., R. R. Co. v. Sherman, 30 Gratt. 602.

Acts Incorporating Cities, Towns or Villages.—It was held in Beasley v. Town of Beckley, 28 W. Va. 81, that when in any judicial proceeding in West Virginia it becomes material to inquire whether a certain city, town or village has been incorporated, or within what county the same is situated, the court, judge or justice, before whom the same is pending, will take judicial notice of the acts of the legislature incorporating the same and of the county within which the same is situated.

Public Acts of Congress.—The courts of the several states take judicial notice of all public acts of congress, including those which relate exclusively to the District of Columbia, without any formal proof. Bayly v. Chubb, 16 Gratt. 284; Bird v. Com., 21 Gratt. 800.

b. Private Acts.—On the other hand, courts will not take judicial notice of private laws or acts of the legislature, but they must be proven when in issue. Hart v. Baltimore, etc., R. Co., 6 W. Va. 338.

Though private acts of the Virginia Assembly may be given in evidence, without being specially pleaded, they are not to be taken notice of judicially, by the court, as public acts are, but must be exhibited, as documents, if not admitted by consent of parties. Legrand v. Hampden Sidney College, 5 Munf. 324.

Statutory Rule—Appellate Court.—But the statutes provide that an appellate court shall take judicial notice of all such acts and resolutions of the legislature, though local and private, as appear to have been relied on in the court below. Va. Code 1887, ch. 164, § 3328; W. Va. Code, ch. 130, § 1; Somerville v. Wimbish, 7 Gratt. 205; Hart v. Baltimore, etc., R. R. Co., 6 W. Va. 338; Groves v. County Court, 42 W. Va. 587, 26 S. E. Rep. 460.

What Are Public and Private Laws.—A private law is one which relates to private matters which do not concern the public at large, and a public law is one which affects the public, either generally or in some classes. Hart v. Baltimore, etc., R. R. Co., 6 W. Va. 338.

c. Ordinances.—Courts of a municipal corporation will take judicial notice of its ordinances without allegation or proof of their existence. Town of Moundsville v. Velton, 35 W. Va. 217, 13 S. E. Rep. 373; Wheeling v. Black, 25 W. Va. 266.

d. Constitutional Provisions.—The supreme court may take judicial notice of the fact that a board of supervisors, which is a party to an appeal pending in that court, has since the taking of the appeal, been extinguished by the adoption of a new constitution. Board of Supervisors v. Livesay, 6 W. Va. 44.

e. Custom of Merchants.—A custom of merchants, when first brought into court, is a matter of fact, and merchants are examined to prove what it is, but when legal decisions are once made upon it, it becomes the law of the land, of which all parties and courts are to take notice without stating it. Branch v. Burnley, 1 Call 147.

f. Foreign Laws.—Courts, however, do not take judicial notice of the laws of other states. Such laws are facts to be proved as other facts. The usual and better, if not the only manner, of proving laws of a foreign state, when they are statutory, is by introducing in evidence a properly authenticated copy of the statute, or so much of it as is necessary to show what the foreign law is on the point in controversy. Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. Rep. 421, 64 Am. St. Rep. 715.

Usury Laws of Another State.—For example, the courts of one state are not bound to take judicial cognizance of the usury laws of another state; and

one who sets up the usurious, and therefore void, nature of a contract made in another state must also show what are the usury laws of such other state. Klinck v. Price, 4 W. Va. 4, 6 Am. Rep. 268.

Statutory Rule.—But under ch. 13, § 4, of the W. Va. Code, courts take judicial notice, without proof, of the law of another state, and in so doing may consult any book purporting to contain, state, or explain the same, and consider any testimony, information, or argument offered on the subject. Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. Rep. 1035; Singer Mfg. Co. v. Bennett, 28 W. Va. 16; State v. Goodrich, 14 W. Va. 842.

8. MORTALITY TABLES.—Courts may take judicial notice of mortality tables, though not offered in evidence. Abell v. Penn Mutual Life Ins. Co., 18 W. Va. 402.

9. ORDERS OR DECREES OF FOREIGN COURTS.—Where a court of competent jurisdiction in one of the United States has by its final order or decree passed upon and confirmed the accounts of an executor, administrator, or other fiduciary, the courts of West Virginia will take judicial notice of the effect of such order or decree in any judicial proceeding in that state affecting the validity of the same. Shriver v. Garrison, 30 W. Va. 456, 4 S. E. Rep. 660.

10. PLACES WITHIN COUNTY.—The Supreme Court of West Virginia will take judicial notice that the city of Wheeling is the county seat of, and is within, Ohio county. Seibright v. State, 2 W. Va. 591.

11. PRIVILEGE OF MEMBER OF ASSEMBLY.—But the privilege of a member of Assembly, cannot be noticed by the courts *ex officio*. As it may be waived, it must be claimed. And it can only be claimed by plea, or on motion tendered, or made at the proper period. Prentis v. Com., 5 Rand. 697, 16 Am. Dec. 782.

12. RAILROADS.

Incorporation.—In some cases the courts have taken judicial notice that a railroad company is a corporation. Baltimore, etc., R. R. Co. v. Sherman, 30 Gratt. 602; Hart v. Baltimore, etc., R. Co., 6 W. Va. 338; State v. Baltimore, etc., R. R. Co., 15 W. Va. 363; Douglass v. Kanawha, etc., Ry. Co., 44 W. Va. 267, 28 S. E. Rep. 705.

Gates and Flagman at Railroad Crossing.—Courts will take judicial notice that the maintenance of gates and a flagman at a crossing of the tracks of a railroad and a street railway on a city street diminishes the danger of accidents. Richmond, etc., Ry. Co. v. Richmond, etc., R. Co., 96 Va. 670, 32 S. E. Rep. 787.

Sources of Information.—And the courts may, with propriety, look to the vast number of adjudged cases upon the subject of railroad crossings, and the treatises of text-writers to ascertain that such devices are resorted to to prevent accidents, and are regarded as useful and beneficial contrivances. Richmond, etc., Ry. Co. v. Richmond, etc., R. Co., 96 Va. 670, 32 S. E. Rep. 787.

Eminent Domain.—But the court will not take judicial notice, that a railroad company, under its charter, condemned or acquired title to any particular land, or strip of land. Chapman v. Pittsburgh & S. R. Co., 18 W. Va. 185.

III. PRESUMPTIONS.

A. IN CRIMINAL CASES.

Innocence.—In all criminal proceedings, the prisoner is presumed to be innocent until his guilt is established beyond a reasonable doubt. McBride v. Com., 95 Va. 818, 30 S. E. Rep. 454; Longley v. Com., 99 Va. 807, 37 S. E. Rep. 339; Davis v. Com., 99 Va. 868, 39 S. E. Rep. 585; Wadley v. Com., 98 Va. 803, 35 S. E. Rep. 452.

Malice.—But malice may be presumed from the deliberate use of a deadly weapon in the previous possession of the slayer. Com. v. Brown, 90 Va. 671, 19 S. E. Rep. 447; Hall v. Com., 89 Va. 171, 15 S. E. Rep. 517; Murphy v. Com., 23 Gratt. 960; Hill v. Com., 2 Gratt. 594, and *note*. See monographic *note* on "Homicide" appended to Souther v. Com., 7 Gratt. 678.

Attempts of Accused to Escape.—Where a party charged with or in custody for a crime which he is alleged to have committed, attempts to escape, or to evade the threatened prosecution, it becomes one of a series of circumstances from which guilt may be inferred. State v. Koontz, 31 W. Va. 127, 5 S. E. Rep. 328; Dean v. Com., 4 Gratt. 541. See Williams v. Com., 85 Va. 607, 8 S. E. Rep. 470.

Possession of Goods Recently Stolen.—And it is well settled that the exclusive possession of goods recently stolen, raises a presumption of fact that the possessor is the thief, and in order to repel the presumption, it is incumbent on him, when called on for the purpose, to account for such possession consistently with his innocence. Price v. Com., 21 Gratt. 847; Taliaferro v. Com., 77 Va. 411; Porterfield v. Com., 91 Va. 801, 22 S. E. Rep. 352; Walker v. Com., 28 Gratt. 969.

Burglary.—But it has never been decided in Virginia that such possession is even *prima facie* evidence of guilt in cases of burglary and housebreaking. Taliaferro v. Com., 77 Va. 411. The question was discussed, but not decided in Walker's Case, 28 Gratt. 969.

Burglary—Exclusive Possession of Stolen Property.—But it has been held that though the mere possession of the stolen property might not be *prima facie* evidence of the burglary charged in the indictment, yet, in connection with other evidence of such burglary, evidence of *exclusive possession* of the stolen property is admissible. Wright v. Com., 82 Va. 183, *citing* and *approving* Walker's Case, 28 Gratt. 969. This court distinguished Walker's Case, 28 Gratt. 969, from Taliaferro's Case, 77 Va. 411, on the ground that the possession of the stolen property by the accused in the latter case was not *exclusive*.

Nature of Presumption.—The presumption of guilt arising from the unexplained possession of the fruits of crime, recently after its commission, is a presumption of fact, not of law. Standing alone, it constitutes a *prima facie* case which will warrant conviction for felony. But to incorporate this proposition into an instruction, in a case of homicide, tends to mislead the jury, and to prejudice the prisoner. Thus, the mere possession of the pocket-book of the deceased by the prisoner, who lived under the same roof with him, as a member of his family, though unexplained, cannot be said to create a strong and reasonable presumption that he murdered the deceased. It is for the jury to say what weight, under all the circumstances of the case, should be given to the fact of such possession. Kibler v. Com., 94 Va. 804, 26 S. E. Rep. 858.

Conclusive Presumption.

Infant under Fourteen Years Incapable of Rape.—A boy under fourteen years of age is conclusively presumed to be incapable of committing rape, or of attempting to commit it, whatever may be the real facts. But he may be convicted as principal in the second degree. Foster v. Com., 96 Va. 306, 31 S. E. Rep. 503; Law v. Com., 75 Va. 885, 40 Am. Rep. 750.

B. PRESUMPTION AS TO LIFE AND DEATH.

Continuance of Life.—When the existence of a person is once established by proof, a presumption arises that such person continues to exist or live until the contrary is shown, or till a different presumption is raised. State v. Goodrich, 14 W. Va. 843.

Death after Seven Years' Absence.—But a person who for seven years has not been heard of by those who, had he been alive, would naturally have heard of him, is presumed to be dead, in the absence of proof to the contrary. But the law raises no presumption as to the precise time of his death. Boggs v. Harper, 45 W. Va. 554, 31 S. E. Rep. 943; State v. Goodrich, 14 W. Va. 843; Evans v. Stewart, 81 Va. 724; W. Va. Code, ch. 130, §§ 44, 45; Va. Code 1887, § 3373. See also, Ogle v. Adams, 12 W. Va. 213.

Time of Death—Burden of Proof.—The burden of proving that the death took place at any particular time within the seven years lies upon the person claiming a right to the establishment of which that fact is essential. Evans v. Stewart, 81 Va. 724.

Bigamy—Conflicting Presumptions of Life and Innocence.—In a prosecution for bigamy, where the presumption of innocence conflicts with the presumption of the continuance of life, the law makes no absolute decision between these conflicting presumptions, but, in such cases, they are regarded as presumptions of fact, to be considered and weighed by the jury, and not presumptions of law. State v. Goodrich, 14 W. Va. 834.

C. NONPRODUCTION OF EVIDENCE.

1. WITHHOLDING EVIDENCE.—The holding back of material evidence by any party to a suit raises a presumption of fact against him, whenever it appears that he could have produced such evidence. Bindley v. Martin, 28 W. Va. 774; Heffiebower v. Detrick, 27 W. Va. 16.

No rule of law is better settled than that a party having it in his power to prove a fact, if it exists, which if proven, would benefit him, his failure to prove it must be taken as conclusive that the fact does not exist. Wells-Stone Mercantile Co. v. Truax, 44 W. Va. 531, 29 S. E. Rep. 1006.

a. Failure to Examine Witness.—So, also, where a party to a controversy fails to examine a material and important witness in his behalf, the law raises the presumption that the witness' testimony, if given, would be adverse to such party. Dewing v. Hutton, 48 W. Va. 576, 37 S. E. Rep. 670; Union Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. Rep. 1025; Garber v. Blatchley, 51 W. Va. 147, 41 S. E. Rep. 222; Knight v. Capito, 23 W. Va. 639.

But in an action against a railroad company for injury to a brakeman while uncoupling cars, alleged to have resulted from the negligence of the yard foreman in ordering the engine to go back, where there was no direct proof that the foreman gave such an order, and the engineer and fireman both denied that the engine backed a second time, it was held that the failure to put the foreman on the stand to deny giving such second order does not raise the presumption that he gave it. Norfolk, etc., R. Co. v. Brown, 91 Va. 668, 22 S. E. Rep. 496.

D. PRESUMPTION OF PERFORMANCE OF OFFICIAL DUTY.

1. LEVY OF EXECUTION BEFORE RETURN DAY.—When an execution is placed in the hands of a sheriff, the presumption of law, in the absence of evidence to the contrary, is that he did his duty, and made the levy before the return day. O'Bannon v. Saunders, 24 Gratt. 138; Paine v. Tutwiler, 27 Gratt. 440; Cockerell v. Nichols, 8 W. Va. 159; Rowe v. Hardy, 97 Va. 674, 34 S. E. Rep. 625.

E. REGULARITY IN JUDICIAL PROCEEDINGS.—It is well settled that every reasonable presumption will be indulged in in support of the regularity of the proceedings and the validity of the judgments of courts of competent general jurisdiction, where both the subject-matter and the parties are within the territorial limits of the court's jurisdiction; but, even with respect to such courts, no presumption is allowable when the want of jurisdiction affirmatively appears on the face of its proceedings. Wade v. Hancock, 76 Va. 620; Woodhouse v. Fillbates, 77 Va. 317; Hill v. Woodward, 78 Va. 765; Wilcher v. Robertson, 78 Va. 602; Ferguson v. Teel, 82 Va. 690; Dillard v. Cent. Va. Iron Co., 82 Va. 734, 1 S. E. Rep. 124; Dove v. Com., 82 Va. 301; Pulaski County v. Stuart, 28 Gratt. 872.

Refusal of Instruction to Jury.—For example, there is *prima facie* presumption that the court below acted correctly in refusing instructions to the jury, unless the contrary is made to appear from the bill of exceptions. Shepherd v. McQuilkin, 2 W. Va. 90; Wise v. Postlewait, 3 W. Va. 452; Fitzhugh v. Fitzhugh, 11 Gratt. 300, and *note*.

Overruling of Demurrer.—Moreover, in accordance with the presumption which usually obtains in regard to all judicial proceedings, in the absence of evidence to the contrary, that there has been a regular and orderly course of procedure, it has been held that where the record does not show that a demurrer has been overruled, that must be presumed, if the court has decided the merits of the cause for the plaintiff. Smith v. Profitt, 82 Va. 833, 1 S. E. Rep. 67; Matthews v. Jenkins, 80 Va. 463; Hinchman v. Ballard, 7 W. Va. 153.

Judgment of Foreign Courts.—The presumption as to the validity of judgments of courts of general jurisdiction, equally applies to the judgments of such courts in other states. If the court of such foreign state, which renders the judgment or decree, was a court of general jurisdiction, the presumption is that it had jurisdiction of the particular case, and to render the judgment or decree void, this presumption must be overcome by proof. Gilchrist v. W. Va., O. & O. L. Co., 21 W. Va. 115; Stewart v. Stewart, 27 W. Va. 167.

Burden of Proof to Show Irregularity.—And the presumption in favor of the regularity in judicial proceedings extends to every step and part thereof, and the burden is on him who alleges irregularity to show affirmatively by the record, that the irregularity exists. Dove v. Com., 82 Va. 301.

Limitation of Rule.—But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and where such powers are not exercised according to the course of the common law, its action being ministerial only, and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record. Pulaski County v. Stuart, 28 Gratt. 872.

F. DELIVERY OF INSTRUMENTS.

Bonds.—In the absence of all evidence of a conditional delivery of a bond by the sureties who signed it, the presumption of law is, that they consented to the delivery of the bond without the signature of the other party, whose name is on the bond. Ward v. Churn, 18 Gratt. 801, 98 Am. Dec. 749.

G. STATUS OF INDIVIDUALS.

1. SLAVERY.—It was held in Fulton v. Gracey, 15 Gratt. 314 (decided in 1859), that the presumption of law is that a person of African descent is a slave, but that the presumption may be repelled by any evidence tending to show he is free. See Hudgins v. Wrights, 1 Hen. & M. 134.

H. PRESUMPTION OF GRANT FROM TWENTY YEARS' ADVERSE POSSESSION.—It has been held that the adverse, exclusive, uninterrupted enjoyment of an incorporeal right for the period of twenty years affords a conclusive presumption of

title in the party so enjoying it, derived from grant. But no such presumption of grant will arise from an adverse use and possession for any shorter period; the statute of limitations as to entry, or as for bringing an action for land, does not apply to this adverse user of an incorporeal hereditament. Cornett v. Rhudy, 80 Va. 710.

On the other hand, some cases hold that the adverse and exclusive use and enjoyment of a prescriptive or incorporeal right by a party and his privies for twenty years, is not conclusive evidence of the party's right, but merely presumptive, and may be rebutted by evidence showing that the adversary use and enjoyment relied on, was not acquiesced in, but the right thereto contested; and any evidence tending to show such resistance is admissible to rebut the presumption. Nichols v. Aylor, 7 Leigh 546; Field v. Brown, 24 Gratt. 74. See learned opinion of BRANNON, P., in Wooldridge v. Coughlin, 46 W. Va. 345, 33 S. E. Rep. 233.

I. KNOWLEDGE OF USAGE.—There is a *prima facie* presumption that a party had knowledge of a well established usage. Hansbrough v. Neal, 94 Va. 722, 27 S. E. Rep. 593.

J. PRESUMPTION OF FRAUD.—See monographic *note* on "Fraud" appended to Montgomery v. Rose, 1 Pat. & H. 5.

K. PRESUMPTION OF PAYMENT.—See monographic *note* on "Payment."

L. PRESUMPTION OF SANITY.—See monographic *note* on "Insanity" appended to Boswell v. Commonwealth, 20 Gratt. 860.

M. OTHER MATTERS PRESUMED.

1. DISCHARGE OF PUBLIC RIGHTS BY STATE.—It is a well settled rule of construction that the state is not to be presumed to have discharged the public rights without express declarations or manifest intention to that effect. Bennett v. McWhorter, 2 W. Va. 441.

2. ACKNOWLEDGMENT OF CORRECTNESS OF ACCOUNT.—If an account has been rendered by one party to another, the court cannot presume, in the absence of all evidence on the subject, that the party who received it has acknowledged its receipt and the correctness of the account. Robertson v. Wright, 17 Gratt. 534.

3. CURRENCY IN WHICH BOND IS TO BE PAID.—Where a bond for the purchase of land was executed March 30th, 1863, payable in two years, in the absence of anything on the face of the bond to indicate the kind of money in which it was to be paid, under the statute there is no presumption of law on the question. The only presumption is a presumption of fact, from the circumstances proved, and is a question for the jury. Effinger v. Kenney, 24 Gratt. 116. See Walker v. Pierce, 21 Gratt. 722.

4. CHASTITY.—In prosecutions for seduction, the chastity of the female is presumed by law. Barker v. Com., 90 Va. 820, 20 S. E. Rep. 776; Mills v. Com., 93 Va. 815, 22 S. E. Rep. 863.

5. LEGITIMACY OF CHILDREN.—This subject has been fully treated elsewhere in this series. See monographic *note* on "Parent and Child" appended to Armstrong v. Stone, 9 Gratt. 102.

IV. CUMULATIVE EVIDENCE.

Cumulative evidence is generally said to be additional evidence of the same kind to the same point. Halstead v. Horton, 38 W. Va. 727, 18 S. E. Rep. 953; Wynne v. Newman, 75 Va. 812; St. John v. Alderson, 32 Gratt. 140. See Preston v. Otey, 88 Va. 491, 14 S. E. Rep. 68.

But evidence of the same kind and to the same point must be additional in order to be cumulative, if it is antagonistic, although of the same kind and to the same point, it is not cumulative. Halstead v. Horton, 38 W. Va. 733, 18 S. E. Rep. 953.

Newly-Discovered Evidence.—Evidence newly discovered is said to be cumulative in its relation to the evidence on the trial, when it is of the same kind and character. If it is dissimilar in kind; it is not cumulative, in a legal sense, though it tends to prove the same proposition. Wynne v. Newman, 75 Va. 812; St. John v. Alderson, 32 Gratt. 143, opinion of CHRISTIAN, J. For a full discussion of this subject, see monographic *note* on "New Trials" appended to Boswell v. Jones, 1 Wash. 322.

V. CIRCUMSTANTIAL EVIDENCE IN CRIMINAL CASES.

Circumstantial evidence must always be scanned with great caution, and can never justify a verdict of guilty, especially of murder in the first degree, the penalty of which is death, unless the circumstances proved are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt. Dean v. Com., 32 Gratt. 912; Longley v. Com., 99 Va. 808, 37 S. E. Rep. 339; Davis v. Com., 99 Va. 838, 38 S. E. Rep. 191; Anderson v. Com., 83 Va. 326, 2 S. E. Rep. 281. See monographic *note* on "Homicide" appended to Souther v. Com., 7 Gratt. 673.

VI. RELEVANCY.

A. IN GENERAL.—As a general rule if evidence offered to be introduced on the trial of a cause is relevant to the issue, it should be admitted. It is for the jury to determine what effect it should have. But irrelevant evidence is inadmissible and must be excluded. Underwood v. McVeigh, 23 Gratt. 409; Parsons v. Harper, 16 Gratt. 64; Rowt v. Kile, 1 Leigh 216; Thompson v. Com., 88 Va. 45, 13 S. E. Rep. 304; McBride v. Com., 95 Va. 818, 30 S. E. Rep. 454; Greever v. Bank, 99 Va. 547, 39 S. E. Rep. 159.

Evidence offered to the jury, and properly applying to the issue joined, ought not to be rejected on the ground of objections to the declaration. Preston v. Bowen, 6 Munf. 271.

For example, at a trial for robbery occurring at 10.30 p. m., half a mile from a depot, evidence on behalf of the accused that a negro was seen at 3 a. m. on the following morning, is irrelevant and properly excluded. Thompson v. Com., 88 Va. 45, 13 S. E. Rep. 304.

It is not error, however, to exclude evidence which would not have benefited the party offering it. Bartlett v. Patton, 33 W. Va. 71, 10 S. E. Rep. 21.

Need Not Be Direct Evidence.—But it is not necessary that evidence shall bear directly upon the point in issue. If it constitutes a link in the chain of proof or tends to make the question at issue in the particular case more or less probable, it is, as a general rule, admissible. Grubb v. Burford, 98 Va. 553, 37 S. E. Rep. 4; Hanriot v. Sherwood, 82 Va. 1; Parsons v. Harper, 16 Gratt. 64.

Right to Contradict Irrelevant Testimony.—A party to a suit who testifies in his own behalf to a fact irrelevant to the issue in support of his own testimony, and prejudicial to his opponent, cannot object to its contradiction on the ground of irrelevancy. Sisler v. Shaffer, 43 W. Va. 769, 28 S. E. Rep. 721. See Womack v. Circle, 29 Gratt. 193.

Rejection of Irrelevant Evidence—Tender of Other Evidence.—After a court has rejected as irrelevant and inadmissible, evidence tendered along a particular line, it is unnecessary to go through the formality of tendering other evidence on the same subject. Clark v. Sleet, 99 Va. 381, 38 S. E. Rep. 183.

B. COLLATERAL FACTS.

1. IN GENERAL.—The general rule is that collateral facts are inadmissible in evidence, because they do not afford any reasonable presumption or inference as to the principal fact or matter in dispute, and tend to draw away the minds of the jury from the point in issue, excite prejudice, and mislead the jury. Whitelaw v. Whitelaw, 96 Va. 712, 32 S. E. Rep. 458; Moore v. Richmond, 85 Va. 538, 8 S. E. Rep. 387.

Defective Sidewalk.—For example, in an action against a city for injuries from falling into a hole in a sidewalk, testimony that plaintiff's witness fell into the same hole the same night was held collateral and inadmissible. Moore v. Richmond, 85 Va. 538, 8 S. E. Rep. 387.

Dislike of Prisoner.—And where, on a trial for rape, the prosecutrix testified that her father hated the prisoner, it was held that the prisoner could not introduce evidence to show the cause of that hatred, because the fact sought to be proved is collateral to the issue, and one from which no reasonable inference can be drawn as to the principal fact or matter in dispute. Mings v. Com., 85 Va. 638, 8 S. E. Rep. 474.

2. THREATS—HOMICIDE.

Communicated Threats.—In prosecutions for homicide, upon the plea of self-defense, threats by the deceased communicated to the prisoner, directly, or through others, are admissible to determine whether the accused had, at the time of the killing, reasonable ground to apprehend serious bodily harm. Lewis v. Com., 78 Va. 732; State v. Abbott, 8 W. Va. 741; State v. Evans, 33 W. Va. 417, 10 S. E. Rep. 792.

Uncommunicated Threats.—And it has been held that, evidence of uncommunicated threats by the deceased is admissible to show his mental attitude. State v. Evans, 33 W. Va. 417, 10 S. E. Rep. 792. Compare Gray v. Com., 92 Va. 772, 22 S. E. Rep. 858. See monographic *note* on "Homicide" appended to Souther v. Com., 7 Gratt. 673.

3. MOTIVE OR INTENT.—Where the motives of a party are a material enquiry in a cause, any evidence which tends in any degree to throw light upon them, is not to be rejected, though the court may think it not entitled to much weight with the jury. Parsons v. Harper, 16 Gratt. 64; Jackson v. Com., 96 Va. 107, 30 S. E. Rep. 452.

Evidence of Motive or Intent in Criminal Cases.—See monographic *note* on "Homicide" appended to Souther v. Com., 7 Gratt. 673; monographic *note* on "False Pretenses and Cheats" appended to Leftwich v. Com., 20 Gratt. 716.

C. RES INTER ALIOS ACTA.

1. IN GENERAL.—The general rule is that, when the issue is whether a person did a particular thing, it is inadmissible to put in evidence the fact that he did a similar thing at some other time. Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. Rep. 553; Wilson v. Carpenter, 91 Va. 183, 21 S. E. Rep. 243; Hartman v. Evans, 38 W. Va. 669, 18 S. E. Rep. 810; Cole v. Com., 5 Gratt. 696. But see Brighthope Railway Co. v. Rogers, 76 Va. 443; Brock v. Brock, 92 Va. 173, 23 S. E. Rep. 224.

Execution of Similar Contracts with Other Persons.—Except in certain cases where the knowledge, motive or intention of the party is a material fact in the case, the general rule is that no reasonable presumption can be formed as to the making or execution of a contract by a party with one person in consequence of the mode in which he has made or executed similar contracts with other persons. Neither can parties be affected by the conduct or dealing of strangers. Transactions which fall within either of these classes are *res inter alios acta*, and evidence of this description is uniformly rejected. Repass v. Richmond, 99 Va. 508, 39 S. E. Rep. 160.

Indictment against Other Persons.—It is not error to exclude as evidence an indictment against another person for the same offense. Taylor v. Com., 90 Va. 109, 17 S. E. Rep. 812.

Proof of Other Crimes.—It seems to be well settled that proof of other crimes, having no connection with the one for which the accused is on trial, is irrelevant and inadmissible. Cole v. Com., 5 Gratt. 696; State v. Sheppard, 49 W. Va. 582, 39 S. E. Rep. 676. But see Heath v. Com., 1 Rob. 735.

Larceny.—For example, on the trial of an indictment for the larceny of a watch, evidence of another larceny of a cloak, committed by the prisoner, the two acts being wholly distinct and unconnected, is not admissible for any purpose. Walker v. Com., 1 Leigh 574. See Burr v. Com., 4 Gratt. 534.

It has been held that evidence of acts and conversations of third parties is irrelevant and inadmissible to show that the defendant was fraudulently induced by them to execute the bond sued on, unless the plaintiff is shown to have participated in the fraud. Relevancy must always be shown by him offering the evidence. Triplett v. Goff, 83 Va. 784, 3 S. E. Rep. 525.

Executions in Other Suits.—So, also, the rejection of evidence offered by the defendant, of executions issued against the plaintiff in other suits, and returned "no effects," the policy whereon this suit was brought having been taken out for the benefit of a third person named in the policy, is not erroneous, the evidence being irrelevant. Fire Ass'n v. Hogwood, 82 Va. 342, 4 S. E. Rep. 617.

Guilty Knowledge or Intent.—But whenever the guilty knowledge or intention of a party is a material fact in issue, then collateral facts, that is other acts and declarations of a similar character, tending to establish such intent or knowledge, are proper evidence, provided they are not too remote. Trogdon v. Com., 31 Gratt. 862.

Passing Counterfeit Money.—For example, in indictments for passing counterfeit money, the *scienter* may be proved by showing that the defendant passed or attempted to pass other counterfeit money to other persons about the same time. Martin v. Com., 2 Leigh 745; Spencer v. Com., 2 Leigh 751; Hendrick v. Com., 5 Leigh 708; Wash v. Com., 16 Gratt. 540; Finn v. Com., 5 Rand. 701.

Obtaining Goods by False Pretenses.—And, in a prosecution for obtaining goods upon false pretenses, evidence that the accused, in the same city and at or about the same time, purchased goods from other parties, upon the same false pretenses, is admissible to show the intent of the accused in making the representations. Trogdon v. Com., 31 Gratt. 862.

False Representations.—So, also, in a suit to rescind a contract for false representations, evidence of similar representations to other persons, about the same time, is admissible to show the bent of the mind of the party making the representations. Wilson v. Carpenter, 91 Va. 183, 21 S. E. Rep. 243.

2. HABIT.—It has been held that in an action against a surety on a bond, evidence of his habit as respects becoming surety for persons, is admissible. Triplett v. Goff, 83 Va. 784, 3 S. E. Rep. 526. See Dillard v. Collins, 25 Gratt. 359.

D. CHARACTER.

Character in Civil Cases.—See monographic *note* on "Libel and Slander" appended to Bourland v. Eidson, 8 Gratt. 27, and various other titles throughout this series for the admissibility of character as evidence in particular instances.

Character in Criminal Cases.—General character is

always in issue in a criminal case; and evidence thereof is always admissible. Parrish v. Com., 81 Va. 1; Hey v. Com., 32 Gratt. 946. See monographic *note* on "Homicide" appended to Souther v. Com., 7 Gratt. 673, and various other notes on special branches of criminal law throughout this series.

Seduction.—In prosecutions for seduction, the previous chaste character of the female seduced is in issue, but as her chastity is presumed by law, the burden of impeaching it lies on the accused. Va. Code 1887, ch. 180, § 3677; Mills v. Com., 93 Va. 815, 22 S. E. Rep. 863; Barker v. Com., 90 Va. 820, 20 S. E. Rep. 776.

E. WEALTH OF PARTIES.—It has been frequently held, in cases where exemplary damages may be awarded, that the financial standing of the defendant may be given in evidence as affecting the measure of damages, for a verdict absolutely ruinous to a man in moderate circumstances, would scarcely be felt by a man of large fortune. Evidence of the pecuniary circumstances of the defendant has been received in actions for breach of promise of marriage, in actions by a father for the seduction of his daughter, in action for slander, and in actions for malicious prosecution and false imprisonment. Dent v. Pickens, 34 W. Va. 240, 12 S. E. Rep. 698 (breach of marriage promise); Clem v. Holmes, 33 Gratt. 722, 36 Am. Rep. 793; Riddle v. McGinnis, 22 W. Va. 253 (actions for seduction); Womack v. Circle, 29 Gratt. 192; Harman v. Cundiff, 82 Va. 239 (actions for slander); Womack v. Circle, 29 Gratt. 192 (malicious prosecution and false imprisonment).

Slander—Rank and Influence of Defendant.—It is not improper to instruct the jury that if, from the evidence, they believe the defendant uttered the slander from actual malice, they may find exemplary damages, and that in estimating the damages they shall consider the standing of the parties, and the wealth of the defendant is only to be considered so far as it tends to show his rank and influence in society. Harman v. Cundiff, 82 Va. 239, *citing* and *approving* Womack v. Circle, 29 Gratt. 192.

F. ILLEGAL OR IMPROPER EVIDENCE.—Illegal or improper evidence, however unimportant to the cause, should never be confided to the jury. Lee v. Tapscott, 2 Wash. 276; Brown v. May, 1 Munf. 288.

VII. HEARSAY EVIDENCE.

A. DEFINITION.—The term *hearsay* is used with reference to that which is written as well as that which is spoken, and in its legal sense it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity or competency of some other person. 4 Min. Inst. (3d Ed.) 869.

B. GENERAL RULE AS TO ADMISSIBILITY OF HEARSAY EVIDENCE.—And the general rule is that such evidence is inadmissible. Claiborne v. Parrish, 2 Wash. 146; Taliaferro v. Pryor, 12 Gratt. 277; Reusch v. Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. Rep. 358.

1. SELF-SERVING DECLARATIONS.—It may be stated generally, that a party's declarations are not admissible as evidence in his own favor, unless they form a part of the *res gestæ*. Garnett v. Sam, 5 Munf. 542; M'Alexander v. Harris, 6 Munf. 465; Scott v. Shelor, 28 Gratt. 891; Sprouse v. Com., 81 Va. 374; Crite v. Com., 1 Va. Dec. 423; Repass v. Richmond, 99 Va. 508, 39 S. E. Rep. 160; State v. Abbott, 8 W. Va. 743; Corder v. Talbott, 14 W. Va. 277; Deck v. Tabler, 41 W. Va. 332, 23 S. E. Rep. 721, 56 Am. St. Rep. 837. See monographic *note* on "Homicide" appended to Souther v. Com., 7 Gratt. 673.

Thus, in an action of debt upon a bond given for the purchase of land at auction, it is not competent for the plaintiff to prove his declarations not in the hearing of the defendant, prescribing different terms of sale from those set forth in the advertisement and publicly announced on the day of sale, unless shown to have been communicated to him. Effinger v. Kenney, 24 Gratt. 116.

It has been held, however, that the declarations of an alleged donee of a gift *causa mortis*, made while the donor is still alive, to the effect that the gift had been made by him to her, are admissible in evidence in her favor to rebut other testimony tending to prove that at a later day she did not claim the making of such gift. Thomas v. Lewis, 89 Va. 1, 15 S. E. Rep. 389, 37 Am. St. Rep. 848.

Relevancy.—But to come within the terms and operation of the general rule just stated, the declarations must accompany and explain an act done, which is a fact in issue, or is relevant to the issue. Accordingly, it has been held that the declarations of a party in his own favor ought not to be received as evidence, though it be a part of the *res gestæ* of a collateral fact introduced in the case, merely to contradict a witness on the other side, but which fact is no way otherwise connected with the material enquiry involved in the case. Scott v. Shelor, 28 Gratt. 891; Corder v. Talbott, 14 W. Va. 277.

2. DECLARATIONS BY THIRD PERSONS.—And the declarations of a third person, not a party to the suit, and made in the party's absence, are hearsay and inadmissible. French v. Chapman, 88 Va. 317, 13 S. E. Rep. 479; Norfolk, etc., R. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454, 20 Am. St. Rep. 718. See Hopper v. Com., 6 Gratt. 685; Thompson v. Updegraff, 3 W. Va. 629.

Thus, a declaration, not upon oath, by a person not a party to the cause, that he committed the trespass for which the suit is brought, cannot be given in evidence to exculpate the defendant. Penner v. Cooper, 4 Munf. 458.

3. GENERAL REPUTATION.—As a general rule, reputation is hearsay, and inadmissible to show any fact in issue. State v. Evans, 33 W. Va. 417, 10 S. E. Rep. 792; Taliaferro v. Pryor, 12 Gratt. 277; Barker v. Com., 90 Va. 820, 20 S. E. Rep. 776.

For example, hearsay and general reputation in the neighborhood, as to the reputed "influence" of one man over another, are inadmissible. State v. Evans, 33 W. Va. 417, 10 S. E. Rep. 792.

So, also, on a trial for seduction, the ill repute of the house where the prosecutrix resided prior to the seduction, cannot be shown by general reputation, but only by proof of particular facts. Barker v. Com., 90 Va. 820, 20 S. E. Rep. 776.

And it has been held, that reputation and tradition are inadmissible to prove or disprove a title. Taliaferro v. Pryor, 12 Gratt. 277; Cline v. Catron, 22 Gratt. 378.

4. MARKET QUOTATIONS.—Market quotations published in a newspaper, and price lists furnished by commission merchants, and opinions based solely thereon, are alike hearsay, and cannot be received in evidence as proof of the prices actually paid for an article, in the absence of proof of the authority upon which such quotations and lists were made. Norfolk, etc., R. Co. v. Reeves, 97 Va. 284, 33 S. E. Rep. 606.

It was held in Norfolk, etc., R. Co. v. Reeves, 97 Va. 284, 33 S. E. Rep. 606, in an action against a common carrier to recover for loss of cattle delayed in transit, that the testimony of the shipper that he was informed by his commission merchant that they sold his cattle at a certain price, is hearsay.

C. EXCEPTIONS TO GENERAL RULE.—But to the general rule excluding hearsay evidence there are exceptions. Claiborne v. Parrish, 2 Wash. 146.

1. PEDIGREE.—Thus, hearsay evidence, general reputation, or tradition, are admissible to prove pedigree. Colvert v. Millstead, 5 Leigh 88; Jenkins v. Tom, 1 Wash. 123; Claiborne v. Parrish, 2 Wash. 146; Pegram v. Isabell, 2 Hen. & M. 193; Hudgins v. Wrights, 1 Hen. & M. 134; Gregory v. Baugh, 2 Leigh 665, opinion of CARR, J.; Adie v. Com., 25 Gratt. 712 (identity); Peterson v. Ankrom, 25 W. Va. 61, 62.

In Gregory v. Baugh, 2 Leigh 665, the court was equally divided upon the question whether, in the case of a person claiming freedom on the ground of descent from a female Indian ancestor, hearsay be admissible, not only to prove the plaintiff's pedigree, but also to prove that the female ancestor, from whom he derives his descent, was an Indian.

Qualification of Rule.—But the exception which tolerates hearsay in cases of pedigree extends only to the hearsay of those who, by connection and consanguinity, have both the means of knowing, and an interest in making themselves acquainted with the facts of which they speak, and does not take in every neighborhood rumor or report. Gregory v. Baugh, 4 Rand 611; Pegram v. Isabell, 2 Hen. & M. 193; Clemmitt v. Ins. Co., 76 Va. 356.

Suits for Freedom.—Thus, in a suit for freedom, it is not competent for the plaintiff to introduce evidence of hearsay, or of common report, that her mother had been considered a free woman in Massachusetts, and had been carried off from thence by a particular individual, to corroborate the testimony of other witnesses, or for any other purpose. Charlton v. Unis, 4 Gratt. 58.

In questions of freedom, evidence that there had been a belief in the neighborhood, some fifty or sixty years before, that the female ancestor of the plaintiff was entitled to her freedom, is not admissible. Gregory v. Baugh, 4 Rand. 611.

Declarant Must Be Dead.—But, in order that declarations may be introduced in proof of pedigree, it is essential that the declarant be dead when the declarations are tendered. 22 Am. & Eng. Enc. Law (2d Ed.) 644; Peterson v. Ankrom, 25 W. Va. 56; Colvert v. Millstead, 5 Leigh 88.

Declarations Post Litem Motam.—A woman named S. brought a suit for freedom in 1772, and, dying soon after, that proceeding was abated; some twenty-five or thirty years after, one W., an old person, informed her son that S. was free, and her family, in consequence of their Indian descent from the mother; in a suit brought by S.'s grandson to recover his freedom, W.'s son testifies to those declarations of his mother, as to the plaintiff's ancestor S. The court held that this hearsay evidence was not objectionable, on the ground that the declarations of W. were made *post litem motam*, BROOKE, P., dissenting. Gregory v. Baugh, 2 Leigh 665.

a. Family Bible.—The entry in the family Bible of the date of the birth of a member of the family, though not made by a member of the family, is in the nature of a record, and, being produced from the proper custody, is itself evidence tending to show such date. Being a family Bible, and accessible to all the family, the presumption is that the entry would not be permitted to remain if the whole family did not adopt it, and thereby give authenticity to it. Union Central Life Ins. Co. v. Pollard, 94 Va. 147, 26 S. E. Rep. 421, 64 Am. St. Rep. 715.

2. DECLARATIONS AS TO BOUNDARIES.

a. In General.—The general rule is that the declarations of deceased persons as to corners or boundary lines of a tract of land are admissible in evidence, when it appears from their situation that they had peculiar means of knowing the fact, and no interest to misrepresent, and that such declarations are not made *post litem motam*, and are not in contradiction of the surveyor's official report; as, for instance, declarations of the surveyor or chain-carrier upon the original survey, or of the owner of a tract of land or of an adjoining tract calling for the same boundary, and also the declarations of tenants, processioners, and others whose duty or interest would lead them to a diligent inquiry or accurate information as to the fact. Harriman v. Brown, 8 Leigh 697; Overton v. Davisson, 1 Gratt. 211, 42 Am. Dec. 544; Clements v. Kyles, 13 Gratt. 468; Smith v. Chapman, 10 Gratt. 445; Cline v. Catron, 22 Gratt. 378; Fry v. Stowers, 92 Va. 13, 22 S. E. Rep. 500; Hill v. Proctor, 10 W. Va. 59; Corbleys v. Ripley, 22 W. Va. 154, 46 Am Rep. 502; High v. Pancake, 42 W. Va. 602, 26 S. E. Rep. 536.

And this is true, whether the boundary be one of a general or public interest, or be between the estates of private proprietors. Harriman v. Brown, 8 Leigh 697.

Particular Fact.—But the declarations must be as to a particular fact, a corner or line tree, or something equivalent. Clements v. Kyles, 13 Gratt. 467; High v. Pancake, 42 W. Va. 602, 26 S. E. Rep. 536. See opinion of TUCKER, P., in Harriman v. Brown, 8 Leigh 697.

Declarant Must Be Dead.—And the person making such declarations, must be dead at the time of the trial. Overton v. Davisson, 1 Gratt. 211, 42 Am. Dec. 544.

Declarations as Evidence in Favor of Privies.—But declarations of a deceased person, claiming ownership of a specific property, are not competent evidence in favor of his administrators, or others claiming title under him, whether such declarations of ownership were made before or after the title of the adverse claimant commenced. Crothers v. Crothers, 40 W. Va. 169, 20 S. E. Rep. 927; Masters v. Varner, 5 Gratt. 168.

Boundaries.—Admissions of a former owner of a tract of land as to the boundaries of the tract are admissible in evidence in determining such boundaries, but are not conclusive, and it may be shown that he was mistaken. Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347.

b. Reasons of Rule.—In Harriman v. Brown, 8 Leigh 707, it is said: "Questions of boundary, after the lapse of many years, become of necessity questions of hearsay and reputation. For boundaries are artificial, arbitrary, and often perishable; and when a generation or two have passed away, they cannot be established by the testimony of eyewitnesses. In such cases, therefore, it becomes necessary to look to reputation, or depend upon hearsay evidence of the former existence and actual locality of an artificial boundary."

c. Declarations of Former Owner.—Declarations of a former owner of land, now dead, are admissible to show the identity of a particular corner, tree, or other corner or marked boundary line; but not a mere general statement or claim that certain land was in his boundary, or where the lines would run, or that he owned the land, without reference to any corners or marked lines. If it appears that such declarations are subject to suspicion of bias from interest, they cannot be received or made *post litem motam*. High v. Pancake, 42 W. Va. 602, 26 S. E. Rep. 536. See Corbleys v. Ripley, 22 W. Va. 154, 46 Am. Rep. 502.

Son-in-Law of Former Owner.—But declarations of a deceased person as to boundary lines are not rendered admissible by the fact that he was the son-in-law of the former owner and carried the chain when such owner had some lines run, it not appearing that they were the lines in question. Fry v. Stowers, 92 Va. 13, 22 S. E. Rep. 500.

Declarations to Prove or Disprove Title.—Declara-

tions of a deceased owner are not competent evidence to prove that he had title, or to prove possession. High v. Pancake, 42 W. Va. 602, 26 S. E. Rep. 536; Cline v. Catron, 22 Gratt. 378.

But declarations of one in actual possession of land, explanatory of the character of his possession, that is, for instance, how he claimed, under what title, and to what limit, are admissible. High v. Pancake, 42 W. Va. 602, 26 S. E. Rep. 536.

d. Declarations of Chain-Carrier.—In Smith v. Chapman, 10 Gratt. 445, declarations of a dead chain-carrier as to corner and line trees of a survey were admitted in evidence, but his statement as to the locality of the land, and the streams which the land would cross were rejected, because mere opinions of the chain-carrier from facts which he supposed to be within his knowledge, but not given.

e. Declarations of Surveyor.—In a controversy touching the boundary or locality of a tract of land granted by the commonwealth upon a survey made by an authorized surveyor, the declarations of such surveyor, or of a chain-carrier, or other person who was present at such survey, as to the acts done by or under the authority of such surveyor in making the survey, are properly admissible unless plainly irrelevant; provided they are not made *post litem motam*, and are not in contradiction of the surveyor's official report, and that the parties making the declarations are dead. Overton v. Davisson, 1 Gratt. 211, 42 Am. Dec. 544.

Declarations of Surveyor in Contradiction of His Report.—Although a surveyor's declarations, whether oral or written, are not admissible in evidence where they will contradict his own official report, still the declarations of other persons, if otherwise admissible, may be received in evidence to contradict the report. Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347.

Ancient Reputation and Possession.—Ancient reputation and possession, in respect to the boundaries of streets in a town, are entitled to infinitely more respect, in deciding upon the boundaries of the lots, than any experimental survey that can now be made. Ralston v. Miller, 3 Rand. 44, 15 Am. Dec. 704.

3. DECLARATIONS AGAINST INTEREST.

By Stranger.—A declaration made by a stranger to the controversy, now dead, and against his pecuniary interest, may be admitted as evidence to show the existence of a fact relevant in such controversy, as an exception to the rule excluding hearsay. Bartlett v. Patton, 33 W. Va. 71, 10 S. E. Rep. 21.

By Party.—So, also, written or oral declarations of a party to a suit, relevant to the issue, and against his interest, are admissible as evidence against him. Powell v. Tarry, 77 Va. 250.

Interest Must Exist at the Time.—The declarations of one interested in a matter of controversy, and operating against his own interest, may be given in evidence; but if his interest arose after the declarations, they cannot be received as evidence. Burton v. Scott, 3 Rand. 399.

Nature of Interest Required.—And, it is well settled that where an entry is offered in evidence upon the ground that it is against the interest of the declarant, it must be of a pecuniary or proprietary nature. The declaration in such cases derives its value exclusively from the fact that the person has made an entry or charge which it is against his interest to make, and the effect of which will be to render him pecuniarily liable to some third person. Tate v. Tate, 75 Va. 522. See further, upon the subject of declarations against interest, High v. Pancake, 42 W. Va. 602, 26 S. E. Rep. 536; Barley v. Byrd, 95 Va. 816, 28 S. E. Rep. 329; Moorman v. Arthur, 90 Va. 455, 18 S. E. Rep. 869.

4. EVIDENCE ON FORMER TRIAL.

a. Criminal Cases.

Death of Witness.—Where a witness in a criminal case has died, his testimony on a former trial cannot be given in evidence, even by the accused. Montgomery v. Com., 99 Va. 833, 37 S. E. Rep. 841; Finn v. Com., 5 Rand. 701. See Crite v. Com., 1 Va. Dec. 423, 425, in which case JUDGE ANDERSON, delivering the opinion of the court, discusses this subject at length.

Witness Absent from State.—So, also, where a witness for the prisoner, who has given evidence at a former trial, is absent from the commonwealth at the second trial, it is not competent for the prisoner to prove what the witness swore to on the former trial. Brogy v. Com., 10 Gratt. 722, and *note*; Finn v. Com., 5 Rand. 701.

b. Civil Cases.

Death of Witness.—But the evidence of a witness given on a former trial of a civil case, who has since died, may be proven on a subsequent trial of the case. Carrico v. W. Va. Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. Rep. 571, 24 L. R. A. 50; Caton v. Lenox, 5 Rand. 31.

Although, in a civil action, proof may be given of what a witness, who is since dead, did swear to on a former trial between the same parties, and on the same issue, yet such evidence is inadmissible in a criminal prosecution. Finn v. Com., 5 Rand. 701. This was *obiter* as to a civil case, as the case was a criminal case, and perhaps *obiter* as to a criminal case as to a dead witness, as the witness was one out of the state.

Where one of the parties dies pending the action, thereby rendering the other party incompetent to testify, statements made by him at the first trial may be proved at the second trial by the evidence of other witnesses. Lee v. Hill, 87 Va. 497, 12 S. E. Rep. 1052, 24 Am. St. Rep. 666.

Depositions in Chancery Suit.—In the trial of an action at law, depositions taken in a suit in chancery between the same parties, are proper evidence, provided it be proved that the witnesses are dead, or by reason of sickness are unable to attend, or that they cannot be found, or are absent from the country, or are otherwise not amenable to the process of the court. Pleasants v. Clements, 2 Leigh 474.

Proof of Testimony at Former Trial.—The longhand notes made by the sworn stenographer who took the evidence upon a former trial of the case, are the best evidence of such testimony of the dead witness, and should be used, or the nonproduction legally accounted for, on a second trial; but where those notes show that the dead witness made in his evidence an illustration merely, and do not show what that illustration was, or in any way convey it to the second jury, a witness may be used to prove what such illustration was. Carrico v. W. Va. Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. Rep. 571, 24 L. R. A. 50.

Parties and Issues in Both Actions Must Be the Same.—But in order that the testimony of a witness on a former trial may be received in a subsequent proceeding, the point in controversy and the parties must be the same in both actions. Rowe v. Smith, 1 Call 487; Pleasants v. Clements, 2 Leigh 474; Hatcher v. Crews, 78 Va. 460. See monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

It has been held that depositions taken in a suit with the factor may be read in a suit with the principal for the same cause. Ritchie v. Lyne, 1 Call 489.

Record in Former Suit.—And, in order that a record in a former suit may be read as evidence in a

subsequent suit, the parties and points in controversy must be the same in both suits. Payne v. Coles, 1 Munf. 373; Chapmans v. Chapman, 1 Munf. 399; Pleasants v. Clements, 2 Leigh 476; Frazier v. Frazier, 2 Leigh 642; Downer v. Morrison, 2 Gratt. 250; Bargamin v. Clarke, 20 Gratt. 544.

Thus, where one obtained an injunction to restrain a trespass, and declared in his bill that the defendant was a sole trespasser, and afterwards brought his action against his landlord for committing the same trespass, it was held that in the second action the record in the former suit is not admissible except such part as may contradict the evidence of the plaintiff in the second action. Robrecht v. Marling, 29 W. Va. 765, 2 S. E. Rep. 827.

Substance of Former Testimony Sufficient.—All that is required, moreover, is to prove the *substance* of what a witness, since dead, swore to at a former trial. It is not necessary that the *very words* of the deceased witness should be repeated and sworn to. Such a restriction would destroy the rule, as no man, with the least respect for his reputation, would undertake to repeat and swear to the *very words* that another witness has used, unless he had written down the words at the moment of their delivery. Caton v. Lenox, 5 Rand. 31.

5. HEARSAY IN CORROBORATION OF TESTIMONY.—It is a general and well-nigh universal rule, that evidence of what a witness said out of court, is inadmissible to corroborate his evidence in court. Howard v. Com., 81 Va. 488; Oliver v. Com., 77 Va 590; Repass v. Richmond, 99 Va. 508, 39 S. E. Rep. 160.

But where an attempt is made to discredit a witness by showing malice on his part, growing out of his arrest for an offence, it is admissible to show that the witness made the same statement before his arrest that he made in court. Such evidence is original, not hearsay. Howard v. Com., 81 Va. 488.

6. DECLARATIONS RELATIVE TO POSSESSION.—Declarations of one in possession of land, explanatory of his possession and making claim, are admissible evidence, while he is in possession, to show that he is under claim of ownership, but not to show title. Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 S. E. Rep. 255, citing High v. Pancake, 42 W. Va. 602, 26 S. E. Rep. 536; 1 Greenl. Ev. § 109.

VIII. BURDEN OF PROOF.

Scope of Title.—No attempt is made to set forth, under this head, the burden of proof in particular instances, as this question will be found fully discussed under the special titles throughout this series in connection with which it arises. Therefore, special reference is here made to monographic *notes* on "Consideration," "Fraud," "Insanity," "Wills" and the various other notes in this series, for a detailed discussion of the question so far as it relates to that special subject.

A. STATEMENT OF GENERAL RULE.—The burden of proving the existence of any fact or thing rests upon him who affirms it. 4 Min. Inst. (3d Ed.) 867; Peters v. McWilliams, 78 Va. 567; Norfolk, etc., R. R. Co. v. Ferguson, 79 Va. 241; Wright v. Rambo, 21 Gratt. 158; Norman v. Hill, 2 Pat. & H. 676.

Negligence.—For example, it has been held that the burden of proving negligence rests on him who alleges it. Norfolk, etc., R. R. Co. v. Ferguson, 79 Va. 241; Sheeler v. Chesapeake, etc., R. R. Co., 81 Va. 188; Snyder v. P. C. & St. L. R. Co., 11 W. Va. 14; Johnson v. Railroad Co., 25 W. Va. 570.

Contributory Negligence.—But where a city, in an action against it to recover for injuries resulting from a defective sidewalk, relies on the defence of contributory negligence, the burden of proving it lies on the city. Gordon v. City of Richmond, 83 Va. 436, 2 S. E. Rep. 727. See Johnson v. R. Co., 25 W. Va. 570; Sheff v. Huntington, 16 W. Va. 307.

Common Carriers.—In an action against a common carrier for loss of goods, the burden of proof is on the carrier to show that it has not been guilty of negligence, and that the loss arose from a cause which, by the common law, or by the terms of its special contract, exempts it from liability. Brown v. Adams Express Co., 15 W. Va. 812.

Fraud.—So, also, the burden of proving fraud, mistake, or misrepresentation is on the party alleging it. See monographic *note* on "Fraud" appended to Montgomery v. Rose, 1 Pat. & H. 5, and the following additional authorities: Hale v. W. Va., etc., Co., 11 W. Va. 229; Pusey v. Gardner, 21 W. Va. 469; Hord v. Colbert, 28 Gratt. 49; Crebs v. Jones, 79 Va. 381; Matthews v. Crockett, 83 Va. 394.

B. PRESUMPTIONS.—Where there is a *prima facie* presumption of law that a certain fact or condition exists, the burden of proof to repel that presumption rests on him who alleges the contrary.

That Female Seduced Is Chaste.—For example, in a prosecution for seduction, the chastity of the female seduced is presumed by law, and the burden is on the prisoner to impeach it. Barker v. Com., 90 Va. 820, 20 S. E. Rep. 776.

That Postnuptial Settlement Is Void as to Creditors.—There is likewise a presumption of law that a postnuptial settlement in favor of a wife is void as to existing creditors, and the burden is upon those claiming under the settlement to prove that it was made for a valuable consideration moving from the wife. Where the bill charges the settlement to be voluntary, an answer denying the allegations of the bill does not shift this burden, but the defense set up in the answer must be established by proof. Fink v. Denny, 75 Va. 663; Hatcher v. Crews, 78 Va. 460; Perry v. Ruby, 81 Va. 317; Robbins v. Armstrong, 84 Va. 810, 6 S. E. Rep. 130; Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209, 10 Am. St. Rep. 883; DeFarges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805, 24 Am. St. Rep. 659.

That Domicile Continues Unchanged.—And residence, once established, is presumed to continue until proved to have been changed; therefore, the burden of proving a change of domicile is on him alleging it. Lindsay v. Murphy, 76 Va. 428; Starke v. Scott, 78 Va. 180.

That Person Named Is Original Inventor.—So also, letters-patent issued to a person afford a *prima facie* presumption that he, who is named as inventor is the original and first inventor of what is described as the improvement; and the burden of proof to sustain an opposite conclusion is on him who denies that such person is the original inventor. Maurice v. Devol, 23 W. Va. 247.

That Ex Parte Settlement Is Correct.—Moreover, there is a *prima facie* presumption of law that *ex parte* settlements are correct, and the burden of proof to repel this presumption is on him who alleges the contrary. Wimbish v. Rawlins, 76 Va. 48; Radford v. Fowlkes, 85 Va. 820, 8 S. E. Rep. 817; Nimmo v. Com., 4 Hen. & M. 57, 4 Am. Dec. 488; M'Call v. Peachy, 3 Munf. 289.

That Sum Named in Instrument Is Correct.—So, where an instrument, appearing on its face to be an absolute bill of sale, but which is admitted to have been intended as a security, names a certain sum, that sum is *prima facie* the amount due the creditor, and the presumption must be repelled by the debtor. Gold v. Marshall, 76 Va. 668.

That Sale and Delivery of Chattel Divests Title.—It has been held that when a slave is sold and delivered, although without a bill of sale, it is to be presumed *prima facie*, that the seller has parted with his title. If, therefore, he contends that he reserved the title in himself until the purchase

money should be paid, the *onus probandi* lies on him. Randolph v. Randolph, 3 Munf. 99.

That Persons Are Sane.—All persons are presumed to be sane, and the burden of proving insanity is on the person alleging it. See monographic *note* on "Insanity" appended to Boswell v. Com., 20 Gratt. 860. Temple v. Temple, 1 Hen. & M. 476.

C. PROVING A NEGATIVE.—Where the plaintiff, in an action for slander, made affidavit that the defendant engaged to pay certain taxes, and the defendant said that the affidavit was false, and that he would have the plaintiff indicted for perjury, it was held that the burden of proof, at the trial, does not rest on the plaintiff to prove that the defendant engaged to pay the taxes, but it rests on the defendant to prove that the plaintiff's affidavit is false, though such proof involves proof of a negative. Hinchman v. Lawson, 5 Leigh 695. In this case the court said: "The rule is not universal, which forbids the proof of a negative to be thrown upon a party. It is, indeed, generally true, that the *onus probandi* lies upon that party who has the affirmative of the issue; a rule founded upon the difficulty, in most cases, and the impossibility in some, of proving a negative. But to this general rule, there are well established exceptions. One of these is, that where the negative involves an affirmative, the burden of proof will rest upon either the one or other party, according to other principles, and without reference to the mere formal character of the negation. Such are the cases of the pleas of infancy, fully administered, beyond the sea, and such like. * * * There is another exception to the generalirule. It is, that where the negative involves a criminal omission in the party, and consequently where the law upon its general principle presumes his innocence, the affirmative of the fact is presumed, and the *onus* is thrown upon the party alleging the criminal omission." See Gibson v. Jones, 5 Leigh 370.

D. ALIBI.—Although the burden rests upon the commonwealth to make out its case against the accused to the exclusion of any reasonable doubt, yet, where the accused relies upon or attempts to prove an *alibi* in his defense, the burden of proving the *alibi* rests upon him. Thompson v. Com., 88 Va. 45, 13 S. E. Rep. 304; State v. Lowry, 42 W. Va. 205, 24 S. E. Rep. 561.

IX. BEST AND SECONDARY EVIDENCE.

A. STATEMENT OF GENERAL RULE.—As a general rule, the best evidence which the nature of the case admits of, must be produced. State v. Cain, 9 W. Va. 559; Fox v. Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. Rep. 757; Lee v. Tapscott, 2 Wash. 276; Gilliam v. Perkinson, 4 Rand. 325; Pendleton v. Com., 4 Leigh 694, 26 Am. Dec. 342; Apperson v. Dowdy, 82 Va. 776, 1 S. E. Rep. 105; Ben v. Peete, 2 Rand. 539; Schmertz v. Hammond, 47 W. Va. 524, 35 S. E. Rep. 945.

B. PRIVATE DOCUMENTS.

1. PRODUCTION OF ORIGINAL DOCUMENT.

a. General Rule.—Therefore, secondary evidence is inadmissible to prove the contents of a written document, unless the nonproduction of the original is satisfactorily accounted for, which ought to be shown before the evidence of its contents is given to the jury. Lunsford v. Smith, 12 Gratt. 554; Pidgeon v. Williams, 21 Gratt. 251; Taylor v. Peck, 21 Gratt. 11.

For example, testimony in relation to the correctness of the copy of a paper is not admissible unless the absence of the original paper is accounted for. Lunsford v. Smith, 12 Gratt. 554.

Contents of Private Entry in a Book.—So also, evidence of a witness giving contents of a private entry in a book by a person deceased, of payments of money to his children, neither the book nor a copy of the entry being produced, nor the book verified, is not admissible to show such payment, even if the book itself would be evidence. Bennett v. Bennett, 37 W. Va. 396, 16 S. E. Rep. 688, 38 Am. St. Rep. 47.

Contents of Release.—The contents of a release, pleaded but not offered in evidence, may be proved by parol evidence, if no objection is made to such mode of proof. Washington v. Burnett, 4 W. Va. 84.

There is no error, however, in permitting a record of a deed to go in evidence, where the original is in the possession of the party offering such record, without accounting for the original. Robinson v. Pitzer, 3 W. Va. 335.

b. Exception to General Rule—Parol Proof of Admissions.—But an exception to the general rule is that a parol admission by a party to a suit is always receivable in evidence against him, although it relates to the contents of a deed or other written instrument; and even though its contents be directly in issue in the cause. Taylor v. Peck, 21 Gratt. 11.

c. Excuses for Nonproduction of Original.

(1) **In General.**—It may be stated generally, however, that where the original document is satisfactorily proven to have been lost or destroyed, or in the possession of a nonresident so that its production cannot be compelled by the court, or where it is in the possession of the opposite party, who refuses to produce it on due notice, its contents may be proven by secondary evidence. Maxwell v. Light, 1 Call 117; Taylor v. Peyton, 1 Wash. 252; Dawson v. Graves, 4 Call 127; Givens v. Manns, 6 Munf. 191; Smith v. Carter, 3 Rand. 167; Hamlin v. Atkinson, 6 Rand. 574; Pendleton v. Com., 4 Leigh 694, 26 Am. Dec. 342; Beirne v. Rosser, 26 Gratt. 537; Timberlake v. Jennings, 1 Va. Dec. 741; Atkinson v. Smith, 2 Va. Dec. 373; Apperson v. Dowdy, 82 Va. 776, 1 S. E. Rep. 105; Foulkes v. Com., 2 Rob. 886; Vinal v. Gilman, 21 W. Va. 301; Edgell v. Conaway, 24 W. Va. 747; Hall v. Lyons, 29 W. Va. 410, 1 S. E. Rep. 582; State v. Lowry, 42 W. Va. 205, 24 S. E. Rep. 561; Ben v. Peete, 2 Rand. 539. See monographic *note* on "Forgery and Counterfeiting" appended to Coleman v. Com., 25 Gratt. 865.

(2) **Loss or Destruction of Original.**

Wills.—Thus, if the record of a will is lost, after proof of the loss, its contents may be proved like any other document by parol and secondary evidence, such being the best evidence the nature of the case admits of. Apperson v. Dowdy, 82 Va. 776, 1 S. E. Rep. 105. See Smith v. Carter, 3 Rand. 167; Millers v. Catlett, 10 Gratt. 477.

Where the plaintiffs in ejectment claim title through one of several heirs of the original owner, to whom such owner devised it to the exclusion of the other heirs, and the will has been lost, evidence of a witness who has examined the records of the courts where the will would probably be recorded, that such records do not contain any record of the will, is admissible to account for the nonproduction of the will or a copy. Atkinson v. Smith, 2 Va. Dec. 373.

Receipts.—So, also, if a witness introduced by the plaintiff *speaks* of receipts which he had taken, the evidence ought to be respected, unless he can show that they were lost, or out of the power of the plaintiff. Hamlin v. Atkinson, 6 Rand. 574.

Deeds.—And, where the original deed and its record are destroyed, the fact that such a deed was made may be proved by secondary evidence; as, for instance, admissions of the grantor in a chancery suit. Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347. See Robinson v. Pitzer, 3 W. Va. 335.

Fraudulent Destruction of Original.—Where a writ-

ten document is proven to have been lost or destroyed, or in the hands of a nonresident, its contents may be proven by secondary evidence, unless the destruction was fraudulent. Edgell v. Conaway, 24 W. Va. 747; Vinal v. Gilman, 21 W. Va. 301; Beirne v. Rosser, 26 Gratt. 537.

Evidence of Loss or Destruction of Original.—It is not necessary that all the possible evidence of the loss or destruction of the original paper should be exhausted, the sufficiency of such evidence is a preliminary question addressed to the discretion of the judge, and the object of the proof is merely to establish a reasonable presumption of the loss or destruction. Edgell v. Conaway, 24 W. Va. 747. See Beirne v. Rosser, 26 Gratt. 537, opinion of MONCURE, P., in which he discusses the degree of diligence necessary to obtain the original before secondary evidence of its contents may be received.

(3) **Original Out of Jurisdiction.**—It has been held that proof that a letter is out of the state, taken in connection with evidence showing an effort to obtain it, is a sufficient foundation for the introduction of parol or secondary evidence of its contents. Beirne v. Rosser, 26 Gratt. 537.

(a) **In Possession of Nonresident.**—When a book of original entries is in the possession of a nonresident, so that its production cannot be compelled by the court, then a copy of such entries, which has been compared with the original entry, and proven to be an exact copy, is the best secondary evidence that can be obtained in the nature of the case, and is, therefore, admissible. Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

(4) **Refusal to Produce Original on Notice.**—Moreover, the refusal of a party to produce, on due notice, an original document which is in his possession, will authorize the admission of a copy in evidence, on proof of its being a true copy. Maxwell v. Light, 1 Call 117.

Indictment for Burglary.—But upon an indictment for burglary, charging the prisoner with stealing labor tickets, parol evidence of them is admissible without further notice to produce them. Wright v. Com., 82 Va. 183.

2. STATUTORY PROVISIONS.—It is provided by statute that the copy of any record or paper in the clerk's office of any court, attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original. W. Va. Code, ch. 130, § 5; Va. Code 1887, ch. 164, § 3335; Hinchman v. Ballard, 7 W. Va. 153; Chenowith v. County Court, 32 W. Va. 628, 9 S. E. Rep. 910.

Copy of Contract.—Under this statute, it has been held that the copy of a contract and specifications may be read in evidence to the jury, especially when the order of the court awarding the contract, directed that the contract be filed in the office of the clerk of the court; the certified copy made by the clerk being doubtless the best evidence obtainable. Chenowith v. County Court, 32 W. Va. 628, 9 S. E. Rep. 910.

3. EFFECT OF ERROR IN ADMITTING SECONDARY EVIDENCE.—Though parol evidence of the contents of a book has been admitted, though objected to, without excuse for failing to produce the book, yet, if after exception has been taken, evidence is introduced showing good reason why the book cannot be produced, the error is thereby cured. Pidgeon v. Williams, 21 Gratt. 251.

4. OBJECTIONS IN APPELLATE COURT.—But if secondary evidence is introduced without objection in the court below, an objection to it in the appellate court comes too late and will not be considered. Baltimore, etc., R. R. Co. v. Skeels, 3 W. Va. 557; Shue v. Turk, 15 Gratt. 256.

C. PUBLIC DOCUMENTS.

1. COPIES OF RECORDS.

a. Rule at Common Law.—At common law the original record must have been produced wherever the cause was in the same court, a copy, however authenticated, being under no circumstances admissible, unless the original were lost. 4 Min. Insts. (3d Ed.) 881; Burk v. Tregg, 2 Wash. 216; Anderson v. Dudley, 5 Call 529.

Record Best Evidence.—Where the law requires a certain document or record to be kept by a public officer as a memorial of a fact, such document or record is the best evidence of that fact. Battin v. Woods, 27 W. Va. 64, citing Phares v. State, 3 W. Va. 567.

Records of City Council.—Thus, where work or other action of city authorities is claimed to have been done by its authority, the records of the city council are the proper and best evidence, if existent and accessible. Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. Rep. 266; Childrey v. City of Huntington, 34 W. Va. 457, 12 S. E. Rep. 536. Compare Phillips v. City of Huntington, 35 W. Va. 406, 14 S. E. Rep. 17.

Naturalization.—And it cannot be proven by parol evidence that an alien was admitted to citizenship in a court of record, but that by inadvertence, or for any other reason, there was no entry made of it. Dryden v. Swinburne, 20 W. Va. 89.

b. Rule by Statute.—But the common-law rule has been changed by statutes which provide that a copy of any record or paper in the clerk's office of any court or in the office of the secretary of the state, treasurer or auditor, or surveyor of lands in any county, attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original. W. Va. Code, ch. 130, sec. 5; Va. Code 1887, ch. 164, secs. 3334, 3335; Battin v. Woods, 27 W. Va. 58. See Phares v. State, 3 W. Va. 567.

Records of Federal Courts.—It has been held that a similar provision in the West Virginia Code of 1868 applied as well to the records of the district court of the United States held within that state, as to the records of the courts of the state. Dickinson v. Railroad Co., 7 W. Va. 391.

Foreign Records.—Moreover, a copy of a record or paper in the clerk's office of any court in the state of Virginia, attested by the officer in whose office the same is, is admissible as evidence in West Virginia, though it has not the seal of the court or a certificate of a judge, as required by the act of congress relating to the authentication of records. Thrasher v. Ballard, 33 W. Va. 285, 10 S. E. Rep. 411, 25 Am. St. Rep. 894.

Original Records Still Admissible.—Notwithstanding the statute, however, the original record is still competent evidence of its contents, to the same extent as a certified copy is; the copy being allowed, not because it is better evidence than the original, but to avoid the inconvenience of removing the original record from place to place. Thus, it has been held that the original order book of a county court is competent evidence wherever a certified copy would be. Ballard v. Thomas, 19 Gratt. 14.

Whole Record Not Necessary.—Except in a criminal trial for perjury, it is not necessary to introduce the whole of the record of another case in evidence, but only such parts of it as relate to the matters in issue. White v. Clay, 7 Leigh 68; Wynn v. Harman, 5 Gratt. 157; Masters v. Varner, 5 Gratt. 168, 50 Am. Dec. 114; Dickinson v. Railroad Co., 7 W. Va. 390; McClaugherty v. Cooper, 39 W. Va. 313, 19 S. E. Rep. 415. But see Parsons v. Harper, 16 Gratt. 64, 75, opinion of JUDGE LEE.

For example, a decree or other extract from the record may be given in evidence without the production of the whole record, where the decree or

extract so offered satisfactorily establishes the fact it is offered to prove. White v. Clay, 7 Leigh 68; Wynn v. Harman, 5 Gratt. 157; Masters v. Varner, 5 Gratt. 168, 50 Am. Dec. 114. See Waggoner v. Wolf, 28 W. Va. 820, 1 S. E. Rep. 25.

When Destruction of Record Presumed.—Although the best evidence of a return on an execution is the writ of *fieri facias* itself, with the endorsement on it by the officer, still where the records of the clerk's office are destroyed, the presumption is that the execution was destroyed with the other records, and the memorandum of the clerk, kept in his office, will be received to prove a return. Brown v. Campbell, 33 Gratt. 402.

What is a Public Record.—A public record must be a written memorial intended to serve as evidence of something written, said or done, made by a public officer authorized by law to make it; but that authority need not be derived from express statutory enactment. Bouv. Law Dict. vol. 2, p. 849; Coleman v. Com., 25 Gratt. 865.

For, whenever a written record of the transactions of a public officer, in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that written memorial, whether expressly required to do so or not; and when kept it becomes a public document, or a public record, belonging to the office, not the officer. Coleman v. Com., 25 Gratt. 865.

Volume of Supreme Court Decisions.—The report of a case in a printed volume of reports of decisions of the court of appeals of Virginia, the original record of the case having been destroyed, held admissible in evidence to show that such a map as that mentioned in the reports, as Watkins' map, actually existed, and was in the papers in said cause; and thereby to lay a foundation for the introduction, as further evidence in the cause, of a map purporting to be and certified as a map of Manchester by the clerk of the superior court of chancery of the Richmond district. Taylor v. Com., 29 Gratt. 780.

c. Abstracts.

From Records of Marriages and Births.—An abstract from the books of the county court containing a record of the marriages and births, duly certified by the proper officer having the custody thereof, are *prima facie* evidence of the facts therein stated. Blair v. Sayré, 29 W. Va. 604, 2 S. E. Rep. 97.

From Tax Books.—Also, certified abstracts from the books, containing the returns of the assessments for taxation of the land and personal property belonging to the defendant in a slander suit, are admissible evidence to show his wealth and influence. Womack v. Circle, 29 Gratt. 192.

From Personal Property List.—But a document not purporting to be a copy or abstract from the assessor's personal property list, but merely a certificate of a clerk of a county court of the assessment or nonassessment of a person or his property in such book, is not admissible in evidence. The personal property book itself is primary evidence. Bartlett v. Patton, 33 W. Va. 71, 10 S. E. Rep. 21. See Jackson v. Conrad, 14 W. Va. 526.

2. COPIES OF PATENTS, SURVEYS AND DEEDS.—The rule that the best evidence which the nature of the case admits of, ought to be produced, though generally true, is, in some cases, inapplicable as it respects titles to lands in this country. For example, a copy of a patent, either from the records of the register's office or of a county court, is as good evidence of title as the original would be. Lee v. Tapscott, 2 Wash. 276.

And, it has been held that copies of surveys of waste and unappropriated lands, and of patents from the register's office, are competent evidence in the place of originals. Pollard v. Lively, 4 Gratt. 73.

Copy of Deed.—As to when the copy of a deed is competent evidence in place of the original will be found discussed elsewhere in this series. See monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564.

3. COPIES OF STATUTES.

Copies of Journals of Legislature.—The statutes provide that the copies of the journals of either house of the legislature, printed by authority of the legislature, shall be received as evidence for any purpose for which the original journal could be received. W. Va. Code, ch. 130, § 2; Va. Code 1887, § 3329.

Foreign Statutes.—Moreover, a transcript of a statute of another state, authenticated by the certificate of the secretary of the commonwealth, under his hand and seal, accompanied by a declaration of the governor, under the great seal of the commonwealth, that he is secretary, and that full faith and credit ought to be given to his official acts accordingly, is proper evidence to be submitted to the jury, that such copy of the act is the law of that state. Warner v. Com., 2 Va. Cas. 95. See Wilson v. Lazier, 11 Gratt. 477, and *note*.

Acts of Congress.—And the printed copies of the acts of Congress, distributed to the executives of the several states to be distributed among the people, are proper evidence of the statute therein contained, without further authentication. Taylor v. Bank, 5 Leigh 471.

Copy of Whole Law Unnecessary.—Where a party in a suit in Virginia relies on the law of another state to support his claim, he may produce an authenticated copy of the section only on which he relies, without a copy of the whole law. Hunter v. Fulcher, 5 Rand. 126, 16 Am. Dec. 738.

Foreign Laws.—It seems that the doctrine of primary and secondary evidence does not apply to the introduction of foreign laws as evidence, but that a foreign law, whether written or unwritten, may be proved by a person who is learned in that law, without laying any foundation for the introduction of secondary evidence. Per MONCURE, J., in Dickinson v. Hoomes, 8 Gratt. 353, 409.

D. PRODUCTION OF ORIGINAL INCONVENIENT.—Upon the general principle that secondary evidence is not admissible where better evidence, or the best evidence is accessible, the secretary of a railroad company cannot be permitted to testify in regard to the result of his examination of the company's books, as to a certain item of accounts; the proper mode of proving the account would be a production of the books, or, if this is very inconvenient or impossible, there must be presented to the jury an authenticated copy of such account. Fox v. B. & O. R. Co., 34 W. Va. 466, 12 S. E. Rep. 757.

E. DEGREES OF SECONDARY EVIDENCE.—Although it is a rule of evidence that the best evidence of which the case, in its nature, is susceptible, s ould be required, still, where there is no substitution of evidence, but only a selection of the weaker instead of the stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed. For example, a minor may state, on oath, his age to the jury, with a view of proving that he was a minor at the time intoxicating liquors were sold to him, although his father and mother are both living. State v. Cain, 9 W. Va. 559.

In an action against a county for a balance due on a contract to construct a bridge, a member of the court was allowed to testify that the court had accepted the bridge without reading the order from the order book, as that is a fact within his knowl-

edge. Chenowith v. County Court, 32 W. Va. 628, 9 S. E. Rep. 910.

X. REAL EVIDENCE.

Wounds and Injuries.—In an action to recover damages for injury a to plaintiff's arm, necessitating its amputation, it is not error to allow the plaintiff to exhibit to the jury the naked remnant of the arm. Carrico v. W. Va. Cent., etc., R. Co., 39 W. Va. 96, 19 S. E. Rep. 571, 24 L. R. A. 50.

XI. EVIDENCE EXCLUDED FROM PUBLIC POLICY.

A. ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—See monographic *note* on "Attorney and Client" appended to Johnson v. Gibbons, 27 Gratt. 632.

B. PROCEEDINGS OF GRAND JURIES.—See monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

C. PROCEEDINGS OF PETIT JURIES.—See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

XII. ADMISSIONS.

A. PARTIES TO THE RECORD.—The admissions of one of the parties to the record, whether as plaintiffs or defendants, are competent evidence against all other parties to the suit who have a joint interest in the matter of it, with the party making the admissions. Dickinson v. Clarke, 5 W. Va. 280; Walker v. Pierce, 21 Gratt. 722, opinion of ANDERSON, J.; Gaines v. Alexander, 7 Gratt. 257, opinion of DANIEL, J.; Burton v. Scott, 3 Rand. 399. See Tabb v. Cabell, 17 Gratt. 160.

Parol declarations of a defendant in a suit for freedom, that the plaintiff is free, are admissible evidence of the fact, according to the general rule that the admissions of a party to a suit are evidence against him. Fulton v. Gracey, 15 Gratt. 314.

1. ADMISSIONS BY ADMINISTRATORS.—But in an action against an administrator, his declarations and admissions, made before he qualified as administrator, are not competent evidence for the plaintiffs, as the admissions of a party on the record. Gaines v. Alexander, 7 Gratt. 257.

For the rule that the declarations and admissions of a party to a suit, against his interest, are evidence in favor of the opposite party, does not extend to declarations and admissions made by parties before their interest in the subject-matter of controversy arose. Burton v. Scott, 3 Rand. 399.

B. PRIVIES.

1. DECLARATIONS IN DISPARAGEMENT OF TITLE.

a. In General.—Declarations and admissions, made while the declarant is in possession of the property, contemporaneous with the transaction, and against his interest, are admissible, not only against the declarant, but also against persons deriving title through or from him, because of the privity of estate, or identity of interest, that subsists between the parties. Dooley v. Baynes, 86 Va. 644, 10 S. E. Rep. 974; Houston v. McCluney, 8 W. Va. 136; State v. Andrews, 39 W. Va. 35, 19 S. E. Rep. 385.

Declarations of Mortgagee.—Thus, the declarations by the mortgagee, under whom the defendant claims, that the mortgage was paid off, are admissible evidence on the part of the plaintiff. Walthall v. Johnston, 2 Call 275.

b. Declarations of Grantor before Conveyance.—The declarations of a grantor in a deed in disparagement of his title, if made before he parts with it, are admissible against his grantee. Fry v. Feamster, 36 W. Va. 454, 15 S. E. Rep. 253.

To Show Fraud.—But, the declarations of the grantor in a voluntary deed made before the execution of the deed, are not competent evidence against the grantee in favor of the grantor's heirs and next of kin, to show that the deed was fraudulently procured. Smith v. Betty, 11 Gratt. 752.

c. Declarations of Grantor after Conveyance.—On the other hand, it is well settled that the declarations of the grantor in a deed in disparagement of his title, made after the conveyance, are inadmissible to affect the title of his grantee. Casto v. Fry, 33 W. Va. 449, 10 S. E. Rep. 799; Fry v. Feamster, 36 W. Va. 454, 15 S. E. Rep. 253; Thornton v. Gaar, 87 Va. 315, 12 S. E. Rep. 753; Crothers v. Crothers, 40 W. Va. 169, 20 S. E. Rep. 927; Robinson v. Pitzer, 3 W. Va. 335; Houston v. McCluney, 8 W. Va. 136; Smith v. Betty, 11 Gratt. 752.

Generally, the statements and acts and judicial proceedings, and other transactions to which any one is a party, are evidence against himself or any person claiming to acquire a title or right from him, after such statement or transaction; but they are not evidence against a person having acquired such title or right before. Houston v. McCluney, 8 W. Va. 136.

Fraud.—But the declarations of the grantor in a voluntary deed, made after its execution, are not competent evidence against the grantee, to show that provisions which were intended to be inserted in the deed have been fraudulently omitted. Smith v. Betty, 11 Gratt. 752.

d. Declarations of Former Owner of Chattels.

(1) **To Defeat Vendee's Title.**

(a) **In General.**—As a general rule, the declarations and admissions of a former owner of a chattel or chose in action, made either before or after the sale and conveyance, and not in the vendee's presence, are inadmissible in evidence to defeat the latter's title. Vaughan v. Winckler, 4 Munf. 136; Givens v. Manns, 6 Munf. 191; Hodnett v. Pace, 84 Va. 878, 6 S. E. Rep. 217; Wustland v. Potterfield, 9 W. Va. 438.

(b) **Declarations before Conveyance.**—For example, in an action of trespass for unlawfully, and with force of arms, carrying away goods and chattels of the plaintiff, it was held that the declarations and admissions of the plaintiff's vendor, made prior to the sale and conveyance to him, and not in his presence, are not admissible in evidence against the plaintiff's possession. Wustland v. Potterfield, 9 W. Va. 438.

(c) **Declarations after Conveyance.**—So, also, if a proprietor of slaves deliver them to another, who thereupon claims them as sold, any declarations made by the former, after such delivery of possession, and not in the presence of the latter, are not admissible as evidence in opposition to such claim. Givens v. Manns, 6 Munf. 191.

But it has been held that the declarations of a vendor of a slave, made after the sale, are good evidence against the vendee, if they accord with the acknowledgments of the vendee himself previously made. Hunter v. Jones, 6 Rand. 540.

In trespass for goods taken away, proof by witnesses, that the person of whom the plaintiff bought the goods, was heard to say, before the institution of the suit, that, when he sold them, they belonged to the defendant, is not admissible evidence against the plaintiff. Vaughan v. Winckler, 4 Munf. 136.

And in detinue for a slave, the defendant having produced a bill of sale to support his title, the plaintiff may prove parol declarations of the defendant, disclaiming title to the slave, under the bill of sale, after he had notice of the plaintiff's purchase, and before he had perfected his own title by obtaining possession. Fowler v. Lee, 4 Munf. 373. See Smith v. Townes, 4 Munf. 191.

(2) **To Support Vendee's Title.**—In an action on a bond against the surety thereof, the declarations

of the obligee, not made in the presence of the obligors, that he had transferred the bond to the plaintiff, are hearsay, and inadmissible to prove title in the plaintiff. Hodnett v. Pace, 84 Va. 873, 6 S. E. Rep. 217.

e. Declarations of Donor after Gift.—Declarations of the donor, after the gift, are inadmissible in evidence against his donee. Brock v. Brock, 92 Va. 173, 23 S. E. Rep. 224.

But in an action by the donor in a deed of gift to annul the same for fraud, proof of subsequent declarations and acts of the donor, though not admissible taken singly, may be received, under a total absence of testimony applying to the time of the contract, and in connection with corroborating circumstances, to show that the writing was misunderstood, or misrepresented at the time of the contract. Jones v. Robertson, 2 Munf. 187.

f. Declarations of Assured, before or after Issuance of Policy.—The declarations of one whose life is insured for the benefit of another, in contradiction of his statements in the application for the policy, are mere hearsay, and inadmissible against the beneficiaries, whether these declarations were made before or after the issuing of the policy. Schwarzbach v. Protective Union, 25 W. Va. 623, 52 Am. Rep. 227.

g. Declarations of Assignor after Assignment.—It is well settled that the declarations of an assignor, after assignment, are inadmissible in evidence against his assignee. Brock v. Brock, 92 Va. 173, 23 S. E. Rep. 224; Ginter v. Breeden, 90 Va. 565, 19 S. E. Rep. 656; Barbour v. Duncanson, 77 Va. 76; Daily v. Warren, 80 Va. 512; Hodnett v. Pace, 84 Va. 873, 6 S. E. Rep. 217; Smith v. Betty, 11 Gratt. 752; Strother v. Mitchell, 80 Va. 149; Coldiron v. Asheville Shoe Co., 93 Va. 364, 25 S. E. Rep. 238; Hopkins v. Richardson, 9 Gratt. 485; Wilcox v. Pearman, 9 Leigh 147; Lewis v. Long, 3 Munf. 136. See monographic *note* on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

C. DECLARATIONS OF AGENTS.

1. IN GENERAL.—The declarations and admissions of an agent, made while he is performing an act authorized by his principal, and made during the continuance of the agency, in regard to a transaction then depending *et dum fervet opus*, are admissible in evidence against the principal as part of *res gestæ*. If made after the transaction is completed, it is mere hearsay and inadmissible. Virginia, etc., R. Co. v. Sayers, 26 Gratt. 328; Lake v. Tyree, 90 Va. 719, 19 S. E. Rep. 787; Jammison v. Chesapeake, etc., R. Co., 92 Va. 327, 23 S. E. Rep. 758; Norfolk, etc., R. Co. v. Suffolk Lumber Co., 92 Va. 413, 23 S. E. Rep. 737; Baltimore, etc., R. Co. v. Christie, 5 W. Va. 325; Coyle v. Baltimore, etc., R. Co., 11 W. Va. 94; Hawker v. Baltimore, etc., R. Co., 15 W. Va. 628; Fisher v. West Virginia, etc., R. Co., 42 W. Va. 183, 24 S. E. Rep. 570. See Baltimore, etc., R. Co. v. Gallahue, 12 Gratt. 655, and *note*.

The declarations of an agent made while he is performing the act authorized by the principal, which qualify and characterize the act, are admissible in evidence against the principal as a part of the *res gestæ*. It is otherwise if these declarations are made after the transaction has been completed. Lawrence v. DuBois, 16 W. Va. 443, citing Hawker v. Baltimore & O. R. Co., 15 W. Va. 637; Virginia & Tenn. R. Co. v. Sayers, 26 Gratt. 350. See monographic *note* on "Agencies" appended to Silliman v. Fredericksburg, etc., R. R. Co., 27 Gratt. 119.

Insurance Agents.—As an insurance company can transact its business only through its officers and agents, their acts and declarations, made within the scope of their employment, will bind the principal. Muhleman v. Nat. Ins. Co., 6 W. Va. 509; Continental Ins. Co. v. Kasey, 25 Gratt. 268.

Authority of Agent.—In an action by a brakeman for an injury received in a collision, evidence of the result of an investigation by an agent of the railroad into the causes of the accident is inadmissible, where it does not appear that the agent had authority to conduct the investigation, nor that its result would have any binding force upon any one, nor that the rules of evidence were complied with in conducting the investigation. Eastburn v. Norfolk, etc., R. Co., 34 W. Va. 681, 12 S. E. Rep. 819. See Baltimore, etc., R. Co. v. Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

Declarations of Bank Cashier.—And the declarations of the cashier of a bank, made after the acceptance of a note by the bank, touching the conditions upon which the note was delivered to the bank, are irrelevant and immaterial, where it appears that he was not present when the negotiations took place. Greever v. Bank, 99 Va. 547, 39 S. E. Rep. 159.

Admissions of General Manager of Corporation.—The testimony of a witness that in a conversation with the general manager of a defendant company in a libel suit, such general manager admitted that his company had no right to stop the plaintiff's money, and that the purpose of the alleged libelous letter was to injure the plaintiff's business, is hearsay, and inadmissible. Reusch v. Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. Rep. 358.

Fraud—Declarations before and after Transactions.—Declarations of a person who has been the agent in procuring a deed for another, made either before the negotiation for the deed was commenced, or after the execution of the deed is completed, are incompetent evidence against the grantee in the deed, to show that provisions which were intended to be inserted in the deed, have been fraudulently omitted. But acts and declarations of such person made while the negotiation was pending, or the deed was in process of execution, are competent evidence against the grantee to show fraud. Smith v. Betty, 11 Gratt. 752.

2. DECLARATION OF AGENT TO PROVE AGENCY.—But neither the declarations of a man, nor his acts can be given in evidence to prove that he is the agent of another. Poore v. Magruder, 24 Gratt. 197.

According to the rule that the declarations and admissions of an agent are inadmissible until the fact of agency is proved, it is error to allow a witness to testify that he heard G. tell S. that the defendants desired him to testify in the case and that they might give him some money, where there is no proof that G. is the defendant's agent. Myers v. Trice, 86 Va. 835, 11 S. E. Rep. 428.

D. HUSBAND AND WIFE.

1. STATEMENT OF GENERAL RULE.—The general rule is, that the declarations and admissions of the wife are inadmissible evidence against her husband. Wright v. Rambo, 21 Gratt. 158; Sheppard v. Starke, 3 Munf. 29. See monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

E. PRINCIPAL OBLIGOR AGAINST SURETY.—In an action against a surety on a bond, evidence of the declarations of the principal obligor, not made in the presence of the surety, that the bond had not been paid, is hearsay and inadmissible against the surety. Hodnett v. Pace, 84 Va. 873, 6 S. E. Rep. 217.

But the acts, declarations and admissions of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties on the bond, though he is dead, and therefore, not a party to the suit. Walker v. Pierce, 21 Gratt. 722.

F. PARTIES JOINTLY INTERESTED.

1. IN GENERAL.—The general rule is well settled that the admissions of one of the parties to the record, whether as plaintiff or defendant, are competent evidence against all other parties to the suit, who have a joint interest in the matter of it, with the party making the admissions; but admissions by one who is not a party to the suit, though jointly interested in the subject-matter thereof with the the parties to the record, or some of them, are, it seems, incompetent. Dickinson v. Clarke, 5 W. Va. 280; Walker v. Pierce, 21 Gratt. 722, 732.

Admissions Incompetent to Prove Joint Interest.—But the admissions of one party whether he be a party to the record or not, are incompetent to establish the fact of such joint interest with other parties to the suit. That fact must first be made out by independent testimony; and, until that is done, such admissions can only be evidence against the party making them. Dickinson v. Clarke, 5 W. Va. 280.

2. DEVISEES.—By the weight of authority, the declarations, admissions, and conversations of one devisee, cannot be admitted in evidence against his co-devisees. Forney v. Ferrell, 4 W. Va. 729.

3. HEIRS.—But the acknowledgment in writing of some of the heirs, that the audited account of an administrator is just, will not suffice to establish it against the others; such account must be established as against all the heirs, or it cannot avail as to any. Street v. Street, 11 Leigh 498.

4. TRUSTEE AND CESTUI QUE TRUST.—Nor are the declarations to a third person, of a trustee in a deed of trust upon land, made to secure the payment of money due from the deed of trust debtor to his creditor, that the debt so secured has been paid, admissible as evidence against the *cestui que trust*, as tending to prove the payment or nonexistence of the trust debtor for the purpose of stopping the *cestui que trust* from asserting his debt against the property covered by the deed of trust. Calwell v. Prindle, 19 W. Va. 604.

5. PARTNERS.—On the other hand, the acts and declarations of each member of a partnership, in furtherance of the common object of the association, and the admissions by one partner after the dissolution, in regard to the business of the firm, previously transacted, are binding on the firm. Wilson v. McCormick, 86 Va. 995, 11 S. E. Rep. 976, citing 1 Greenl. Ev. § 112. See monographic *note* on "Partnership" appended to Scott v. Trent, 1 Wash. 77.

Although the acknowledgment of the debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away the bar of the act of limitations, in an action brought against the firm, the existence of the debt being first proved by other testimony, or admitted by the pleadings; yet, such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners. Shelton v. Cocke, 3 Munf. 191.

6. CO-CONSPIRATORS.

a. In General.—It is well settled that when two or more persons conspire together for an illegal purpose, the acts and declarations of any one of them, in furtherance of the common object, are evidence against the others. Sands v. Com., 21 Gratt. 871; Danville Bank v. Waddill, 31 Gratt. 469, 484; Claytor v. Anthony, 6 Rand. 285; Ellis v. Dempsey, 4 W. Va. 126.

But before such evidence can be admitted, a foundation for its introduction must first be laid, by establishing, *prima facie*, the fact of the conspiracy, or combination between the parties. Carskadon v. Williams, 7 W. Va. 2; Claytor v. Anthony, 6 Rand. 300; Danville Bank v. Waddill, 31 Gratt. 469; State v. Cain, 20 W. Va. 679; Williamson v. Com., 4 Gratt. 547; Brown v. Com., 86 Va. 935, 11 S. E. Rep. 799.

For example, it was held in Triplett v. Goff, 83 Va. 784, 3 S. E. Rep. 525, that as between parties to a suit in which a defense set up claims relief upon the ground of fraud, the party against whom relief is claimed, must be shown to have participated in the fraud, before the acts and conversations of other participants can be admissible in evidence against him.

Reversal of Judgment.—It has been held, however, that although evidence of the declarations of an alleged co-conspirator be admitted without the proper foundation being laid, yet the judgment will not be reversed for this reason, if the facts proved or evidence certified shows that, *prima facie*, the fact of conspiracy was established. State v. Cain, 20 W. Va. 679.

b. Admissions after Conspiracy Completed.—But, after the conspiracy has been consummated, and the common purpose carried fully into effect, no subsequent declarations of any of the conspirators not made in the presence of the others, are admissible as evidence against the latter. Danville Bank v. Waddill, 31 Gratt. 469; Oliver v. Com., 77 Va. 590; State v. Cain, 20 W. Va. 680; State v. Goodwin, 32 W. Va. 177, 9 S. E. Rep. 85.

Confessions or admissions of an accomplice in a felony, made after the commission and completion of the offence charged, are not competent evidence against a prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice to commit the felony has been proved. Hunter v. Com., 7 Gratt. 641, 56 Am. Dec. 121. See Jones v. Com., 31 Gratt. 836, and *note*.

7. STRANGERS.—The receipt, or even the verbal statement, of a person entitled to receive money, that he has received it, can be given in evidence as to the fact of payment in a controversy between other parties as to that payment. Lee v. Virginia, etc., Co., 18 W. Va. 299; Holladay v. Littlepage, 2 Munf. 316.

G. WHAT ADMISSIONS ARE RECEIVABLE.

1. ADMISSIONS FOR SAKE OF COMPROMISE.—Admissions made by a party for the sake of or with a view to a compromise, and offers to pay money by way of compromise to get rid of an action, if not accepted, cannot be given in evidence against the party making them. 1 Am. & Eng. Enc. Law (2d Ed.) p. 714; Brown v. Shields, 6 Leigh 440; Williams v. Price, 5 Munf. 507; Baird v. Rice, 1 Call 18.

2. JUDICIAL ADMISSIONS.—A record may be admitted in evidence in favor of a stranger against one of the parties, as containing a solemn admission or judicial declaration by such party in regard to a certain fact. But in that case it is admitted not as a judgment conclusively establishing that fact, but as the deliberate declaration or admission of the party himself that the fact was so. 1 Greenl. Ev. § 527; Lee v. Virginia, etc., Co., 18 W. Va. 299; Ray v. Clemens, 6 Leigh 600; Breathed v. Smith, 1 Pat. & H. 301; Honaker v. Howe, 19 Gratt. 50; Trogdon v. Com., 31 Gratt. 862, 880.

H. PROOF.—When the admission of a party is the foundation of a claim asserted against him, the whole of his statement must be taken together. Perkins v. Lane, 82 Va. 59.

The mere admission of a debt is not sufficient to charge the defendant with the whole demand of the plaintiff; he must, nevertheless, prove the amount. Quarles v. Littlepage, 2 Hen. & M. 401, 3 Am. Dec. 637.

Weight as Evidence.—The general rule with respect to verbal admissions, is that they ought to be received with caution. Yet, when they are deliberately made, and precisely identified, they afford evidence of the most satisfactory nature. Horner

v. Speed, 2 Pat. & H. 616; Dooley v. Baynes, 86 Va. 644, 10 S. E. Rep. 974; Snodgrass v. Com., 89 Va. 679, 17 S. E. Rep. 238.

The admissions of parties given in open court are not only admissible evidence, but are evidence of the most satisfactory character to establish the payment of a debt, or the satisfaction of a lien. Little v. Slemp, 2 Va. Dec. 545.

But admissions made in a casual conversation are intrinsically weak, and are inconclusive to establish a fact, without the aid of other testimony. Horner v. Speed, 2 Pat. & H. 616.

XIII. PAROL EVIDENCE.

A. STATEMENT OF GENERAL RULE.

1. AT LAW.—The general rule is well settled that parol evidence of prior or contemporaneous oral negotiations or stipulations, is inadmissible to vary, contradict, add to, or explain the terms of a complete, unambiguous, written instrument. Buena Vista Co. v. Billmyer, 48 W. Va. 382, 37 S. E. Rep. 583; Knowlton v. Campbell, 48 W. Va. 294, 37 S. E. Rep. 581; Camden v. McCoy, 48 W. Va. 377, 37 S. E. Rep. 637; Martin v. Monongahela R. Co., 48 W. Va. 542, 37 S. E. Rep. 563; Hukill v. Guffey, 37 W. Va. 425, 16 S. E. Rep. 545; Hurst v. Hurst, 7 W. Va. 340; McGuire v. Wright, 18 W. Va. 507; Long v. Perine, 41 W. Va. 314, 23 S. E. Rep. 611; Crawford v. Jarrett, 2 Leigh 630; Watson v. Hurt, 6 Gratt. 633; Towner v. Lucas, 13 Gratt. 705; Tuley v. Barton, 79 Va. 387; Shirley v. Rice, 79 Va. 442; French v. Williams, 82 Va. 462, 4 S. E. Rep. 591; Bruce v. Slemp, 82 Va. 352, 4 S. E. Rep. 692; Ins. Co. v. Gamble, 94 Va. 622, 27 S. E. Rep. 463; Catt v. Olivier, 98 Va. 580, 36 S. E. Rep. 980; Hubble v. Cole, 85 Va. 87, 7 S. E. Rep. 242; Hughes v. Tinsley, 80 Va. 259; Scott v. Norfolk, etc., R. Co., 90 Va. 241, 17 S. E. Rep. 882; Ratcliffe v. Allison, 3 Rand. 537; Hardin v. Kelley, 89 Va. 332, 15 S. E. Rep. 894; Allen v. Crank, 2 Va. Dec. 279.

See monographic *note* on "Deeds" appended to Fiott v. Com., 12 Gratt. 564, and monographic *note* on "Insurance, Fire and Marine," appended to Mutual, etc., Soc. v. Holt, 29 Gratt. 612.

Merger of Prior or Contemporaneous Negotiations and Stipulations.—Where parties have made a written agreement, the writing is regarded as the exclusive evidence of the contract, and all oral negotiations and stipulations preceding or accompanying the execution of the written agreement are merged in it, and are inadmissible in evidence. Providence Washington Ins. Co. v. Board of Education, 49 W. Va. 360, 38 S. E. Rep. 679.

Bonds and Deeds of Trust.—Thus, parol evidence is not admissible to prove that bonds and deeds of trust were not to be paid and executed according to their terms, but were only to be paid out of the profits of the property for the price of which they were given. Sangston v. Gordon, 22 Gratt. 755.

Assignment.—So, the terms of a written assignment of a bond cannot be altered by parol evidence. Houston v. McNeer, 40 W. Va. 365, 22 S. E. Rep. 80.

Contract of Subscription.—And parol evidence is inadmissible to vary a written contract of subscriptions by adding thereto conditions. Little Kanawha Navigation Co. v. Rice, 9 W. Va. 636.

Joint Purchase of Land.—In the case of a joint purchase of land by two, parol evidence is not admissible to prove an agreement between them for an unequal division of the land. Jarrett v. Johnson, 11 Gratt. 327.

Unconditional Agreement to Pay Money.—Under a well-settled rule of law, a party who has covenanted or agreed in writing to pay money unconditionally, cannot prove that there was a contemporaneous parol agreement that it was not to be paid, or was to be paid in a manner different from that provided for in the covenant or writing. Triplett v. Woodward, 98 Va. 188, 35 S. E. Rep. 455. See Watson v. Hurt, 6 Gratt. 633.

And the rule that parol evidence is inadmissible to alter, add to, or explain a written agreement applies in every case where the question is, what is the agreement. Ratcliffe v. Allison, 3 Rand. 537.

Terms of Contract Supplied by Law.—Moreover, the general rule that parol evidence is inadmissible to vary or contradict the terms of a valid written instrument applies, though the terms sought to be varied are supplied by the law governing the contract, and not by its express terms. Calhoun v. Wilson, 27 Gratt. 639.

Evidence Tending to Confirm Contract.—But parol evidence, which does not tend to vary the written contract of the parties, but tends to confirm it, is admissible. Southern Mut. Ins. Co. v. Trear, 29 Gratt. 255.

2. IN EQUITY.

Fraud, Accident, or Mistake.—And the general rule is also applicable in equity, in the absence of fraud, accident, or mistake. Thus, the rule in equity may be stated as follows: In the absence of *fraud, accident*, or *mistake*, parol evidence of prior or contemporaneous oral negotiations or stipulations, is inadmissible to vary, contradict, add to or explain the terms of a valid written instrument. Lockwood v. Holliday, 16 W. Va. 651; Crislip v. Cain, 19 W. Va. 440; Hukill v. Guffey, 37 W. Va. 425, 16 S. E. Rep. 545; Long v. Perine, 41 W. Va. 314, 23 S. E. Rep. 611; Howell v. Behler, 41 W. Va. 610, 24 S. E. Rep. 646; Knowlton v. Campbell, 48 W. Va. 294, 37 S. E. Rep. 581; Crawford v. Jarrett, 2 Leigh 630; Towner v. Lucas, 13 Gratt. 705; Woodward v. Foster, 18 Gratt. 204; Allen v. Crank, 2 Va. Dec. 279; Tait v. Cent. Lunatic Asylum, 84 Va. 271, 4 S. E. Rep. 698; Richardson v. Planters' Bank, 94 Va. 130, 26 S. E. Rep. 418; Slaughter v. Smither, 97 Va. 202, 33 S. E. Rep. 544; Barnett v. Barnett, 83 Va. 504, 2 S. E. Rep. 733.

In the absence of fraud, accident or mistake, the terms of a deed cannot be varied by parol evidence of what occurred between the parties either before or during its execution, all prior contracts, written or oral, between them, being merged in the subsequent deed. Shenandoah Val. R. R. Co. v. Dunlop, 86 Va. 346, 10 S. E. Rep. 289.

The general rule is that parol evidence cannot be admitted to contradict, explain, or alter a written agreement, but may be received to prove fraud, mistake or surprise, in the execution of it. In the latter case, however, the evidence must be strong and clear. M'Mahon v. Spangler, 4 Rand. 51.

Fraud.—The fraud which will let in such evidence must be fraud in the procurement of the instrument which goes to its validity, or some breach of confidence in using a paper delivered for one purpose by fraudulently perverting it to another. Towner v. Lucas, 13 Gratt. 705; Hukill v. Guffey, 37 W. Va. 425, 16 S. E Rep. 545; Slaughter v. Smither, 97 Va. 202, 33 S. E. Rep. 544.

Thus, in a proceeding to construe a contract by which the plaintiff sold to defendant "all the timber" on an estate, testimony that at the time of its execution there was a contemporaneous understanding that the contract included only "pine" timber is inadmissible, where no fraud was shown in its procurement. Allen v. Crank, 2 Va. Dec. 279.

Promise Not to Enforce Rights.—In the absence of fraud, parol evidence is inadmissible to show that the obligee contemporaneously with the execution of a bond, promised not to enforce it as against one of the parties who executed it. Towner v. Lucas, 13 Gratt. 705; Barnett v. Barnett, 83 Va. 504, 2 S. E. Rep. 733.

Release of Covenant.—In the absence of fraud or

mistake, parol evidence cannot be admitted to show that an endorsement made on a sealed agreement in these words: "All matters and things embraced in the within contract have been fully adjusted and settled, and this contract is, for value received, declared, ended and settled," and signed by the parties, was intended to refer only to money accounts between those parties, and not to include a covenant therein contained on the part of the party paying the consideration for the release, not to engage in a certain business for a certain period. Bonsack Machine Co. v. Woodrum, 88 Va. 512, 13 S. E. Rep. 994.

To Impeach Evidence under Seal.—Parol evidence is admissible to impeach evidence under seal, on the ground of fraud. Starke v. Littlepage, 4 Rand. 368.

Sale in Gross or by Acre.—Where the contract of sale is in writing and unambiguous, no parol evidence of any character can be received to prove that the parties intended a sale by the acre, if on the face of the contract it is a sale in gross. But though the contract be in writing and unambiguous, and is a sale in gross, yet, if the pleadings show that the issue between them is, whether the vendor did misrepresent the number of acres in the land by the contract to the prejudice of vendee, any sort of parol evidence, which tends to establish such fraud, may be received, even though it tends to contradict the written contract, as by showing that the land was considered by the parties as sold by the acre. Depue v. Sergent, 21 W. Va. 327, 337; Crislip v. Cain, 19 W. Va. 438, 549. Both these cases cited with disapproval Caldwell v. Craig, 21 Gratt. 132. See Hansford v. Coal Co., 22 W. Va. 71.

Mistake.—Parol evidence is admissible to prove a material mistake of facts in a written instrument, though it is denied in the answer. But the evidence must be clear and strong, so as to establish the mistake to the entire satisfaction of the court. Allen v. Yeater, 17 W. Va. 128; Koen v. Kerns, 47 W. Va. 575, 35 S. E. Rep. 902; Knowlton v. Campbell, 48 W. Va. 294, 37 S. E. Rep. 581.

3. RECORDS.

Court Records.—Parol evidence is inadmissible to contradict a court record, unless it has a tendency to establish fraud. Vaughn v. Com., 17 Gratt. 386; Quinn v. Com., 20 Gratt. 138; Chesapeake, etc., R. Co. v. Rison, 99 Va. 18, 37 S. E. Rep. 321; Beeson v. Stephenson, 7 Leigh 107.

Execution Book.—The execution book kept by a clerk of court may be contradicted by parol. Taylor v. Dundass, 1 Wash. 92.

But an unauthorized interlineation or spoliation of a record may be proven by parol testimony. Despard v. County, 23 W. Va. 318, 322, citing State v. Vest, 21 W. Va. 796; Herring v. Lee, 22 W. Va. 661.

4. NEGOTIABLE INSTRUMENTS.

To Vary or Contradict Endorsement.—Parol evidence cannot be received to vary or contradict the legal effect of the endorsement of negotiable paper. Riverview Land Co. v. Dance, 98 Va. 240, 35 S. E. Rep. 720; Citizens' Nat. Bank v. Walton, 96 Va. 435, 31 S. E. Rep. 890; Woodward v. Foster, 18 Gratt. 200; Watson v. Hurt, 6 Gratt. 633; Martin v. Lewis, 30 Gratt. 672, 32 Am. Rep. 682.

Watson v. Hurt, 6 Gratt. 633, was the case of an endorsement in blank by a person other than the payee, which was held to import a guarantee of payment, according to the terms of the note on which the endorsement was made. It was held, that the contract thus imported could not be varied by evidence of a contemporaneous parol agreement that the endorser was to be bound on different terms as to the time of the payment.

And, in an action by an endorsee against his immediate endorser, upon a protested bill, parol evidence of an agreement between them, at the time of the endorsement, which would vary the legal liability of the endorser under his endorsement, is inadmissible. Woodward v. Foster, 18 Gratt. 200.

But parol evidence is admissible to show that a stranger, who endorses negotiable paper at the time it is made, intended to bind himself only as guarantor, or even as second endorser, and thus limit his liability. Burton v. Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

Authority of Clerk to Refuse Acceptance of Bill.—Parol evidence that the clerk of the drawee of a bill of exchange was authorized to refuse acceptance of the bill, is admissible in an action by the holder against the endorser. Stainback v. Bank, 11 Gratt. 260.

5. LEASES.—As a lessee has until the expiration of his lease to fulfil his contract for repairs upon the leased premises, if no time is specified, parol evidence is inadmissible to prove a verbal agreement on his part to make them at an earlier period. Colhoun v. Wilson, 27 Gratt. 639.

And the lessee, in an action of assumpsit against his lessor for damages sustained by reason of the failure of his lessor to repair, will be confined to the terms of the written contract declared upon, and cannot recover upon a verbal contract or understanding made or had contemporaneously with the written lease. Kline v. McLain, 33 W. Va. 32, 10 S. E. Rep. 11.

But whether or not certain premises are parcel of the demised premises in a lease, if not ascertained by the written contract, is always open to extrinsic evidence. Crawford v. Morris, 5 Gratt. 90.

B. EXCEPTIONS TO GENERAL RULE.

1. RECEIPTS.—The rigor of the rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument, has been relaxed in its application to receipts as contradistinguished from contracts *inter partes*. So far as receipts are mere admissions of payment or delivery, they are merely *prima facie* evidence of the fact, and may be contradicted by parol testimony; but so far as they are evidence of a contract, they stand on the footing of other written contracts, and cannot be contradicted by parol. Tuley v. Barton, 79 Va. 387; Dolan v. Freiberg, 4 W. Va. 101; Dunlap v. Shanklin, 10 W. Va. 662.

A receipt, so far as it is a mere admission, is not conclusive evidence of the payment therein acknowledged, but the party signing it may invalidate it by oral evidence of fraud, or of mistake or surprise on his part; for the document amounts only to *prima facie* proof, and is capable of being explained. Cushwa v. Imp., etc., Assn., 45 W. Va. 490, 32 S. E. Rep. 259, citing 2 Tayl. Ev. § 1134.

2. COLLATERAL FACTS AND CIRCUMSTANCES.—Parol evidence is also admissible when it is not offered with the view to contradict, vary, or explain the language employed in the written instrument, but to establish a fact or circumstance collateral to the writing, which would control its effect and operation as a binding agreement. Wendlinger v. Smith, 75 Va. 309, 40 Am. Rep. 727. See Ratcliffe v. Allison, 3 Rand. 537.

3. ADDITIONAL INDEPENDENT FACTS.—And parol evidence is admissible to show additional independent facts, contemporaneously agreed upon and not inconsistent with or contradictory of the contract, so far as reduced to writing. Tuley v. Barton, 79 Va. 387; Brent v. Richards, 2 Gratt. 542.

Measurement of Logs.—Where a written contract shows that logs are purchased at a given price per cubic foot, no mode of measurement being specified by it, evidence is admissible to prove a contempo-

raneous oral agreement that a certain mode of measurement is to be applied. Johnson v. Burns, 39 W. Va. 658, 20 S. E. Rep. 686.

Hire Bond.—The true function of an ordinary hire bond is not to stipulate for the mode in which the slave is to be employed, but to bind the bailee for the payment of the hire; the execution of a bond or note for the price does not extinguish so much of the contract of hiring as may relate to the manner in which the slave is to be employed; hence parol evidence showing that there were restrictions as to the mode of employing the slave does not vary or contradict the written instrument, but is consistent with it, and may be properly admitted. Howell v. Cowles, 6 Gratt. 393; Towner v. Lucas, 13 Gratt. 705; Harvey v. Skipwith, 16 Gratt. 410.

Lease.—But where a lessee has, by his written contract with his lessor, until the end of his term to make repairs, a verbal agreement to make them at an earlier period is inconsistent with his written contract, and therefore does not come within the exception to the general rule, that parol evidence may be introduced when it establishes an agreement additional to but consistent with the written agreement. Colhoun v. Wilson, 27 Gratt. 639.

4. RESULTING TRUSTS. — It is a well established rule in equity, that where one person buys an estate with another's money, and takes the conveyance in his own name, a trust results by presumption of law in favor of him with whose money the purchase was made, which trust may be established by parol evidence, provided the proof is clear and explicit. Such trusts are unaffected by the statute of frauds. Bank v. Carrington, 7 Leigh 566; Phelps v. Seely, 22 Gratt. 573; Borst v. Nalle, 28 Gratt. 423; Miller v. Blose, 30 Gratt. 744; Kane v. O'Connors, 78 Va. 76; Sinclair v. Sinclair, 79 Va. 40; Parker v. Logan, 82 Va. 376, 4 S. E. Rep. 613; Donaghe v. Tams, 81 Va. 132; Moorman v. Arthur, 90 Va. 455, 18 S. E. Rep. 869; Throckmorton v. Throckmorton, 91 Va. 42, 23 S. E. Rep. 162; Smith v. Patton, 12 W. Va. 542; Troll v. Carter, 15 W. Va. 567; Murry v. Sell, 23 W. Va. 475; Bright v. Knight, 35 W. Va. 40, 13 S. E. Rep. 63; Seiler v. Mohn, 37 W. Va. 507, 16 S. E. Rep. 496; Currence v. Ward, 43 W. Va. 367, 27 S. E. Rep. 329.

And in Walraven v. Lock, 2 Pat. & H. 547, JUDGE NASH was of opinion that the law in Virginia has been settled that parol evidence may be received to prove express as well as implied trusts, and that the statute of frauds has no application to either. See Currence v. Ward, 4 W. Va. 367, 27 S. E. Rep. 329.

5. DATE OF DELIVERY OF DEED.—Parol evidence is always admissible to show that a deed was not delivered on the day of its date, but on a different day, and to show the real nature and character of the consideration. Bruce v. Slemp, 82 Va. 352, 4 S. E. Rep. 692; Summers v. Darne, 31 Gratt. 791, 804. See monographic *note* on "Deeds" appended to Flott v. Com., 12 Gratt. 564.

6. DELIVERY UPON CONDITION.—So also, parol evidence is admissible between the original parties to show that notes were delivered on conditions which have not been fulfilled. This does not vary or contradict the notes. Catt v. Olivier, 98 Va. 580, 36 S. E. Rep. 980; Woodward v. Foster, 18 Gratt. 200. See monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

Parol evidence is admissible to establish the fact that there was no valid delivery of a note sued on, or a delivery thereof for a special purpose only. Solenberger v. Gilbert, 86 Va. 778, 11 S. E. Rep. 789.

Where an executor contracted to sell land by a contract perfect and absolute on its face, but annexed was a paper purporting to be an approval of the contract by the devisees, signed and sealed by four, and with five other seals with no names attached, it was held that parol evidence was competent to show that the written approval of the nine devisees was a condition of the contract. Wendlinger v. Smith, 75 Va. 309, 40 Am. Rep. 727.

And parol evidence is admissible to show that an agreement to grant a right of way for a railroad was delivered to the president of the road, to take effect only upon the happening of a condition which is shown never to have happened. For example, an agreement to grant a right of way for a railroad through certain land, in consideration of the construction of the road, may be shown by parol evidence to have been delivered to the president, on condition that it should not be used unless the withholding of it would defeat the building of the road, or the board of directors of the road should make compensation for the right of way. Humphreys v Richmond, etc., R. Co., 88 Va. 431, 13 S. E. Rep. 985.

7. EVIDENCE TO PROVE SUBSEQUENT AGREEMENTS.—Where suit has been brought on a written contract, oral evidence may be introduced to prove a new and distinct agreement upon a new consideration, whether it be a substitute for the old contract or in addition to and beyond it. Shepherd v. Wysong, 3 W. Va. 46. See Jarrett v. Nickell, 9 W. Va. 345.

8. EVIDENCE OF CONSIDERATION.—This point has been fully treated elsewhere in this series. See monographic *note* on "Consideration" appended to Jones v. Obenchain, 10 Gratt. 259.

C. EFFECT OF RULE ON THIRD PARTIES.—The rule excluding parol evidence to contradict a written instrument, cannot affect third parties, who are not precluded by recitals in written contracts between others, from showing what was the real transaction. Bruce v. Roper Lumber Co., 87 Va. 381, 13 S. E. Rep. 153, 24 Am. St. Rep. 657.

D. ADMISSIBILITY OF PAROL EVIDENCE TO AID INTERPRETATION.

1. AMBIGUITIES.

a. Patent Ambiguity.

(1) **General Rule.**—The general rule is that parol evidence is inadmissible to explain the patent ambiguities of a written instrument. Gatewood v. Burrus, 3 Call 194.

(2) **Evidence of Surrounding Circumstances.**—But where a written instrument is equivocal and ambiguous in its terms, parol evidence of the surrounding circumstances existing at the time of its execution or of facts collateral thereto, may be admitted to show the real intention of the parties. Crawford v. Jarrett, 2 Leigh 630; Knick v. Knick, 75 Va. 12; French v. Williams, 82 Va. 462, 4 S. E. Rep. 591; Talbott v. Richmond, etc., R. Co., 31 Gratt. 685; Bank v. McVeigh, 32 Gratt. 531; Richardson v. Planters' Bank, 94 Va. 130, 26 S. E. Rep. 413; Crislip v. Cain, 19 W. Va. 441; Hansford v. Coal Co., 22 W. Va. 71; Titchenell v. Jackson, 26 W. Va. 460; Caperton v. Caperton, 36 W. Va. 479, 15 S. E. Rep. 258; Scraggs v. Hill, 37 W. Va. 706, 17 S. E. Rep. 185; Knowlton v. Campbell, 48 W. Va. 294, 37 S. E. Rep. 581. See Bierne v. Erskine, 5 Leigh 62; Reherd v. Clem, 86 Va. 374, 10 S. E. Rep. 504.

For example, the word "increase" without the word "future" prefixed, in a bequest of a female slave is ambiguous; and, if the intention of the testator in using it cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it. Reno v. Davis, 4 Hen. & M. 283.

In Crawford v. Jarrett, 2 Leigh 630, it was held that in cases of equivocal written instruments, the circumstances under which they were made may be let in to explain their meaning. In that case parol evidence of the time and manner of the execution and delivery of the written promise was admitted to show, that a party who had signed but whose name

was not in the body of the instrument, was jointly bound with those named. There no new words were added to the instrument. The proof was consistent with the terms of the instrument, and the only effect of the oral evidence was to enable the court to read the writing by the light of surrounding circumstances, that it might ascertain the meaning of the parties.

Misspelling or Illegibility of Name.—And when, on account of the misspelling or illegibility of the name of the obligee or obligor of a bond, or of the maker or payee of a note, it is doubtful who the person intended is, parol evidence of the surrounding circumstances is admissible, so that the court may be placed as nearly as possible in the situation of the party whose written language is to be interpreted, and thus ascertain the person intended by the name employed. Ambach v. Armstrong, 29 W. Va. 744, 3 S. E. Rep. 44.

Denial in Answer.—On a bill to compel the specific execution of a written agreement, if the defendant, in his answer, denies that interpretation thereof which appears obvious according to its words, parol evidence on the part of the complainant is admissible to explain it. Coutt v. Craig, 2 Hen. & M. 618.

Contract Unambiguous.—But if the intention of the parties to a written contract is plainly expressed and the contract is free from ambiguity, it will be enforced without resorting to parol proof of the surrounding circumstances. Hurst v. Hurst, 7 W. Va. 289; McGuire v. Wright, 18 W. Va. 507; Depue v. Sergent, 21 W. Va. 327; Long v. Perine, 41 W. Va. 314, 23 S. E. Rep. 611; Camden v. McCoy, 48 W. Va. 377, 37 S. E. Rep. 637; Martin v. Monongahela R. Co., 48 W. Va. 542, 37 S. E. Rep. 563; Bowyer v. Martin, 6 Rand. 525; Harris v. Carson, 7 Leigh 639; Tait v. Cent. Lunatic Asylum, 84 Va. 271, 4 S. E. Rep. 698; Norfolk Trust Co. v. Foster, 78 Va. 413; Hughes v. Tinsley, 80 Va. 259. See Gross v. Criss, 3 Gratt. 262.

Parol evidence of prior or contemporaneous verbal contracts or promises is not admissible to vary, contradict, or explain the terms or consideration of a complete, unambiguous written contract. Buena Vista Co. v. Billmyer, 48 W. Va. 382, 37 S. E. Rep. 583.

Where the meaning of the words of a written contract are clear, parol evidence is inadmissible to show that the parties intended something else. Holston Salt, etc., Co. v. Campbell, 89 Va. 396, 16 S. E. Rep. 274.

Power of Attorney.—Thus, where powers of attorney to execute a bond in the grantors' names as sureties for a person as county treasurer, are in no way ambiguous, parol evidence is not admissible to limit the power to the bond required of such person elected by vote, and to execute the bond required by him when, having failed to qualify in time after his election, he is appointed by the county judge to fill the vacancy. Redd v. Com., 85 Va. 648, 8 S. E. Rep. 490. See Calwells v. Sheilds, 2 Rob. 305.

Limitation of Rule.—On the other hand, while prior or contemporaneous declarations of parties contracting cannot be received to interpret an unambiguous written contract, yet evidence that certain alterations from the first draft of the contract were made by the parties before its execution is admissible to show the real intentions. Pancake v. George Campbell Co., 44 W. Va. 82, 28 S. E. Rep. 719.

(3) **Verbal Declarations of Parties.**—If a written contract is ambiguous on its face, the courts will look at the surrounding circumstances existing when the contract was made, at the situation of the parties and the subject-matter of the contract, and will even call in aid the acts done by the parties under it as affording a clue to the intention of the parties; but the court never resorts in such a case to the verbal declarations of the parties either before, at the time of, or after the execution of the contract, to aid in giving a construction to its language. Crislip v. Cain, 19 W. Va. 441; Hansford v. Coal Co., 22 W. Va. 71; Titchenell v. Jackson, 26 W. Va. 460; Caperton v. Caperton, 36 W. Va. 479, 15 S. E. Rep. 258; Scraggs v. Hill, 37 W. Va. 706, 17 S. E. Rep. 185; Knowlton v. Campbell, 48 W. Va. 294, 37 S. E. Rep. 581; Long v. Perine, 41 W. Va. 314, 23 S. E. Rep. 611.

A court can consider no sort of parol evidence, such as the declaration of the parties before, at the time of, or after the execution of a contract in writing; nor can the court call in aid any kind of parol testimony to alter, explain, or modify a written contract, if it is free from ambiguity on its face. Martin v. Monongahela R. Co., 48 W. Va. 542, 37 S. E. Rep. 563.

b. Latent Ambiguity.—But where there is a latent ambiguity in a written instrument, it may be explained by parol testimony; or, where the terms used in the instrument have not a definite legal signification, the custom of the trade, or the acts of the parties, may be resorted to, for the construction of them. Bowyer v. Martin, 6 Rand. 525; Hubble v. Cole, 85 Va. 87, 7 S. E. Rep. 242; Midlothian Coal Min. Co. v. Finney, 18 Gratt. 304.

Marriage Articles.—Parol evidence *dehors* marriage articles, to explain or vary their meaning, ought not to be resorted to, unless there be some latent ambiguity which is otherwise impossible to be solved or explained, or unless something agreed on by the parties at the time has been omitted through fraud or accident. Tabb v. Archer, 3 Hen. & M. 400; Flemings v. Willis, 2 Call 5.

2. EVIDENCE OF PURPOSE AND INTENTION.

a. Merger of Simple Contract.—If the higher security does not show on its face that it was given for the same debt as the simple contract, and the party relying upon the merger or extinguishment of the simple contract is compelled to resort to evidence other than the higher security, in order to show the purpose for which it was executed and accepted, then the party claiming that it was given as collateral security, and not in satisfaction of the simple contract, should have the right to introduce parol evidence also to sustain his contention. This violates no rule of law, but is only an explanation of the purpose for which the higher security was given. Witz v. Fite, 91 Va. 446, 22 S. E. Rep. 171.

b. Advancements.—After the death of the father, on the distribution of his estate, parol testimony is admissible to explain the attending circumstances of the conveyance, and that it was intended either in whole or in part, as an advancement. McClanahan v. McClanahan, 36 W. Va. 34, 14 S. E. Rep. 419.

Where a grantor, in his lifetime, conveyed land to his daughter's husband by deed, reciting a valuable consideration, parol evidence was held admissible to show that the real nature and character of the consideration and the design of the grantor, were to create an advancement for the daughter. Bruce v. Slemp, 82 Va. 352, 4 S. E. Rep. 692.

c. Medium of Payment—Confederate Notes.—Parol evidence is admissible to show whether or not the parties to a contract made during the civil war, payable "in current funds," intended Confederate currency as the medium of payment. Meredith v. Salmon, 21 Gratt. 763; Calbreath v. Porcelain, etc., Co., 22 Gratt. 697; Sexton v. Windell, 23 Gratt. 534; Stearns v. Mason, 24 Gratt. 484; Hilb v. Peyton, 21 Gratt. 386.

3. EVIDENCE TO SHOW RELATION OF PARTIES.

a. Principal and Agent.—Parol evidence is admissible to prove that an instrument, signed in the name of the agent, was intended to be and was in fact the

instrument of the principal, when that fact is doubtful on its face. Early v. Wilkinson, 9 Gratt. 68; Richmond, etc., R. Co. v. Snead, 19 Gratt. 354, 100 Am. Dec. 670; Walker v. Christian, 21 Gratt. 291. Compare Ruckman v. Lightner, 24 Gratt. 19.

Where a contract, not under seal, is made by an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it, and parol evidence is admissible to enable the principal to show that he is the real contracting party. Deitz v. Ins. Co., 31 W. Va. 851, 8 S. E. Rep. 617, 13 Am. St. Rep. 909; Coulter v. Blatchley, 51 W. Va. 163, 41 S. E. Rep. 133.

b. Relation of Surety and Cosurety.—The relation of surety and cosurety between parties may be established by parol evidence, where the existence of such relation is not inconsistent with the terms of the instrument. Williams v. Macatee, 86 Va. 681, 10 S. E. Rep. 1061.

And one or more of a number of obligors has a right to show, by parol testimony, that he or they stand in the relation of surety on the bond. Creig v. Hedrick, 5 W. Va. 140.

c. Relation of Creditor and Debtor.—The relation of creditor and debtor may always be proved by parol. Davis v. Demming, 12 W. Va. 247.

d. Makers and Endorsers.—A written obligation, after payment thereof, does not preclude the makers and endorsers from proving by parol evidence a contemporaneous oral agreement as an inducement thereto; fixing their ultimate liabilities among themselves in accord with the true consideration and purpose of entering into such obligation. Faulkner v. Thomas, 48 W. Va. 148, 35 S. E. Rep. 915.

4. EVIDENCE OF CUSTOM AND USAGE.—Parol evidence of custom and usage is always admissible to discover the real meaning of the parties, but not to contradict or vary express stipulations. Hubble v. Cole, 85 Va. 87, 7 S. E. Rep. 242. See also, Gross v. Criss, 3 Gratt. 262; Sterling Organ Co. v. House, 25 W. Va. 65.

Brick Laying.—For example, where a written contract for laying bricks is silent as to the manner in which the number of bricks is to be ascertained, parol evidence is admissible to show the custom by which such a matter is determined. Richlands Flint Glass Co. v. Hiltebeitel, 92 Va. 91, 22 S. E. Rep. 806.

Way-Going Crops.—But parol evidence of a usage for the off-going tenant to have the way-going crop is not admissible to explain a written contract of lease for a fixed and certain period. Harris v. Carson, 7 Leigh 632.

5. EVIDENCE TO SHOW CONSTRUCTION BY PARTIES.—In the absence of any ambiguity in a written contract, parol evidence is not admissible to show the construction placed upon it by the parties thereto. Grubb v. Burford, 96 Va. 553, 37 S. E. Rep. 4. See Uhl v. Ohio River R. Co., 51 W. Va. 106, 41 S. E. Rep. 340.

E. ADMISSIBILITY OF PAROL EVIDENCE IN OTHER INSTANCES.

1. MATTERS LITIGATED IN FORMER SUIT.—Whenever a question is raised as to what matters were litigated and decided in the first suit, parol evidence is admissible to explain what transpired on the former trial. Kelly v. Board of Public Works, 25 Gratt. 755.

2. RESERVATIONS.

Growing Crop on Land.—The reservation of a growing crop of wheat on land sold at auction, need not be in writing, but may be proven by parol evidence. Kerr v. Hill, 27 W. Va. 577; Robinson v. Pitzer, 3 W. Va. 335.

Coal.—Where a vendor in a contract for the sale of land merely reserves all the coal and coal privileges therein, parol evidence is not admissible to show, that when the parties made the contract, the vendor owned coterminous lands, which would be much depreciated in value, unless the coats on them could be removed through this tract, and the vendee, when he purchased, knew this. Findley v. Armstrong, 23 W. Va. 113.

3. CERTIFICATE OF ACKNOWLEDGMENT OF MARRIED WOMAN.—Parol evidence is inadmissible to supply a defect in the certificate of acknowledgment of a deed by a married woman. First Nat. Bank v. Paul, 75 Va. 594, 40 Am. Rep. 740; Leftwich v. Neal, 7 W. Va. 569; Rollins v. Menager, 22 W. Va. 462.

4. LOCATION OF SURVEY.—Evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of a survey, or a question as to the application of a grant to its proper subject-matter. Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347.

XIV. DOCUMENTARY EVIDENCE.

A. PUBLIC DOCUMENTS.

1. BOOKS.

Municipal Corporation Books.—The corporation books concerning the government of a city, town or village, when they have been publicly kept, and the entries have been made by a proper officer, as well as duly authenticated copies therefrom, are admissible evidence of the facts witnessed in them. Town of Parsons v. Miller, 46 W. Va. 334, 32 S. E. Rep. 1017. See Grafton v. Reed, 34 W. Va. 172, 12 S. E. Rep. 767.

Treasury Books.—And the treasury books are conclusive evidence of the balances on hand at any given time, both against the treasurer and his sureties, without being pleaded as an estoppel. Baker v. Preston, Gilm. 235.

Execution Book.—So, the execution book kept by the clerk is *prima facie* evidence of the truth of the entries made in it. Taylor v. Dundass, 1 Wash. 92.

Warrant Book of Sinking Fund.—It has been held that the warrant book of the sinking fund, kept by the second auditor in his office, of the transactions of the commissioner of the sinking fund of the state, is a public record, and is of itself evidence of what it contains, to be considered with the other evidence in the case. Coleman v. Com., 25 Gratt. 865.

Land-Books.—But neither land-books themselves, nor parol evidence of their contents, are admissible to show the meaning of the parties other than that plainly expressed in their written contract. Holston Salt. etc., Co. v. Campbell, 89 Va. 396, 16 S. E. Rep. 274.

a. Books of Private Corporation.—The books of a corporation are proper evidence to prove its existence, and the regularity of its proceedings. Grays v. Turnpike Co., 4 Rand. 578.

And they are *prima facie* evidence of who are or have been its stockholders. Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. Rep. 806; Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866; Pittsburgh, etc., R. R. Co. v. Applegate, 21 W. Va. 172; South Branch R. Co. v. Long, 43 W. Va. 131, 27 S. E. Rep. 297. See Stuart v. Valley R. R. Co., 32 Gratt. 146. See monographic *note* on "Corporations (Private)" appended to Slaughter v. Com., 13 Gratt. 767.

2. CERTIFICATES OF PUBLIC OFFICERS.

Of Recorder.—The certificate of a recorder of an incorporated town, stating facts which appear upon the records of the common council of the town, and not certifying copies from such records, is not admissible as evidence. Roe v. Town of Philippi, 45 W. Va. 785, 32 S. E. Rep. 224.

Of Auditor.—But a certificate by the auditor of the state, of land forfeited for nonpayment of taxes, being in the usual form in which he certifies papers

from his office, is evidence of the execution of such certificate, and of the official character of the paper, and also of the facts therein stated. Usher v. Pride, 15 Gratt. 190.

Of Magistrate of Another State.—And the certificates of magistrates of other states, has been sufficient evidence of the execution of a deed by a *feme covert*, since the act of 1814; but until the act of 1819, the certificates of such magistrates were not evidence of the execution of deeds by other persons than *feme coverts*. Sexton v. Pickering, 3 Rand. 468.

Of Clerk of Court.—So also, the certificate of the clerk of the circuit court of Monroe county, West Virginia, of the records of which court the records of the former county court of Monroe form a part, of the copy of a judgment rendered in the county court, is proper evidence of the judgment. Gatewood v. Goode, 23 Gratt. 881.

Of Notary Public.—A certificate of a notary public, that a release was acknowledged by a party to be his act and deed, ought to be received in evidence; but the depositions of the notary public, or some equivalent testimony, ought to be produced to the court. Kidd v. Alexander, 1 Rand. 456.

Of Postmaster General.—See Wilkinson v. Jett, 7 Leigh 115.

3. LAWS AND STATUTES.—See *infra*, this note, "Best and Secondary Evidence" and "Judicial Notice."

B. PRIVATE DOCUMENTS.

1. LETTERS.—Letters which have a tendency to prove the facts in issue are generally admissible as evidence. For example, in actions for slander they have been admitted to prove the circulation of the report, in divorce cases to show the intention of the defendant to desert his wife, and in actions for breach of promise of marriage to prove the contract. In actions for seduction, too, the defendant's letters to the plaintiff's daughter relative to the charge, have been admitted. Schwartz v. Thomas, 2 Wash. 167, 1 Am. Dec. 479 (slander); Bailey v. Bailey, 21 Gratt. 43 (divorce); Burke v. Shaver, 92 Va. 345, 23 S. E. Rep. 749; Tefft v. Marsh, 1 W. Va. 38 (breach of promise of marriage); Fry v. Leslie, 87 Va. 269, 12 S. E. Rep. 671 (seduction). See Cluverius v. Com., 81 Va. 787.

Ejectment.—And in ejectment between co-tenants, where the defendants rely upon adversary possession, and acquiescence by the plaintiff, letters by a party under whom the defendants claim, and also a correspondence between one of the plaintiffs and the agent of the defendant, are competent evidence to show for what purpose the tenant in possession had claimed the property and the plaintiffs acquiesced in their claim. Stonestreet v. Doyle, 75 Va. 356.

In Downer v. Morrison, 2 Gratt. 250, a letter written by the plaintiffs to the defendants, and received by them, being in answer to one by the defendant to the plaintiffs, which had been read as evidence in the cause, having been filed by the defendants, and read by them on a former trial, was held, under the circumstances, to be competent evidence for the plaintiffs.

Entire Correspondence Must Be Submitted.—But the rule is well settled that when letters are laid before a jury, the parties affected by them have a right to the entire correspondence, that the true meaning and extent of what is written may be fully understood. Stonestreet v. Doyle, 75 Va. 356, 375.

For example, the plaintiff cannot, against the objection of the defendant, read in evidence to the jury a copy of a letter written by him to the defendant, purporting on its face to be in reply to a letter written by the defendant to the plaintiff, without offering to read also the letter to which it was a reply. He cannot leave it to the defendant to call for and put in the letter to the plaintiff. Heatherington v. Richter, 31 W. Va. 858, 8 S. E. Rep. 609.

Postmark.—The postmark of a letter is not of itself evidence of the time it was deposited in the office, but it is *prima facie* evidence that it was mailed on the day stated therein. Early v. Preston, 1 Pat. & H. 228.

2. MAPS AND SURVEYS.

Ex Parte Maps.—An *ex parte* map or diagram, made by a witness, and shown by him to be correct, may be given in evidence for the consideration of the jury, not as independent evidence, but to be considered by them in connection with other evidence, so as to enable them to understand and apply it. State v. Harr, 38 W. Va. 58, 17 S. E. Rep. 794; Poling v. Ohio River R. Co., 38 W. Va. 645, 18 S. E. Rep. 782; Hoge v. Ohio River R. Co., 35 W. Va. 562, 14 S. E. Rep. 152; King v. Jordan, 46 W. Va. 106, 32 S. E. Rep. 1022. See Taylor v. Com., 29 Gratt. 780; Harrison v. Middleton, 11 Gratt. 527.

But, generally, *ex parte* maps are not of themselves admissible, and can only be used to go with and explain the testimony of the particular witness. Opinion of HOLT, J. Hoge v. Ohio River Co., 35 W. Va. 562, 14 S. E. Rep. 152.

Map of City.—A map of a city, though made by a former city surveyor, and found in the office of the register of the city, in a book labeled "Plans and Charts," not appearing to have been made by the authority of the city government, or adopted by it, is not competent evidence for the commonwealth, in a prosecution for obstructing what is claimed to be a street of the city. Harris v. Com., 20 Gratt. 833.

Maps of Surveys.—But the plan or map of the survey and location of a turnpike road with the certificates thereon by the surveyor, returned to the clerk's office and recorded in pursuance of the statute, is evidence of the line of the road as located, in an action by the owner of the land against a contractor for entering thereon, and injuring the land. Callison v. Hedrick, 15 Gratt. 244.

And streams mentioned in an old survey, no longer capable of being located by the names given, may be identified from maps of contemporaneous surveys. Kain v. Young, 41 W. Va. 618, 24 S. E. Rep. 554.

Diagram.—Where a surveyor has made a survey from a diagram handed him by the plaintiff, which he has in court, the diagram is itself evidence, and he may point out on it what lines he ran. Harrison v. Middleton, 11 Gratt. 527.

Survey.—A private survey may be admitted as evidence of boundary between those who were parties to it, or who claim under them; but not as to strangers. Lee v. Tapscott, 2 Wash. 276. See Johnson v. Brown, 3 Call 259.

But surveys made many years after another survey, and by a different surveyor, are not competent evidence as to the boundaries of the previous survey. Clements v. Kyles, 13 Gratt. 468.

Surveyor's Report.—Where, in an action to try the title to land, an order is made directing the surveyor to go upon it, and make a survey and report, which he does, but before the cause comes on for trial, the surveyor dies, his report is competent evidence. Cline v. Catron, 22 Gratt. 378.

Field Notes of Surveyor.—But an extract or copy taken by a surveyor from his field notes, is not evidence, and he can use it only to refresh his memory, and must then speak from his recollection. Harrison v. Middleton, 11 Gratt. 527. See Richardson v. Carey, 2 Rand. 87.

3. BOOKS OF ACCOUNT.—A book of accounts in the handwriting of and kept by a clerk, since deceased, is proper evidence upon those facts being proved.

Lewis v. Norton, 1 Wash. 76. See Brown v. Brown, 2 Wash. 151.

On the question whether goods were sold by the plaintiff to the defendants, or to a third person, the original entries on the plaintiff's books charging them to the defendants, are admissible evidence for the plaintiffs. Downer v. Morrison, 2 Gratt. 250; Richmond, etc., R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 S. E. Rep. 573. See *foot-note* to Griffin v. Macaulay, 7 Gratt. 476.

An entry on the books of the party, made by his clerk, who is not then to be found, together with the oath of the party as to the quantity of the article charged, though admissible as evidence in the case of a sale and delivery of goods, is not proper to charge the other party with those articles, delivered to the master of the vessel for safe keeping. Kerr v. Love, 1 Wash. 172.

Ledger.—Where the defense is that credit was extended to another than the defendant, the ledger of the plaintiff is admissible to show that the account sued on was charged to the defendant at the time the goods were delivered. Richmond, etc., R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 S. E. Rep. 573. See Clark v. Sleet, 99 Va. 381, 38 S. E. Rep. 183 (ledger and cash book of merchant).

Self-Serving Declarations.—But a book containing entries in the defendant's handwriting, of payments by him to the payee in her lifetime, on a note in action, is not admissible evidence in defendant's favor. Wells v. Ayers, 84 Va. 341, 5 S. E. Rep. 21. See Rowan v. Chenoweth, 49 W. Va. 287, 38 S. E. Rep. 544, 87 Am. St. Rep. 796.

Goods Delivered to Third Person.—The book of accounts and oath of the party, are in no case admissible to charge a person with goods delivered, by order, to a third person, unless the order be otherwise proved. Kerr v. Love, 1 Wash. 172.

Requisites to Admission in General.—A book of original entry, in which an entry is made in the usual course of business, at the time of the transaction, of matters within the personal knowledge of the bookkeeper, may be used as evidence on the trial of a suit, if the bookkeeper be dead at the time of the trial or a nonresident of the state, or if he be unable to be produced as a witness because of any other reason, as for instance, insanity. But if the bookkeeper be living and the court is able to enforce his attendance, the book cannot be used as evidence, unless his testimony as a witness also accompanies its production. Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562. See Harrison v. Garnett, 97 Va. 697, 34 S E. Rep. 612; Bennett v. Bennett, 37 W. Va. 396, 16 S. E. Rep. 638, 38 Am. St. Rep. 47.

Mutilated Memorandum Book.—A memorandum book, which has been mutilated by tearing out and burning some of the entries concerning the action after action commenced, is not admissible in evidence. Johnson v. Fry, 88 Va. 695, 12 S. E. Rep. 973, 14 S. E. Rep. 188.

Unauthorized Entries.—In an action on a contract of sale, an entry on the books of the broker, who acted as agent only for the seller, of a charge against the seller for commission he thought he had earned, is not admissible in evidence as a memorandum of sale binding on the buyer. Carpenter v. Virginia-Carolina Chemical Co., 98 Va. 177, 35 S. E. Rep. 358.

An account given out by a merchant's clerk without his authority is not evidence. Freeland v. Field, 6 Call 12.

Time When Entries Must Be Made.—The entries in a book made by a party since deceased, are not admissible in his favor, where such entries were not made in due course of business, as the business was carried on, and thus forming a part of the *res gestæ*, but were made several years after the business was closed. Rowan v. Chenoweth, 49 W. Va. 287, 38 S. E. Rep. 544, 87 Am. St. Rep. 796.

Whole Book Must Be Given in Evidence.—When a party calls for the production of and uses a writing or account of his adversary, the whole writing, the whole account, debits and credits, is thus made evidence in the case. It cannot be garbled; one side or showing of it merely cannot be used for hurt of one party to the benefit of another. Rowan v. Chenoweth, 49 W. Va. 287, 38 S. E. Rep. 544, 87 Am. St. Rep. 796, *citing* 1 Greenl. Ev. § 563; Whart. Ev. §§ 620, 1103; Jones v. Jones, 4 Hen. & M. 447; Freeland v. Cocke, 3 Munf. 352.

The books of account of a party ought to be taken altogether; therefore, credits ought not to be collected from them to charge him, without admitting the debits charged therein. Waggoner v. Gray, 2 Hen. & M. 603.

Weight as Evidence.

Books of Original Entries Prima Facie Evidence Only.—Books of original entries of sales made by a clerk at the time of the sale, and returned by an officer as a record of the amount of the sale, are only *prima facie* evidence of the fact, and may be overcome by satisfactory evidence that it was a false account and does not give the true amount for which the property was sold. Harrison v. Garnett, 97 Va. 697, 34 S. E. Rep. 612.

Mental Condition of Bookkeeper.—Thus, if a plaintiff relies on the books of his intestate to prove the items of a store account against the defendant, the latter may show that the mental condition of the bookkeeper was such during the period the account was running, that he was incapable of keeping them correctly. Clark v. Sleet, 99 Va. 381, 38 S. E. Rep. 183.

Question for Commissioner.—The weight and sufficiency of books of account as evidence is peculiarly a question of fact for the commissioner, and his finding with regard thereto will not be disturbed unless manifestly erroneous. Dewing v. Hutton, 48 W. Va. 576, 37 S. E. Rep. 670, *citing* 9 Am. & Eng. Enc. Law (2d Ed.) 934, 935.

Secondary Evidence.—If objected to, the court ought not, ordinarily, to permit a plaintiff to prove that he charged the account sued on to the defendants, and not to one of them only, on his original book of entries. This should be proved by the production of these original books of entry, unless it be shown that they had been destroyed, or, for some other sufficient reason, could not be produced. Hall v. Lyons, 29 W. Va. 410, 1 S. E. Rep. 582.

4. PARTNERSHIP BOOKS.—The books of a partnership are competent evidence to show what are debts of the partnership as against the partner who, upon the dissolution of the partnership, has purchased the assets of the partnership, and has undertaken to pay its debts. Shackelford v. Shackelford, 32 Gratt. 481. See Kyle v. Kyle, 1 Gratt. 526. See generally, monographic *note* on "Partnership" appended to Scott v. Trent, 1 Wash. 77.

5. BOOK OF BANK TELLER.—But the book of a teller in a bank is not *per se* evidence to establish the facts appearing in that book, but may be given in evidence in connection with the evidence of the teller himself, if the teller's evidence makes it proper to refer to it, to prove that a particular entry was made. Courtney v. Com., 5 Rand. 666.

6. COMPELLING PRODUCTION OF DOCUMENTS.—The court ought not to compel the production of a document by the plaintiff, which is a part only of his evidence and is not material evidence for the defense. Abrahams v. Swaun, 18 W. Va. 275.

Subpœna Duces Tecum.—In an action in which a municipal corporation is plaintiff, a *subpœna duces*

tecum may be awarded for the production of a document in the possession of the defendant on the affidavit of members of the city council having peculiar means of knowing the importance of such document as evidence for the plaintiff. Wheeling v. Black, 25 W. Va. 267. See Moats v. Rymer, 18 W. Va. 643, 41 Am. Rep. 703, and W. Va. Code, ch. 130, § 43; Va. Code 1887, §§ 3353, 3355.

XV. PROVINCE OF JUDGE AND JURY.

A. PROVINCE OF JUDGE.

1. ADMISSIBILITY OF EVIDENCE.—It is the province of the court to decide on the admissibility of testimony. Bogle v. Sullivant, 1 Call 561; Vass v. Com., 3 Leigh 786; Hill v. Com., 2 Gratt. 594; Bull v. Com., 14 Gratt. 613.

B. PROVINCE OF JURY.

1. WEIGHT OF EVIDENCE.—But the jury are the sole judges of the weight or sufficiency of evidence. Ross v. Gill, 1 Wash. 87; Bogle v. Sullivant, 1 Call 561; Keel v. Herbert, 1 Wash. 203; Whitacre v. M'Ilhaney, 4 Munf. 310; State v. Greer, 22 W. Va. 800; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. Rep. 493; Fisher v. Duncan, 1 Hen. & M. 563, 3 Am. Dec. 605; Vass v. Com., 3 Leigh 786; M'Kinley v. Ensell, 2 Gratt. 333; Coleman v. Com., 25 Gratt. 865; Underwood v. McVeigh, 23 Gratt. 409. *Compare* State v. Perry, 41 W. Va. 641, 24 S. E. Rep. 635. See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

"It is elementary, and is firmly settled in Virginia, that the court responds to questions of law, and the jury to questions of fact. The court must decide on the admissibility of evidence, that being a question of law; but not as to its weight after it is admitted, that being a question of fact." Tyler v. Chesapeake, etc., R. Co., 88 Va. 389, 12 S. E. Rep. 975.

For example, it has frequently been held that an instruction to the jury that, from the whole evidence before them the issue is not proved, is erroneous, as an instruction on the weight of the evidence. Fisher v. Duncan, 1 Hen. & M. 564; Moore v. Chapman, 3 Hen. & M. 260; M'Rae v. Scott, 4 Rand. 463; Cornett v. Rhudy, 80 Va. 710.

In trials at law, where the evidence exhibited is legally admissible, but contradictory, it is most proper to be left to the consideration of the jury. Shanks v. Fenwick, 2 Munf. 478.

Questions of Law.—In criminal cases the jury are not judges of the law. Brown v. Com., 86 Va. 466, 10 S. E. Rep. 745.

Directing Verdict.—But when the evidence given at a trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant. Woolwine v. Chesapeake, etc., R. Co., 35 W. Va. 329, 15 S. E. Rep. 81. See Knight v. Cooper, 36 W. Va. 232, 14 S. E. Rep. 999.

Jeremiah Warder and John Warder v. Richard Arell.

October Term, 1796.

[1 Am. Dec. 488.]

Conflict of Laws—Lex Loci Contractus.*—The laws of the country where a contract is made, (the contract not being made with a view to performance elsewhere,) must govern it.

Municipal Laws—Foreign.†—The municipal laws of the respective States of the United States are foreign in respect to the sister States.

Conflict of Laws—Penal Laws—Discharge from Debt—Tender and Refusal.—One country will not execute the penal laws of another. But if a person be discharged from a debt by a tender and refusal made in a foreign country, by force of the laws of that country he may defend himself in our Courts by relying upon such tender and refusal, and the laws under which he was discharged.

Pennsylvania Statute—Construction.—The Pennsylvania Act of Assembly of January 1777, making certain bills of credit a legal tender, contracts continental, as well as State bills, in that part of it which makes a tender and refusal a forfeiture of the debt. So far as this Act relates to a tender and refusal of continental bills, producing a forfeiture of the debt, it was not virtually repealed by the third section of the Act of May 1778;—this latter law related only to the emissions subsequent to the 29th of January, 1777.

Statutes—Construction.‡—Where there are two affirmative Statutes, on the same subject, if they do not conflict with each other, but may be so construed as that they may consist together, the latter will not be construed as a virtual repeal of the former.

This was an action of debt brought by the appellants against the appellee, in the District Court of Dumfries, upon a bond, executed in the state of Pennsylvania by the appellee and Cyrus Copper.

Pleas 1st payment. 2dly, "that on the 27th of March 1780, the said Cyrus Copper in the city and county of Philadelphia, in the commonwealth of Pennsylvania, on behalf of himself and of the defendant at the house of J. Warder (a deceased obligee) was ready, and then and there offered to pay, and tendered to the said Jeremiah Warder the sum of £882: 2: 6, in bills of credit emitted and made current by the Congress of the United States of America, bearing date a part thereof in the year 1775, and the residue in the year 1776, and requested him to take thereout as much money, as would satisfy what was then due on the said writing obligatory on account of principal and interest, amounting to £844: 18: 10, Pennsylvania currency, but the said J. Warder then and there refused &c. and

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*Conflict of Laws—Lex Loci Contractus.—The general rule is that a defense or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated. Thus, a tender and refusal, good by the *lex loci contractus*, either as a full discharge or as a present fulfillment of the contract, will be respected everywhere. Pritchard v. Norton, 1 Sup. Ct. Rep. 108, citing Story Confl. Laws, sec. 331; *Warder v. Arell*, 2 *Wash.* 282.

The principal case is cited with approval in Nelson v. Fotterall, 7 Leigh 201; Banks v. Greenleaf, 6 Call 275, S. C. 2 Fed. Cas. 756. See Heffebower v. Detrick, 27 W. Va. 16; Klinch v. Price, 4 W. Va. 4.

†Municipal Laws—Foreign.—In Draper v. Gorman, 8 Leigh 640, it is said: "Even the several states of the Union, though confederated, yet retain their individual sovereignties, and with respect to their municipal laws are to each other foreign. Per PENDLETON, P., 2 Wash. Rep. 298." The principal case is cited and approved in Lonsdale v. Brown, 15 Fed. Cas. p. 858.

‡Construction of Statutes—Repeal by Implication.—Repeals by implication are not favored, and ought not to be presumed, unless, from the repugnance of the provisions, the inference is necessary and unavoidable. Hogan v. Guigon, 29 Gratt. 705, and *note*; Fox v. Com., 16 Gratt. 1, and *note*; Davies v. Creighton, 33 Gratt. 696; Justice v. Com., 81 Va. 209; Forqueran v. Donnally, 7 W. Va. 115; State v. Cain, 8 W. Va. 732; The Chesapeake, etc., R. Co. v. Hoard, 16 W. Va. 270; Conley v. Supervisors, 2 W. Va. 416.

In Stribbling v. Bank, 5 Rand. 143, the court said: "Implied repeals, we know, are not favored in law. There must be absolute repugnancy to effect it. If the laws can be made to stand together: especially if there be different functions for the laws, the one a general, the other a particular purpose; the latter will never be construed to repeal the former. For this doctrine, many cases might be cited. I shall only refer to *Warder v. Arell*, 2 *Wash.* 282." The principal case is cited with approval in Stribbling v. Bank, 5 Rand. 151; Com. v. Richmond, etc., R. R. Co., 81 Va. 371.

Same—Retrospective Effect.—See *foot-notes* to Price v. Harrison, 31 Gratt. 114; Elliott v. Lyell, 3 Call 268, and the principal case cited in State v. Mines, 38 W. Va. 134, 18 S. E. Rep. 473.

that the said sum was not demanded by the said J. Warder, or by the plaintiffs within the space of four days after
283 *the same had been tendered and refused as aforesaid, and that the said sum of principal and interest became forfeited, one third part thereof to the said Copper and Arell, and the other two thirds to the commonwealth of Pennsylvania, by reason whereof, and by virtue of a certain law of the said commonwealth made in the first year of the said commonwealth, and in the year 1777, entitled, "an act for making the continental bills of credit, and the bills of credit emitted by resolves of the late Assemblies legal tender, and for other purposes therein mentioned," [which is set forth at large] "and that the said Cyrus Copper, on the 3d of April 1780, (the said law continuing still in full force) paid into the hands of the treasurer of the said county of Philadelphia, appointed to receive the state tax, two third parts of the said sum due for principal and interest on the 27th of March 1780, and took the said treasurer's receipt therefor, and retained the other third part for the benefit of himself and the defendant: and that the said bond was sealed, signed and delivered in the city, county and commonwealth aforesaid, by virtue of which premises of the said law, the defendant saith he is exonerated and acquitted of and concerning the said writing obligatory &c."

The 3d plea is like the preceding, except that the law is not set forth at large, nor is the payment to the treasurer of the two thirds, stated.

Issue upon the first plea. Replication to the second, "protesting, that the said Cyrus Copper was not on the 27th March 1780 at the city of Philadelphia in the county of Philadelphia, and commonwealth of Pennsylvania ready, and did not then and there offer to pay and tender to the said J. Warder, the sum of £882: 2: 6, in bills of credit emitted by the Congress of the United States of America, and bearing date in the years 1775, and 1776, and also protesting, that the said Warder did not then and there refuse &c. also protesting, that the said sum of principal and interest did not become forfeited &c. by virtue of the law set forth in the plea, and that the said law was not then in full force &c. and that the said Copper did not on the 3d day of April 1780, pay into the hands of the treasurer &c. for plea says, that after making the said recited law in the plea set forth, to wit, on the 20th March in the year 1777, the general Assembly of the said commonwealth, made a law entitled, "an act for emitting the sum of two hundred thousand pounds in bills of credit for the defence of this state, and providing a fund for sinking the same, by a tax on all estates
284 real and personal, and *on all taxables within the same, which is to the court shewn &c." [here the law is recited at large] "and also the said General Assembly afterwards to wit on the 25th day of May, in the year 1778, made another law entitled "a supplement to the act entitled an act, for the calling in of the bills of credit issued by the legislative authority of Pennsylvania, under the sanction and authority of the crown of Great Britain, and for other purposes herein mentioned" which is to the court shewn" &c. [here the law is recited at large] "which two laws were in full force on the said 27th of March 1780, without that, that the said defendant is acquitted and discharged of and from the said writing obligatory by virtue of the said law passed in the first year of said commonwealth and in the year 1777 entitled &c."

The replication to the third plea, is exactly like that to the second, except, that the protestation is confined to the matter of the plea, and the title only of the two laws are set forth.

Special demurrer to the 2d and 3d pleas.

At the trial, the following agreement of counsel was made and entered upon the record to wit, "we agree that the facts severally stated in the second and third pleas of the defendant, and the replications of the plaintiffs, shall be mutually admitted without regard to any matter of form, and that the decision of the court shall be had upon the law arising thereupon, and the acts of Assembly therein recited, in lieu of the demurrer joined between the parties, which with the leave of the court is withdrawn.

The defendant withdrew his second plea, and on argument of the demurrers, judgment was given for the defendant, from which the plaintiff prayed an appeal.

Washington for the appellant. This case will depend in a great measure upon the just construction of the laws of Pennsylvania, where this debt was contracted, and the tender made.

The first act upon this subject passed in January 1777. The preamble of the law, professes to make continental bills of credit a legal tender, and to render them equally current with state bills, in the discharge of debts, or in the purchase of property. The 2d section, relates exclusively to this subject. The 3d section confessedly relates to state bills only, when speaking of their currency. It might perhaps be seriously questioned, whether the clause of forfeiture upon a tender and refusal can be extended to continental bills; for since the 2d section fulfills completely what the preamble promises respecting the currency of the continental bills, and their capacity to become the subject
285 *of a legal tender, and the third section respects state bills alone, until the clause of forfeiture is introduced, it may fairly be contended, that the words "if any persons after &c. shall refuse to receive any of the said bills" &c. refer to state bills, the immediate antecedent to those words. There would have been nothing unnatural in this discrimination, which should make continental bills only a tender at common law, and fortify the state bills with the additional aid of forfeitures upon those who should refuse to receive them. But if I should be wrong in this construction of the act, I shall still endeavor to show, that the refusal of Warder to accept the continental bills which were tendered by Copper, did not produce a forfeiture of the debt.

If the third section extends to continen-

tal bills, it comprehends emissions subsequent, as well as those which were prior to the passage of the law. The intention of the law was to give them currency, and to create the fullest confidence in the ultimate goodness of the continental and state money. If to secure these important objects, it was thought necessary to denounce the heavy punishment of forfeiture upon those who refused to receive the paper money, the same reason applied with equal force to all the emissions. To discriminate, was to defeat the very object of the law. To leave subsequent emissions, crippled for the want of a similar provision, was but half doing the work. If this law does not apply to subsequent emissions as to tender and forfeiture, it does not make those emissions current, because the same money which is made current, is declared to be a legal tender; and if this be the case, the subsequent emissions of continental bills were for 16 months not current in that state. But this cannot be contended for, and therefore, the conclusion must be, that the law was meant to include subsequent, as well as prior emissions.

After this, the legislature passed a law in March 1777, directing an emission of £200,000 and declaring it only a legal tender at common law. This was the first moment, when the legislature appear to have felt the injustice of the tender law. The legal scale of depreciation had then arrived at two for one and we all remember, that the actual state of depreciation was greater than that at which the legislatures of the states, or Congress afterwards rated. But when it was afterwards discovered, that tender laws, armed with all the terrors of forfeiture could not sustain the value of the paper money, or stop the progress of its depreciation, the iniquity of the 286 measure was no longer *to be countenanced by arguments of policy. And in May 1778 when depreciation had got to 5 for 1, an act passed, the third section of which declared, "that all bills of credit emitted and made current by resolves of the continental congress, should pass current in the payment of all debts, in as full and as effectual a manner, as the £200,000 which had been emitted in March; and that the refusal to receive them, should subject the parties so refusing, to the same fines, forfeitures and penalties, as such persons were subject to for refusing any of the said emissions of March.

It would seem, that this law had entirely rooted out of the code any thing like a tender, other than such as might be made at common law, and had virtually repealed so much of the act of January 1777, as punished the refusal with a forfeiture of the debt.

But I am aware of the argument which is relied upon by the counsel for the appellee.

It will be contended, that the act of May 1778, applies only to emissions of continental bills since January 1777, which it is supposed were not provided for by that act.

I am at a loss for a rule to warrant such a construction. The words of the section which I have quoted are as general as they can be? they speak of "all the bills of credit emitted and made current by resolves of congress." I cannot perceive a reason for restraining their operation to particular emissions, since if the legislature had intended such a discrimination, nothing could have been more easy than to have expressed it in plain language.

We have in this very law, satisfactory proof, that when the legislature mean to restrain their expressions they know how to do it; for in speaking of counterfeits, they confine them to the emissions subsequent to January 1777. If the same emissions were intended by the 3d clause, why did they use a different language?

I can never admit the propriety of a constructive exposition of a statute, where the words are free from ambiguity; it is seldom a safe guide, and can never be tolerated, but when there is no other mode of reaching the intention of the legislature. For a judge to say, that only some of the bills of credit emitted by congress shall be a tender as at common law, when the legislature have declared that all shall, seems to be taking an unwarrantable liberty with the law.

287 *The strongest reasons present themselves to my mind, against such a construction. For why should the legislature discriminate between bills emitted on the 28th, and those emitted on the 30th of January? In May, the depreciation of both were equal; it was not more wicked to compel the creditor to receive the one, than the other. Policy no more required this extraordinary interference in favor of the prior, than of the subsequent emissions. But it would be still more wonderful, to discriminate between continental, and state bills; to afford what was considered as a protection to the former, whilst it was withdrawn from the latter. This would be to presume a very unnatural preference in the legislature to continental, over their own money. In short, if the distinction contended for is to be supported, it will be incumbent upon the appellees counsel to adduce strong and irresistible reasons for it.

Randolph on the same side. I beg leave to observe in addition to what has been said, that I shall question the power of a Virginia court to enforce the penal laws of Pennsylvania, or of any other state. I admit, that in civil cases, the courts of one country will execute the judgments, or legislative acts of another; but the law in question is highly penal; and is besides, so far local, that it only prevents the right of recovery in the courts of that state, but does not abolish the debt. The principle which is stated in the case of James v. Allen, Dallas's Rep. 188, applies with double force to the present; which depends upon the penal laws of a foreign country.

I shall also insist, that if the 3d section of the act of January 1777, comprehends continental bills, that the requisites of the act as to making the tender, were not complied with by Copper. The debt in question was due to three persons, not associated together as partners in trade, but as joint tenants. The words of the law are, "if any person or persons shall refuse," from which I understand, that to produce a forfeiture, the tender should have been made to all three, since if any one had re-

ceived the money, it would have avoided the forfeiture; and because one refused, are the whole to lose the rights which belonged to them?

In some cases, the act of one, is (by a fiction) presumed to be the act of others, though not concerned directly or indirectly in it; but this never happens, where such a fiction is necessary for the enforcing of a penalty.

But at all events, the part of J. Warder only (to whom the tender was made) was forfeited, for it is laid down in Co. 288 Litt. *186, that a forfeiture by one jointenant extends only to his own interest.

Lee for the appellee. This debt was contracted in Pennsylvania, and therefore, if it hath been discharged by the laws of that state, it can never be recovered in this. Brow. Ch. Rep. 376. The case of James and Allen does not oppose this doctrine. It is in no respect analogous; the insolvent law of New-Jersey did not extinguish, or discharge the demand of the plaintiff; the debt still remained, and followed the person of the defendant, altho' that person had been discharged from imprisonment. It was therefore no bar to an action for a claim yet existing in another state. In this case, if I should be correct in the construction of the Pennsylvania laws, the debt itself was absolutely discharged. It is also to be remarked, that in the case of James and Allen, the jurisdiction of Pennsylvania had attached upon Allen before his discharge in New-Jersey. Besides, by the agreement made in this cause, the judgment of the court is to be founded upon the laws of that state. The words of the act "that the creditor should be forever barred from suing in any court of that state," were tautologous; for if the debt was discharged and forfeited by the tender and refusal, no action could have been maintained.

I come now to the construction of those laws which must decide this question. The ground work of the argument for the appellants is, that no discrimination between the prior and subsequent emissions of congress, or between continental and state bills was intended. This is mere conjecture unwarranted as I conceive, by any thing growing out of the laws themselves. To discriminate between the different kinds of paper money was usual in all the states. That the legislatures had such a power is not questioned, and if they exercised it, it is immaterial what were the motives which led to it. There were two modes of raising money in the United States, viz. by emissions, and by loans. It was reasonable to expect, that when redemption should take place, it would be regulated by the value of the money when it was emitted. This has actually been practised by congress as to loan office certificates; and if this rule was a just one in the repayment of money borrowed from individuals, it was equally so as to money paid by the United States to individuals, for articles furnished or services performed to the public. I premise this, for the purpose of shewing, that in the contemplation of men, the different periods at which emissions were made, was important; and it furnishes 289 *a strong reason for the discrimination, which I contend upon the just construction of the act of January 1777, was intended between the emissions of continental bills prior to that time, and such as might afterwards be made.

The legislature in this very law discriminate between the different sorts of their own paper money; for the 3d section does not include all the state money which was then current. At this time the different states entertained considerable jealousies with respect to Congress, and it was hardly to be expected, that they would be so forward in passing laws to support their money, as to furnish it with these extraordinary aids before it was created.

It is contended, that the third section of this law, does not comprehend continental bills. The court will consider the whole law together, without regarding the mode in which the entire subject is subdivided into sections. The preamble declares the great necessity there was for making continental and state bills a tender in all payments, and that they should be alike taken in discharge of debts. In pointing out the means of producing this likeness, the subject is arranged into different sections, but surely this cannot change, or affect the spirit and intention of the law. "Said bills" in the third section, must refer to the bills which had before been mentioned, and declared a legal tender; and those were continental as well as state.

The act of March 1777, does not in any part of it relate to that of January 1777; the sixth section refers to the £200,000, and to no other state money, and as it is admitted, that this clause speaks only of a tender at common law, the legislature again discriminate between the different kinds of their own money.

Thus the laws stood at the time the act of May 1778 was passed; at this period, there were emissions of continental bills in circulation, which had been made since January 1777, and which of course, having not been noticed in that law, required the aid of the legislature to make them a tender; for this purpose only could the 3d section of that law have been intended.

It is contended, that this law virtually repeals the 3d section of the act of January 1777. Upon what rule of law is this argument founded? I have always supposed, that if there be two affirmative statutes, between which there is no collision, that the one does not repeal the other. A constructive repeal is never to be admitted, if by a fair interpretation of both statutes they may consist together, and both be rendered effectual. Now, there is no inconsistency in confining the operation 290 of *the last law to emissions subsequent to January 1777, and the first to emissions prior to that period. "All the bills of credit," in the 3d section, will then mean, all such as have not been before provided for by the legislature. Or if these words be so broad that they must include the emissions prior to January, there may be another construction given to them, without forcing us upon the dangerous ex-

periment (for such it must always be unless warranted by absolute necessity), of repealing laws by implication. It was doubtful whether continental bills of credit were a tender at common law, unless declared to be so by an express statute. A declaration of this sort was even thought necessary as to the £200,000, of state bills. Now, though the act of January 1777, had made a tender and refusal under certain restrictions a forfeiture of the debt, yet it might have been doubted, whether this had made continental bills of prior emissions, a tender at common law. The intention therefore of the 3d section of the act of May 1778, if it refers to all the emissions of continental bills, might have been to make the whole of them a tender at common law.

All the reasoning on the other side, to prove that the legislature could not have intended a discrimination between the different emissions of continental bills, is answered by the laws themselves; for it must be admitted, that a tender and refusal of the state money emitted by resolves of the late Assemblies, and on loan, prior to February 1777, produced a forfeiture of the debt, which was not the case with the emission of March 1777; and if so, what reason can be urged against a similar discrimination between continental bills?

On the other hand, if the act of May 1778 repeals the 3d section of the act of January 1777, great injustice would follow. It would operate as an ex post facto law, as to those, who after January 1777, may have sold their estates on credit, under an expectation of being able with the money to discharge the debt they owed.

The case of Johnson and Hocker, Dallas's Rep. 406, decided in the Supreme Court of Pennsylvania, is decisive upon this point, and will be regarded by this court as an authority entitled to its respect; I will not say it is binding upon this court. But since we are discussing a question which grows out of Pennsylvania statutes, and it is admitted that if this very case had been decided in that court it would have bound this, a decision of a similar question in that court will be adopted here, unless it be obviously wrong. Much more will it
291 be adhered to, when *the single question is, the construction of laws attended with considerable ambiguity. Extraneous circumstances are often called in to aid the interpretation of doubtful statute, and the rights drawn from thence must have been more clear to a Pennsylvania court, than they can be to the courts of any other state. Having said thus much for the decision, which is complete upon the very point in discussion, I have only to add, that this book is considered as authority in the Pennsylvania courts, and as such will be respected in this court.

It is contended, that this court will not execute the penal laws of other states; be it so. But there is a wide difference between an action instituted to enforce a penalty, and a defence which goes to avoid the payment of a debt, extinguished by the operation of existing laws.

It is said, that the tender ought to have been made to all the obligees. When the legislature speak of a tender properly made they use a technical term, which for its explanation must be referred to the common law; the consequences only are statutary. Now we all know, that at common law, a tender to one of three joint obligees is sufficient, and a refusal by one, suspends the interest as to all.

It is admitted by Mr. Randolph, that a tender to one would be a discharge as to the interest of that one; if so, all must be discharged, because that one could not join in the action if his interest were gone, and it is clear, that the other two could not maintain the action whilst the other was alive. In cases of joint debts or duties, the act of one is the act of all; payment to one is payment to all, and so too is the refusal of one, the refusal of all.

Randolph.—I shall consider this question under three heads.

1. If the act of January 1777 be penal, as I shall endeavor to prove it is, it ought not to be executed now, and here.

2. Under the just construction of the act of January 1777, continental bills are not comprehended in the third section.

3. If comprehended the forfeiture there contemplated, is done away by the subsequent laws.

1. The principle, that the courts of one country will not execute the penal laws of another is not denied. But it is said that the attempt made by the defendant is not to enforce a penalty, but to avoid the payment of a debt discharged by force of a statute. Substantially, it is the same thing. Suppose that instead of abolishing the debt, a penalty equal to the same
292 *amount had been denounced, in case of tender and refusal. What difference would there be between an attempt to enforce this penalty, and a defence, which claims the benefit of a forfeiture of the whole debt. In both cases there is a penalty; in both the court is called upon to give it effect. Suppose the punishment denounced upon the refusing creditor had been attainder or outlawry; would this court have sustained such a plea in bar of Warders suit? It surely would not.

This is a personal action, and in its nature fugitive; it is not fixed to the soil of Pennsylvania, but may be sued for any where. Suppose the creditors and debtors had been citizens of Virginia, and being in Pennsylvania, the tender and refusal had there taken place. It is clear that it could not have been pleaded as a bar to this suit, although Mr. Lee's argument would lead to a different conclusion. I admit, that Warder's remedy was gone in a Pennsylvania court, but his right was not extinguished; for if it were, why does this act give the debtor a remedy to recover his bond from the creditor? It could be for no other reason, than because the legislature supposed there remained a latent right which might be asserted in some other country. If I am correct in this, the case of James and Allen (so far as that, or any other decision of a Pennsylvania court can be considered as authority here) is in point.

It is contended, that the clause of the law which ousts the right to sue in the courts of Pennsylvania was tautologous. If so, there is nothing else in the law which

would give to a tender and refusal any other effect than a tender at common law. The agreement made at the trial of this cause refers not only to the Pennsylvania acts of Assembly, but leaves the case open to the operation of general law.

The case of Johnson and Hocker is considered as conclusive. As authority, I deny it. It is the decision of a court, which tho' supreme in name, is but subordinate in fact. The judgments of that court were subject to revision in a Superior Court, and this very case may have been reversed for any thing that we know to the contrary; for the decision was made in 1789, and there are no reports of cases in the High Court of Errors and Appeals, since the year 1788. Neither can I agree, that that court had more lights, or was from its situation more competent to decide upon the construction of a Pennsylvania statute, than this or any other court of equal ability would be.

I come 2dly, to the construction of the act of January 1777. The 2d section of the law does no more than establish
293 the currency *of the continental bills. It is contended, that the 3d section is connected with, and operates upon the 2d. That two distinct sections of a statute which is to be liberally construed, may be connected and melted together, I do not deny. But it is otherwise in laws which impose penalties and forfeitures. Suppose, that instead of the forfeiture spoken of in the 3d section, it had been fine and imprisonment; would not the court have been tied down to a strict construction, and would it have been proper to go out of one section into another, for the purpose of hunting after penalties?

The 3d section begins by declaring, "that state bills shall be considered as a legal tender, and shall be received in payment of debts according to the sum specified in said bills." What bills? Why surely state bills, because the value of continental bills had been fixed by the 2d section. When the law goes on to speak of a refusal of said bills, it must necessarily apply to state bills, which were clearly meant before, and were alluded to in the same clause.

For this discrimination, (which I think was intended,) a sufficient reason may be assigned. The state bills had been issued under the regal government, and fortified by taxes for their redemption; this was not the case with the continental money. The superior value of the state money was afterwards acknowledged by the legislature, when they passed a law to prevent that money from being locked up, and preserved on account of its supposed value over other state money.

But if the 3d section do extend to continental bills, I insist, that the requisites of the law have not been complied with. I object that the tender was made to one of the obligees only; it is answered, that at common law, a tender to one is a tender to all, and that so it must be under this statute.

I admit the principle, if the bond be in the possession of the obligee to whom the tender is made, but I deny the conclusion even if this fact appeared. Where a tender and refusal is to produce a forfeiture of the debt, the act of one is not binding upon all. If it be, I am at a loss to understand the meaning of the words "person or persons" connected with what follows, "that he, she or they shall be barred from suing" &c. I admit that payment to one, would be payment to all, for that would be a satisfaction of the debt; payment could not be made to all. But where a forfeiture was to be the consequence of a refusal, the tender ought to have been made to all, because if one refused, another might not, and
294 thereby the forfeiture *might have been saved. It is said, that if one be barred, the others cannot sue. This is not admitted. If one obligee be outlawed or attained, the others may sue.

The next law which I shall consider is, that which passed on the 23d of March 1778, page 115 of the Pennsylvania laws, and which, tho' not stated in the pleadings, may be referred to under the agreement. At this time, there were three sorts of state money current in Pennsylvania: 1st, the emissions by resolves of the late Assemblies, during the proprietary government; 2d, emissions on loans by the act of Assembly of the 26th of February 1773, which was also during the former government; and 3dly, the emission of the 20th of March 1777.

The two first classes are called in by the law under consideration, and are to be exchanged for the emissions of the 3d class. Of course, there was no state money remaining in circulation except the £200,000, and none which could be tendered under the act of January 1777. Would it not be wonderful then, that the legislature should leave the continental bills under the operation of the act of January 1777, strengthened and supported by forfeitures, and permit their own to languish under the less efficient qualities of a tender at common law? The legislature supposing, that continental money was assisted only by the second section of the act of January 1777, do by the joint operation of this law and that of March 1777, place all the state money upon the same footing with the continental. And having done this, the act of January 1777, was no longer necessary, and is repealed by that part of the law now under consideration, which repeals "each and every of the acts of General Assembly by which the state money issued by the legislative authority of Pennsylvania under the authority of the crown of Great Britain, or any part thereof had been made current."

3d point. But if this be not the operation of those laws, and if the 3d section of the act of January 1777 does refer to the 2d, then I contend, that the act of May 1778, does completely repeal so much of it as makes a tender and refusal of any continental money a forfeiture of the debt. The words of the law are general; if a discrimination between prior and subsequent emissions had been intended, it could easily have been expressed. The 4th clause is a proof that the legislature knew how to limit their expressions to posterior emissions when they wished to do so. But if, as I have before contended, the act of March 1778 repealed that of January 1777, then

we perceive a sufficient reason for the general expression used in the act of May 1778.

295 *ROANE, J.—This contract having been made in Pennsylvania, without a view to a performance in any other state, the agreement made upon the trial of the cause referring to those laws, was an act of supererogation, and entirely unnecessary, for it is clear, that the laws of that country where a contract is made must govern the fate of it.

The rule which I have just mentioned is laid down in the case of Robinson v. Bland 2 Burr. 1679, and is well explained and illustrated in Fonblanque's excellent treatise on equity 2 vol. page 443.

It is true, that the laws of one country, have not in themselves an extra territorial force in any other; but by the general assent of nations, they are always regarded in contracts formed there.

A distinction however is attempted in this case, under the idea, that this is a penal law, and that the courts of one country will never execute the penal laws of another. The principle, is true, but inapplicable. The law of 1777, points out a mode of discharging debts different from that which is customary; it may produce an injury, but it is not therefore penal. The case cited from Brow. Ch. Rep. 376 is in principal like this. Payment in depreciated paper money was a penalty (under this interpretation of the word), in South Carolina, beyond what existed in England; yet the lex loci prevailed. The only difference between that and this case is, that in that, the loss was partial, in this total, but the principle is precisely the same.

We are now to enquire, how the law of Pennsylvania stands upon this subject. The act of January 1777, in the preamble declares, "that the emissions of continental and state bills ought to be alike taken in discharge of debts"&c. To effect this, it was necessary to make them alike in all those qualities, which were any ways connected with the payment of debts. If received by the creditor, they were alike a discharge of so much of the debt. But if a tender and refusal of continental money, was not a discharge of the debt, it was not alike taken with state money, because if state money had been tendered and refused, the debt would have been discharged.

The 3d section declares "that the state money" there described "shall in like manner be a legal tender and be received in payment of all debts as aforesaid" &c. Now the two descriptions of money would not be alike in their tenderable qualities, if the refusal of one discharged a debt, and the other did not. So that, if the words "said bills" in the next sentence, do

296 not *refer to continental bills, yet by assigning certain qualities to state bills, they at once attach to continental bills, which it is declared are to be alike taken in discharge of debts, and to be in like manner a legal tender.

But the 6th section of the law clears the question of all doubt as to the operation of the 3d clause, upon continental bills. It declares, "that where any person stands bound to pay sterling money, the creditor shall receive continental bills of credit, or state bills in payment thereof at a particular rate, if tendered as aforesaid, and on refusal thereof, shall be deemed and taken to be within the meaning of this act in cases of refusal of the bills of credit in tender as aforesaid." And there can be no doubt, but that the clear scope of the law was to assimilate continental to state bills in their tenderable quality.

The next question is, was this act in force at the time the tender was made.

It is argued by the appellant's counsel, that the generality of the expressions in the 3d section of the act of May 1778, operated a virtual repeal of the act of January 1777, so far as it related to a tender and refusal of continental bills, producing a forfeiture of the debt. It is contended, that the legislature began then to acknowledge the injustice of the act of January 1777. Yet in March 1778, when it was equally discernable, the legislature only repeal the law as to state bills.

Every rule of construction is opposed to the argument of the appellant's counsel upon the operation of the 3d clause of the act of May 1778. The court will never favor the repeal of a law by implication. 4 Bac. Ab. 638.

If there be two affirmative statutes upon the same subject, the one does not repeal the other, if both may consist together, and we ought to seek for such a construction as will reconcile them together.

The words all the bills of credit, must be confined to such as had not been before provided for consistently with the intention of the legislature; and these were, the emissions subsequent to the 29th of January 1777. By this interpretation of the words, all the laws are reconciled, and we avoid the necessity of an implied repeal, which if it had been intended, we ought reasonably to suppose it would have been expressed. The words, "all the bills of credit," in the case of Johnson and Hocker, were not considered as producing the effect which has been contended for; and though I do not consider myself bound by that decision, yet the authority of it is entitled to respect, and fortifies my construction of the laws.

297 *Upon the whole, I think the judgment should be affirmed.

CARRINGTON, J.—The only question arises out of the construction of the laws of Pennsylvania, which must assuredly govern this contract, as it was formed in that state, and discharged there, if it be discharged at all. I have read with attention, and have considered all the laws of that state upon this subject, and I entirely concur with the judge who has preceded me, in the construction and operation of them. The appellee having conformed to the law of January 1777, he must enjoy such benefits as that law gave him, unless he was deprived of them by subsequent laws. In March 1778, the legislature call those emissions which had been made a legal tender by the act of January 1777, and a refusal of which, was declared to be a forfeiture of the debt but; they do not expressly, or by implication repeal that law, except as to

such emissions. The legislature so far from discovering a disposition to relax at this early period, emitted more money as late as April 1781, and declared it a legal tender. The first law which operated a repeal of the act of January 1777, passed in 1781.

It is contended, that the act of May 1778 virtually repealed it. If the two laws may be reconciled, a constructive repeal is inadmissible, and that they may be, has been already demonstrated by the judge who has given his opinion. The case of Johnson and Hocker, is expressly in point, and accords entirely with my sentiments upon this subject.

The operation of the act of January 1777, upon this case, has been denied, under an idea, that it is penal, and consequently, not to be enforced by the courts of this state. But the appellee in this case is not in pursuit of a penalty, and does not ask the aid of the court to enforce it. He protects himself from the claim of the appellants, by pleading a discharge by the laws of another state having competent power over the subject. I confess that the opinion of judge Shippen, in the case of James and Allen, appears an extraordinary one to me; I cannot discover, how the demand in that case could be considered as local. The judgment in New-Jersey, did in my mind completely extinguish the original claim; for suppose the debt had been due by bond, the bond would of course have been filed in the cause, and tho' an action of debt might have been maintained upon the judgment, yet surely it could not have been upon the original debt, which was merged in the judgment.

As a payment to one is a payment to all the joint obligees, so it is clear, that a tender to one is a tender to all; for if
298 this *were not the case, it would be almost impossible to make a valid tender, where there were many obligees.

As to the hardship of this case, we have nothing to do with it. The state has got two thirds of the money, and it would be equally hard, if not more so upon the debtor, if he were now obliged to pay the whole again.

The PRESIDENT. Though very much indisposed, I will endeavor to state the grounds of the opinion which I am to give. The question is, whether the tender and refusal in the present case, produced a forfeiture of the debt according to the laws of Pennsylvania, or whether it operated only as a tender at common law, to stop the interest until again demanded.

But before I consider the case upon its merits, I will endeavor to clear it of some preliminary objections made by the counsel. The first was, that the act of January 1777, should not be regarded by us, because it is penal, so far as it relates to the tender and forfeiture.

It seems to be admitted on all hands, that in cases of contracts, the laws of a foreign country where the contract was made, must govern. The same principle applies, tho' with no greater force, to the different states of America; for though they form a confederated government, yet the several states retain their individual sovereignties, and with respect to their municipal laws are to each other foreign.

But this is called a penal law. It may deserve very hard names, but it cannot be called penal. It is not for us to justify the morality of the law, but to understand clearly the legislative will and to execute it. If the law had subjected the creditor to a penalty for his refusing to receive the money, and the debtor were now prosecuting him to recover it, the principle contended for, which I admit to be correct, would then apply. But it is the creditor who sues, and the defendant pleads a discharge of the debt which is the foundation of the action, under the laws of that country, where the contract was made. It is no more penal, than the act of limitations, the bankrupt laws or the like. The decision in the case of Johnson and Hocker is upon the very point, and is complete. Being however a single case, and subject to revision, it has not the authority of a determination of the supreme judiciary of that state, and would not perhaps be considered even there as absolutely binding; but it may with propriety be referred to for illustration, and as such, is entitled to the respect of this court.

299 *Upon the merits. The first objection made by the appellant's counsel is, that the 3d section of the act of January 1777, must be confined to state bills only; that the words "said bills" refer to them as the next antecedent. However this may be according to the strict rules of grammatical construction, it is not the correct rule of interpreting a statute. To get at the meaning of the legislature, we are not confined to the order of the sentences, but must take into view the whole law. The legislature have said enough to shew, that their intention was to place continental and state bills upon the same ground. The 2d section makes the former current, and receivable in payments and discharge of debts. The 3d declares, that states bills shall in like manner be a legal tender, and be received in payment. Then follows the effect of a tender and refusal, and the words, "any of the said bills" comprehend each class before mentioned, and cannot be confined to any one of them. It is to be remarked, that in the 13th and 14th sections of the same law, the former of which declares the penalties for refusing, and the latter for counterfeiting the money, the same expression ("any of the said bills") is used. Although the subject is divided into sections, I have no doubt, but that the spirit, as well as the just exposition of the words of the law comprehends continental, as well as state bills, in the clause which respects the forfeiture. The reason for dividing the subject into sections is obvious; the second describes at what rate continental dollars, should be estimated in shillings and pence, which was not necessary as to state bills.

We are next to enquire, if this law be repealed expressly, or by implication? The act of March 1777, directs an emission of £200,000, and declares it a legal tender. It was of course, a tender only at common law. The 10th section of this law declares, "that all bills emitted before the 1st of July

1759, shall not pass in payment of any debt or demand, except for taxes &c." but not a word is said respecting continental bills, yet it was contended at the bar, that the words, all bills, operates a repeal of the act of January. The rule is, that where there are two affirmative statutes, if they do not conflict with each other, the latter does not repeal the former. Repeals by implication are never favored by courts. Whatever apparent inconsistencies may appear in the declarations of the legislative will, yet it is not decent to presume that they would change their mind upon the subject, without saying so in express terms. But if the two laws are absolutely in opposition to each other,
300 *then since the latter will prevail, the former must of necessity be considered as being altered. If however there be different subjects for the two laws to operate upon, there is no inconsistency, and consequently no necessity for presuming a repeal. Now apply these principles to the present case. Continental and state bills, were the subject of the first law; that law may still subsist in all its force as to the former, without in the least conflicting with the act of March 1777, which is confined to states bills. The same observations apply to the act of March 1778; it applies to state bills altogether, and was intended to destroy the preference, which the regal money had obtained over that emitted by the state. In the same manner is the act of May 1778 to be interpreted, which speaks expressly of continental bills. There were emissions prior, and others subsequent to January 1777. The former were provided for by that act; the latter were not. This law then may with propriety, and with great reason be applied to the subsequent emissions, by which the necessity of an implied repeal of the first law is avoided.

But it is contended, that if the act of January 1777, was in force in March 1780, the tender was not made conformably with the requisites of that law: that it ought to have been made to all the obligees. As a payment to one is a payment to all, it as certainly follows, that a tender to one is a tender to all. So a release by one, binds the whole. There were four days of grace allowed, in which time the obligee, to whom the tender was made, might have consulted with the others.

Upon the whole, I concur with the rest of the court, that the debt in question was discharged by the tender and refusal, and therefore,

The judgment must be affirmed.

Young v. Skipwith.

October Term, 1796.

Decree—Final*—Case at Bar.—A decree directing the surveyor to make partition of a tract of land, and to make report, is not final, and cannot be appealed from.

This was an appeal from a decree of the High Court of Chancery, wherein the appellee was plaintiff. The suit was brought for a specific execution of an agree-
301 ment, *whereby the defendant was to purchase a tract of land on the joint account of himself and the plaintiff; the prayer of the bill was for a partition of the land according to certain boundaries agreed upon by the parties, and for a conveyance. The court of chancery decreed in favor of the plaintiff, and directed the surveyor of the county to run a line of division, and to report the quantity of land on each side thereof.

After a very lengthy argument in this court upon the merits of the case, the court dismissed the appeal, as being prematurely prayed before the final decree and remanded the cause to the court of chancery.

Booth's Executors v. Armstrong.

October Term, 1796.

Verdict—Certainty—Plea of Plene Administravit†—Case at Bar.—The defendant pleaded a special plene administravit, and that he hath not, nor had any goods, &c. except to a certain value, which were not sufficient to satisfy the judgments mentioned in the plea. Replication, that the defendant hath and had, &c. goods, &c. more than sufficient to satisfy the said judgments, whereof he could have satisfied the plaintiff. Verdict "for the debt in the declaration mentioned." This is insufficient: the verdict ought to have found that the defendant had goods, &c. more than sufficient to satisfy the judgments, whereof he could have satisfied the plaintiff, or the value of the assets, if they were not sufficient.

This was an appeal from a judgment of the District Court of Winchester. It was an action of debt, brought by the appellee, upon a bond given by the testator. Plea, setting forth sundry judgments obtained against the defendant, and "that he hath fully administered, all the goods of the testator which had come to his hands to be administered, and that he hath not, nor had &c. any goods &c. except the value of £133: 3: 3, which are not sufficient to satisfy the said judgments" &c. Replication, "that the defendant hath, and on the day of commencing this suit had divers goods &c. more than sufficient to satisfy the said

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*Decree—Final.—A decree is not final, unless the cause itself has been thereby terminated in the court below. The principal case is cited, in support of this rule, in Cocke v. Gilpin, 1 Rob. 85; State v. Hays, 30 W. Va. 119, 3 S. E. Rep. 184; Ryan v. McLeod, 2 Gratt. 378; Templeman v. Steptoe, 1 Munf. 368; Alexander v. Coleman, 6 Munf. 340; Thorntons v. Fitzhugh, 4 Leigh 213.

In this connection, the principal case is further cited with approval in Royall v. Johnson, 1 Rand. 427; Grymes v. Pendleton, 1 Call 54; Manion v. Fahy, 11 W. Va. 493.

See *foot-notes* to Grymes v. Pendleton, 1 Call 54; Fleming v. Bolling, 8 Gratt. 292; Vanmeter v. Vanmeters, 3 Gratt. 148, and *notes* referred to therein.

†**Verdict—Certainty—Plea of Plene Administravit.**—A verdict, upon the plea of *plene administravit*, must ascertain the amount of assets in the hands of the executor, to enable the court to pronounce judgment upon the verdict.

The principal case is cited, in support of this proposition, in Fairfax v. Fairfax, 5 Cranch 21; Gardner v. Vidal, 6 Rand. 107; Gordon v. Justices of Frederick, 1 Munf. 14.

See, in accord, Eppes v. Smith, 4 Munf. 466; Rogers v. Chandler, 3 Munf. 65; Sturdivant v. Raines, 1 Leigh 481. See *foot-note* to Richards v. Tabb, 4 Call 522.

Executors and Administrators—Plea of Plene Administravit.—The principal case is cited in Gordon v. Justices, 1 Munf. 12, for the proposition that if the executor or administrator plead either a general or special *plene administravit*, he is only liable to the amount of the assets proved to be in his hands. See generally, monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

judgments in the said plea mentioned, whereof he could have satisfied the plaintiff for his debt aforesaid."

The verdict was in the following words viz: we of the jury find for the plaintiff, the debt in the declaration mentioned, and one penny damages. Judgment de bonis testatoris &c. &c. si non the costs de bonis propriis.

Wickham for the appellant. It is clear law, that upon a special or general plene administravit, it is necessary, that the jury, if they find for the plaintiff, should ascertain the amount of the assets. This verdict finds only that the truth of the issue is with the plaintiff, but it does not ascertain the value of the assets unadministered.

302 *Marshall for the appellee. I shall not controvert the doctrine stated by Mr. Wickham, with this qualification that if the jury find assets sufficient to satisfy the debt, they need not find the precise amount of the assets. The reason of the rule is obvious, and will warrant this limitation of it. Now in this case, the plaintiff having replied assets sufficient to satisfy the judgments mentioned in the plea, as well as the debt in question, and the jury having found the whole issue due for the plaintiff, they have in fact found, that the defendant had assets sufficient in his hands. It was therefore unnecessary to ascertain the exact amount of the assets. The verdict is substantially right, and the court will mould it into form.

Wickham. I do not think that the court can with the most liberal disposition to support this verdict, consider it a special finding, responsive to the issue; for if the defendant had but one penny more than sufficient to satisfy the judgments, it falsified the plea, and therefore it was incumbent upon the jury to find the issue in favor of the plaintiff. But it is agreed, that the plaintiff ought not to have a judgment for the whole debt, unless the court can be satisfied that there are assets sufficient to pay it.

The Court was of opinion that the verdict ought to be set aside "as being uncertain and insufficient in not finding on the issue, that the appellant had goods and chattels which were of the decedent at the time of his death in his hands to be administered, more than sufficient to satisfy the judgments in the appellant's plea set forth whereof he could have satisfied the appellees demand, or the value of the said goods and chattels, if not sufficient to satisfy the said demand."

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2. In the above case, the estate for life did not incorporate with the implicative branch of the devise, because the estates were of different natures; the former being a legal estate, and the latter remaining an equitable estate not executed by the statute, for the want of male issue of James coming into esse. Ib. 34, 35
3. The estate tail in James, expectant upon the determination of the estate to surviving sons, was not bared by the act of 1776, being to take effect after a greater estate than for life or lives. Ib. 35
4. A man devises, that as much of his land should be sold as would be sufficient to pay his debts. To his wife he gives a moiety of his lands remaining after his debts are paid, and the residue of his estate and the reversion of the land given to his wife, to go to his children. The executor ought not to sell the reversion; if he do, a court of equity will set it aside upon the application of the children.
Brock, &c. v. Philips, 68
5. Devise to E. C. the testator's daughters, of the interest of £4000 government funds during her life, and at her death, the interest of the said £4000 to four grand children equally, and at their decease, the principal and interest to be disposed of by them to their heirs. E. C. released to the husband of one of the grand-daughters, all her right to the interest of £1000 of the said certificates. The grand-daughter

died in the lifetime of E. C. and her husband as her administrator having filed his bill to recover the said £1000 of certificates, obtained a decree.
Goodwin v. Taylor, 74

DISCOUNT.

1. S being indebted to M afterwards obtains by assignment the bond of M, to an equal amount. He offers a discount, which M refuses, because he supposed he had an equitable objection against the payment of his bond in the possession of S. S. assigns over the bond to P. for valuable consideration and without notice. Under all the circumstances of this case, the conduct of M, was not considered as a waver of his right to discount, and he was permitted to offsett the bond of S, against his bond assigned to P.
Picket v. Morris, 255

ENTRY.

1. An entry by Lord Fairfax for a forfeiture, was only necessary where a grant had been made; the issuing of the second warrant was sufficient.
Pickett v. Dowdall, 114

EQUITY.

See Assignment No. 5.

ERROR.

1. See Appeals, &c.
2. If judgment be improperly entered against a sheriff for not taking bail, it is erroneous as to the original defendant and he may reverse it.
Ruffin v. Call, 181

ESTATE TAIL.

1. An estate tail expectant upon the determination of a greater estate than for life or lives, not bared, or affected by the operation of the act passed for docking entails in 1776.
Roy v. Garnett, 35
2. See Devise No. 1, 2, 3.

EVIDENCE.

1. In an action for freedom, a verdict finding the mother (the plaintiff) to be free or a slave, is conclusive evidence between a child of the plaintiff, and one claiming under the defendant in that suit.
Shelton v. Barbour, 64
See Pleading, No. 1.
Variance No. 3.
2. What proof as to the inability of a witness to attend, is necessary where his deposition, taken de bene esse is attempted to be read.
Collins v. Lowry, 75
3. Where a deposition is read at common law, whether taken de bene esse, or in chief, it should appear upon the record, upon an appeal, that notice of the time and place of taking it had been given to the adverse party. 75
4. The general rule is, that hear-say evidence is inadmissible; to this there are exceptions; but if it be admitted and excepted to, such a case should be stated upon the record as to show, that it came within some of the exceptions to the rule, otherwise the general rule will be against the admission.
Claiborne v. Parrish, 146
5. The testimony of a witness tending to fix a fraud upon himself ought not to be regarded. Ib.
6. An entry by an administrator, of money paid over to the guardian admitted as evidence to charge the guardian under all the circumstances of the case, the administrator being dead and his hand writing proved.
Brown v. Brown, 151
7. A letter, stating that the writer had heard of a slanderous report, is good evidence to prove the circulation of the report, and may be read for that purpose, the hand writing of the person being proved. But it would be inadmissible, to prove that the defendant had propagated the report.
Schwartz v. Thomas, 167
8. Upon the plea of 'no such record,' if the record be of the same court, a copy of it ought not to be given in evidence, but the original ought to be produced in court for inspection.
Burk's Ex. v. Tregg's Ex., 215
9. A grant admitted as evidence, tho' it wanted many of the formal parts of a deed.
Lee v. Tapscott. 276
10. The rule in England, that 'the best evidence which the nature of the case admits of, ought to be produced,' tho' generally true, is inapplicable as it respects titles to lands in this country; a copy of a patent, either from the records of the register's office, or of a county, is as good evidence of title as the original would be. 281
11. The copy of a patent, signed, 'Samuel Matthews, W. Claiborne,' dated 1658, and recorded in a county court, together with an assignment of it, (which assignment was acknowledged and admitted to record, but it does not appear that the patent was proved or acknowledged,) was admitted as evidence of title, though it did not appear, that the patent was signed by Mathews, as Governor. 276
12. A private survey may be admitted as evidence of boundary between those who were parties to it, or who claim under them; but not as to strangers. Ib
13. Illegal, improper evidence however unimportant to the cause, ought never to be confided to the jury. 281
14. The recording of a paper which is not required by law to be recorded, especially if no notice be given to third persons whose interests may be affected, can never be binding upon them, nor charge them even with implied notice. 280

EXECUTION.

1. Judgment in the county court of F, where the defendant resided: a ca. sa. cannot be served upon him in the county of H, whither he had gone at the time the execution was levied, but no proof was made of his having moved his property out of the county of F.
Brydie v. Langham, 72
2. See Forthcoming Bond No. 2, 3, 4, 5.

EXECUTORS.

1. See Slaves No. 1, 2, 3.
Verdict No. 3.
2. A man devises that as much of his land should be sold as would be sufficient to pay his debts; to his wife he gives a moiety of his lands remaining after his debts are paid, and the residue of his estate, with the reversion of the land given to his wife, to go to his children. The executors ought not to sell the reversion of the moiety devised to the wife: if they do, a court of equity will set it aside upon the application of the children.
Brock v. Philips, 68
3. An action of covenant respecting real estate, will lie against executors, tho' not specially bound.
Harrison's Ex. v. Sampson, 155
4. In debt upon judgment recovered against an executor, upon motion, the declaration suggested a devastavit of assets which accrued after the judgment rendered; the executor is not precluded from pleading a special plene administravit and from supporting it by proof.
Ruffin v. Pendleton, 184

FAIRFAX, LORD.

See Northern Neck.

FOREIGN.

1. For the laws of foreign countries, the decisions of their courts and contracts made there, see Laws.

FOREIGN MONEY.

See Money.

FORTHCOMING BOND.

1. See Replevy Bond No. 1.
2. A forthcoming bond should be made payable to the creditor and not to the sheriff; the amount of the execution ought to be recited; and the condition should be to deliver the property at the time and place of sale, and not when demanded.
Downman v. Chinn, 189
3. If the bond be defective in any of the above instances, or in others, the court may, and ought upon motion to quash it. Ib.
4. A faulty forthcoming bond whilst in force, is a satisfaction of the judgment, and a second execution cannot issue until the bond is quashed. Ib.
5. The common course is to quash the execution as well as the bond, if a motion for that purpose be made; otherwise it is not necessary. Ib.

GRANT.

1. See Northern Neck.
Land.
Settlement and Preemption.
2. A grant of land made in 1658, tho' it wanted the formal parts of a deed, the court considered as valid, after such a length of time, and being accompanied with possession.
Lee v. Tapscott, 276
3. This grant was signed 'Samuel Mathews,' W. Claiborne, and was assigned. The assignment was acknowledged and recorded in the county court. The grant was also recorded. The court considered a copy of this paper as sufficiently authentic, tho' Matthews is not stiled Governor, nor is he stated to have signed it as such; and although it does not appear that the grant was proved or admitted to record as an act of the court. Ib.

GUARDIAN.

1. By the appointment of a second guardian in the room of a former one, the power of the former, as well as his habit of, receiving and disbursing monies generally, on account of the ward, ceases; and therefore payments made by him in depreciated

paper money to the subsequent guardian, are not subject to the scale of depreciation.
Walker v. Walke, 195

HUSBAND AND WIFE.

1. The commission for taking the privy examination of the wife, must be directed to, and executed by those who are in fact justices of the peace; but they need not be so named in the commission or certificate: they will be presumed to be such unless the contrary appear.
Harvey et ux. v. Borden, 156

JEOFAILS.

1. Plea to an action of debt upon a prison bounds bond, "that he was not guilty of the premises laid to his charge." "Conditions performed." would have been the proper plea; but this is substantially the same, and is good after verdict.
Payne v. Ellzey, 143
2. See Declaration No. 3.
3. The omission to lay damages in the declaration, tho' in an action sounding altogether in damages; is cured after verdict by the statute of jeofails.
Stephens v. White, 203
4. Construction of the statute of jeofails. 209
5. That part of our statute of jeofails, which cures 'the omission of all averments, without proving which, the jury ought not to have found such a verdict,' is the adoption of a principle established in the English courts, and which is well explained in the case of Rushton v. Aspinall, Dougl. 658. 210

INDEBITATUS ASSUMPSIT.

1. See Action No. 2.

INFORMATION.

1. In an information against a justice of the peace for bribery in the election of a clerk, it ought to appear certainly, that an election was holden, and that at that election, the vote was given.
Newell v. Commonwealth, 88

INJUNCTION.

See Chancery.

INQUISITION.

1. The jury upon an inquest of office respecting property escheated or forfeited to the commonwealth, might have been composed of twelve jurors, or of a greater or smaller number, prior to the act of 1794.
Bennet v. Commonwealth, 154

JOINT AND SEVERAL.

1. If a bond be made joint without fraud or mistake, equity will not charge the executors of the surety who have become discharged at law by his death, in the lifetime of the principal. Aliter if the lending had been to both.
Harrison &c. v. Field, 136
2. See Tender and Refusal No. 3.

ISSUE.

1. Where the issue was considered to be sufficiently made up.
Walden v. Payne, 1
Turberville v. Self, 71

JUDGMENT.

See Debt No. 2, 3.
Appeal &c. No. 7.

JURISDICTION.

1. The court of one county, may relieve against a judgment at law rendered in another, by way of original jurisdiction; and though it cannot award a new trial at the bar of that other court, yet it may direct an issue to be tried at its own bar. And if the relief be afforded without the trial of an issue where that was necessary, the High Court of Chancery upon an appeal, may after reversal, retain the cause, and direct an issue to be tried at the bar of that, or of any other court.
Ambler v. Wyld, 36
2. See Chancery No. 1.
3. A bond taken upon replevying property distrained for rent, must be returned to the court to which the officer levying the distress belongs, or to the court of that county in which the land lies.
Ferguson v. Moor, 54
4. Consent of parties cannot give jurisdiction where the court has it not. But this principle, is only applicable to a case of original jurisdiction.
Bogle v. Fitzhugh, 213
5. Wherever a case is fully and fairly tried in a court of law, the decision is binding upon the parties, and can only be examined in an appellate court. The court of Chancery cannot interfere.
Picket v. Morris, 255
6. But if the court refuse to decide points of law, or to reserve them, and will submit all such points to the jury, the trial cannot be said to be a fair one, and Chancery may interfere. Ib.

JURY.

1. The number of jurors upon an inquest of office respecting escheated property, might have consisted of twelve, or more, or less, prior to the act of 1794.
Bennet v. Commonwealth, 154

LAND.

1. The act of 1779, establishes the rights of prior settlers and gives pre-emption when vacant lands can be found adjoining. But a right to pre-emption in the adjacent land, as a consequence of settlement, cannot prevail against a right claimed under survey of the adjacent land, made prior to 1779.
Burnsides v. Reid, 43
2. See Northern Neck.
3. No objection, that more land is surveyed than the quantity specified in the warrant.
Johnson v. Buffington, 116
4. In 1756, a warrant from the proprietors office issued to B, which was surveyed in 1757. In 1768, the land was surveyed for C, and in 1770; and not before, B, tendered the composition and office fees and demanded a grant, which was refused. A few months after this, a grant was made to C. A court of equity ought not to afford relief to B, after so unreasonable a delay in complicating his title.
Curry v. Burns, 121
5. Eleven years, unaccompanied with exculpatory circumstances, is an unreasonable time for the owner of a survey in compleating his title. Ib.

LAWS.

1. The laws of the country where a contract is made, (the contract not being made with a view to performance elsewhere,) must govern the fate of it.
Walder v. Arell, 282, 295
2. The municipal laws of each of the state governments of this country, are foreign to the others. 298
3. One country will not execute the penal laws of another. But if a person be discharged from a debt by a tender and refusal made in a foreign country, by force of the laws of that other country; he may defend himself in our courts by relying upon the tender and refusal, and the laws under which he was discharged. 295 &c.
4. The Pennsylvania act of Assembly of January 1777, making certain bills of credit a legal tender, embraces continental, as well as state bills, in that part of it, which makes a tender and refusal a forfeiture of the debt. Ib.
5. The above act, so far as it relates to a tender and refusal, of continental bills, producing a forfeiture of the debt, was not virtually repealed by the third section of the act of May 1778: this latter law, only related to the omission subsequent to the 29th January 1777. Ib.
6. The decisions of the courts of a foreign country, as to the constructions of their own laws though not binding upon the courts of this country, will yet be regarded and respected. Ib.
7. Where there are two affirmative statutes, if they do not conflict with each other, but may be so construed, as that both may stand, the latter will not be considered as virtually repealing the other. Ib.
8. Repeals by implication not favored. Ib.

LEASE.

1. See Replevy Bonds No. 3.
2. If the lessee assign without the privity or assent of the lessor, the lessor is not bound thereby, but may consider the original lessee as the tenant in possession, and replevy bond signed by the original lessee; will be good under the act of Assembly.
Ferguson v. Moor, 57

LIEN.

1. The vendor of land, not taking a security, nor making a conveyance, retains a lien upon the property, and equity will decree a sale for the satisfaction of the purchase money. And this lien exists (even tho' a conveyance were made) against the vendee, of a purchaser from him with notice.
Cole v. Scott, 141

MILLS.

1. Upon an appeal from an order giving leave to build a mill, the record should state that it appeared to the court, that the bed of the water course was in the applicant, or in the commonwealth.
Richards v. Hoome, 36
2. Where an application is made for leave to build a mill, it should appear; that the party whose property is sought to be condemned, had 10 days previous notice of the motion for the writ of ad quod damnum. This might be dispensed with, if it

appeared by the record, that he appeared and contested the application upon the merits. An appearance generally would not be sufficient.
Bernard v. Brewer. 76
3. The writ of ad quod damnum may be executed by thedeputy sheriff.
Wroe v. Harris. 126
4. Where the person applying for leave to build a mill, has land on one side only of the stream, it should be stated, that the bed of the river is in himself, or in the commonwealth: but this is not necessary if he own the land on both sides. Ib.
5. It is not necessary, that the inquisition should say any thing respecting the injury which the land below the dam may sustain. Ib.

MONEY.

1. See Act of Assembly, No. 1.
Depreciation, No. 2, 3.
Appeals, &c. No. 7.
Debt, No. 2, 3.
2. A sterling debt may be sued for, without having the value in current money: if laid, it is mere surplusage, and will not vitiate, but in such case, the damages also should be laid in sterling money. The verdict and judgment should be for sterling, and the court are to fix the rate of exchange.
Skipwith v. Baird, 165

MOTION.

1. The clerk, having entered up a judgment by nil dicit in the District Court, on a bond for the payment of tobacco, without noticing a memorandum endorsed on the bond, which confined the tobacco to certain inspections; this court considered the mistake as being merely clerical, and such, as might have been corrected at a subsequent term upon motion.
Gordon v. Cosby, 130
2. See Forthcoming Bonds, No. 2, 3, 4, 5.

NEW TRIAL.

1. See Chancery No. 1.
Jurisdiction No. 2.

NORTHERN NECK.

1. Lord Fairfax, had a right to establish rules of office for granting out his lands, and in case of forfeiture incurred by a noncompliance with those rules, he was at liberty to grant the lands so forfeited to others.
Picket v. Dowdall, 106
2. The issuing of a warrant to a second applicant, is a sufficient evidence of the proprietor's intention to take advantage of the forfeiture. Ib.
3. An entry of Lord Fairfax for forfeiture, was not necessary, except where a grant had been made, the issuing of a second grant was sufficient. 114
4. Those who took up lands within this district: are presumed to have had notice of the rules of office. 113
5. The act of 1785, c. 47 relates merely, to the unappropriated lands within this district; and therefore it does not authorise the granting of lands for which warrants were issued by the proprietor, although they were forfeited according to the rules of office, unless the proprietor had shewn his intention to take advantage of the forfeiture; such titles were confirmed by the act of 1786 c. 3.
Johnson v. Buffington, 116
6. The act of 1786 c. 3. does not authorise the Register to make grants in cases where grants had been previously made to others by Lord Fairfax. 111
7. In 1756, a warrant from the proprietor's office issued to B. which was surveyed in 1757. In 1768, the land was surveyed by C. and in 1770, and not before, B tendered the composition and office fees, and demanded a grant, which was refused. A few months after this, a grant was made to C.——A court of equity ought not to afford relief to B after so unreasonable a delay in compleating his title.
Curry v. Burns, 121
8. The court would not decide what ought to be considered as a reasonable time to indulge the owner of a survey in compleating his title. Each case ought to stand upon its own particular circumstances. But a delay of 11 years without exculpatory circumstances, is an unreasonable time. Ib.

NOTICE.

1. See Evidence No. 3.
Mills No. 2.
2. Where the owner of a survey has forfeited his right by not obtaining a title within the time prescribed, notice to a subsequent applicant will not affect his title, unless the original claimant had been prevented by fraud from obtaining a legal title.
Picket v. Dowdall, 54

OBLIGATION.

1. Memorandums endorsed on a bond are to be considered in like manner as if they were incorporated with the bond.
Gordon v. Frazer, 130
2. See Surety No. 1, 2.
Assignment No. 2, 3, 4.
3. The assignee of a bond tho' for valuable consideration and without notice, takes the same subject to all the equity of the obligor.
Norton v. Rose, 253

OYER.

1. Tho' you cannot have advantage of the writ to lead a variance without craving oyer of it, yet you may apply to it to amend by.
Stephens v. White, 212

PENNSYLVANIA.

1. See Laws.

PLEAS AND PLEADING.

1. In replevin, the plaintiff upon the plea of nil debet, may give in evidence an award made since the distress taken, (but respecting pre-existing accounts,) in order to show that nothing was due to the avowant.
Turberville v. Self, 71
2. See Jeofails No. 1, 3.
Oyer No. 1.
Verdict No. 3.
3. In debt upon a judgment recovered against an executor, upon motion, the declaration suggested a devastavit of assets which accrued judgment rendered. The executor is not precluded from pleading a special plene administravit, and from porting it by proof.
Ruffin v. Pendleton, 184
5. In assumpsit, the gist of the action is the promise to pay, and unless this be avered, the omission is not cured by the verdict.
Winston's Ex. v. Francisco, 187

POWER.

1. See Executor No. 4.

PRACTICE.

1. See Evidence No. 2, 3.
Appeal No 3, 4, 5, 6, 10.
2. Where there is no appearance entered for the appellant the appellee may move before the record is opened to dismiss the appeal, but not afterwards.
Collins v. Lowry, 75
3. In all cases where a general commission issues for taking despositions upon an answer and replication in any suit in the High Court of Chancery, the cause must remain at rule six months from the time of entering the replication, before it is set down for hearing, unless this be dispensed with by consent of parties entered on the record.
Dalby v. Price, 191

PRESUMPTION.

See Deed No. 5.

PROFERT.

1. Profert of a bill of exchange is not necessary.
Terrel v. Atkinson's Ex, 143

PROMISSORY NOTES.

1 If a promissory note be signed and sent to the payee, in blank for him to fill up with the amount, it is good evidence upon the plea of nil debit.
Jordon v. Nelson, 164
2. See Assignment No. 3.

PURCHASE.

1. See Executors No. 4.

RELATION.

1. A grant relates back to the warrant, which is the inception of the title, but not so as to work an injury to others by destroying intervening rights, fairly and legally acquired.
Picket v. Dowdall, 110

RENT.

1. See Replevy Bond No. 3.
3. Property distrained for rent, can only be sold by an officer.
Ferguson v. Moor, 57

REPLEVY BONDS.

1. In what case of fraud or improper conduct in the commissioners, a replevy bond taken by them may be quashed.
Hendricks v. Dundass, 50
2. A bond taken upon replevying property distrained for rent, must be returned to the court to which the officer levying the distress belongs, or to the court of that county in which the land lies.
Ferguson v. Moor, 54

3. A bond taken upon replevying property distrained for rent, is good, if signed by the original lessee, though not the tenant in actual possession, nor the owner of the property distrained, if he hath assigned to a third person, without the privy or assent of the lessor.
Ferguson v. Moor, 57

SCIRE FACIAS.

1. The second sci fa against the special bail issued on the 3d of April 1771, returnable to the October term; and was returned 'not found.' At June court, the bail moved to surrender the principal which was refused.
Afterwards in 1773, the motion was renewed by consent of parties, when the court permitted the render. The court were not precluded from making the latter decision, the motion being brought on again by consent, and they decided properly, since the writ being made returnable to an improper day, it was merely void, and consequently the first motion was made in time.
Bogle v. Fitzhugh, 113

SET-OFF.

1. Where an assigned bond was not allowed to be set-off.
Turberville v. Self, 71
2. See Discount No. 1.

SETTLEMENT AND PREEMPTION.

1. See Land No. 1.

SHERIFF.

1. Process in this country, may be executed by the deputy in all cases, unless where the high Sheriff is required to go in person. Writs of ad quod damnum may consequently be executed by the deputy.
Wroe v. Harris, 126
2. See Error No. 2.

SLAVES.

1. Slaves from their nature are chattels, and though in the hands of executors, they are exempted from the payment of debts, where there is a sufficiency of other personal estate, they are still assets.
Walden v. Payne, 7
2. Slaves are real estate only in particular cases, such as descents &c. Ib.
3. An executor is not bound by the order of a county court directing a division of the estate of a testator among his distributees, to deliver up slaves, without reserving a sufficiency to pay the debts, or without taking bonds to refund. Ib.

SPECIFICK PERFORMANCE.

1. See Agreement No. 1.

STATUTES.

1. See Laws.

STERLING.

1. See Money.

SUPERSEDEAS.

1. See Appeal.

SURETY.

1. If a joint bond be given for money loaned to the principal, a court of equity will not charge the executors of the surety if they become discharged at law by the death of the surety before the principal.
Harrison &c. v. Field &c., 136
2. If the lending be to both, it creates a moral obligation in both to pay, and though the remedy be lost at law, equity will enforce the moral obligation against both. Ib.

TENDER AND REFUSAL.

1. A tender and refusal of continental bills, in the state of Pennsylvania, in dischange of a Pennsylvania debt, in March 1780, did under the laws of that state, (the requisites of those laws being complied with) produce a forfeiture of the debt.
Warder v. Arell, 222
2. See Laws.
3. A tender, which if refused produces a forfeiture of the debt, if made to one obligee, is equal to a tender made to all.
Warder v. Arell, 297 &c.

TROVER AND CONVERSION.

1. In trover and conversion, the declaration need not state the price of the thing converted, though it is otherwise in detinue.
Pearpoint v. Henry, 192

USES AND TRUSTS.

1. As to persons in esse, the legal estate is executed immediately, and as to persons not in esse, it vests immediately, upon their coming into being if they come in good time, otherwise it goes over to the next remainder man.
Roy v. Garnett, 35
2. See Devise No. 1, 2.

VARIANCE.

1. What is, as to the name of a person.
Johnson v. Buffington, 116
2. Tho' you can not have advantage of the writ to plead a variance without craving oyer of it, yet you may apply to it to amend by, though oyer was not taken.
Stephens v. White, 212
3. Declaration upon a bond executed to A. and assigned to the plaintiff. The bond produced in evidence had an assignment endorsed to B. which had been stricken out except the signature of the obligee, above which was endorsed an assignment to the plaintiff. The erazure of the former assignment does not produce a variance between the obligation and the proof. If any foul, or improper conduct had appeared in the transaction, it might have been otherwise.
Drummond v. Crutcher, 218

VERDICT.

1. In an action for freedom, a verdict finding the mother, (the plaintiff) free, or a slave, is conclusive evidence between a child of the plaintiff, and one claiming under the defendant in that suit.
Shelton v. Barbour, 64
2. See Chancery No. 3.
Debt No. 1.
Jeofails No. 1.
Declaration No. 1.
3. The defendant pleaded a special plene administravit, and that he hath not, nor had any goods except to a certain value, which were not sufficient to satisfy the judgment mentioned in the plea. Replication, that he hath and had &c. goods &c. more than sufficient to satisfy the said judgments whereof he could have satisfied plaintiff. Verdict "for the debt in the declaration mentioned." This verdict is insufficient: it ought to have found that the defendant had goods &c. more than sufficient to satisfy the judgments, whereof he could have satisfied the plaintiff, or the value of the assets if they were not sufficient.
Booth's Ex. v. Armstrong, 301

WILL.

1. Construction of.
Harvey et ux. v. Borden, 156

WITNESS.

1. The testimony of a witness tending to fix a fraud upon himself, ought not to be regarded.
Claiborne v. Parrish, 146

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF

VIRGINIA,

FROM APRIL 10TH, 1820, TO JUNE 28TH, 1821.

BY FRANCIS W. GILMER,

COUNSELLOR AT LAW.

Law in general is human reason, in as much as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which this human reason is applied.

Montesquieu.

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"REPORTS OF CASES decided in the COURT OF APPEALS of Virginia, from April 10th, 1820, to June 28th, 1821. By Francis W. Gilmer, Counsellor at Law. Law in general is human reason, in as much as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which this human reason is applied.—*Montesquieu.*"

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ADVERTISEMENT.

Several of the cases reported were argued before the appointment of a Reporter, which will be an excuse for there being no arguments published in some that are important: that of Taylor *v.* Bruce, was of such novelty and interest, and the law not being settled by the decision, that the Reporter was at the trouble to obtain the notes of one of the Judges, that the arguments as far as practicable might be exhibited: he regrets that even with that diligence, he has not been able to detail the authorities and reasoning of the appellee's counsel, or of Mr. Call, so fully as their ability, and the great moment of the question deserved.

The Reporter is fortunately relieved from a great portion of his responsibility, by the circumstance of the Judges having selected the cases to be reported; and in every case writing their own opinions at large. He wishes the counsel could have taken the same trouble with their arguments, which have embarrassed him most. To give them at length, was the only way to do justice to their ability, but that would have made the volume a book of speeches rather than of reports. To omit them altogether, would have excluded many valuable references; he chose therefore, to insert just enough to embrace the law adduced on each case. No idea can be formed of the ability, and much less of the eloquence of the respective counsel, from their arguments as now presented.

This course has left to the reporter scarcely any other duty, than to state with conciseness and accuracy the facts and pleadings of the cases. With every disposition to retrench, the number and length of seriatim opinions has enlarged the volume beyond his expectation or control.

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CASES IN THE

COURT OF APPEALS OF VIRGINIA.

SPRING TERM, 1820.

Tomlin's Adm'r v. How's Adm'r.

April, 1820.

Pleading and Practice—Plea of Statute of Limitations.* —The plea of the statute of limitations is an issuable plea, and sometimes an honest plea. Another plea may be added to the general issue under circumstances. Presumption of payment arising from staleness of the demand will excuse delay in pleading the statute of limitations —especially in favour of an executor or administrator.

John How brought assumpsit in the year 1809 in the county court of Richmond, against John W. Tomlin, administrator of Walker Tomlin. The declaration contained a general indebitatus assumpsit for 901. 2. 2¾ the price of How's interest in the brig Juno which he sold to Walker Tomlin 24th October 1782, which Walker Tomlin assumed to pay on 1st January 1783 subject to a deduction of 10 per cent.; and also a count on an insimul computassent for the same sum, subject to a like deduction, payable on the same date.

2 *A submission to arbitration was made and at another term set aside. In March 1816 both the plaintiff and defendant being dead, the cause was revived by scire facias, in the name of the appellee administrator of How, against the appellant administrator de bonis non of Walker Tomlin.

In August 1816 the defendant pleaded the general issue and there was a trial, at which the plaintiff moved the court to instruct the jury, that the defendant having pleaded the general issue could not rely on the presumption of payment arising from lapse of time. The court was divided on the motion, the instruction was consequently not obtained, and the plaintiff excepted. The Jury found a verdict for the plaintiff for 901. 2. 2¾ with interest from 24th October 1782. The court granted a new trial.

The plaintiff excepted to the opinion of the court granting a new trial, and in his bill of exceptions spread the whole evidence on the record, consisting of 1. A transcript of the account between How and Walker Tomlin concerning the Juno, with an agreement subjoined dated October 24, 1782, by which Tomlin agreed to pay 901. 2. 2¾ &c. 2. A receipt dated 1801 executed by I. W. Tomlin for Walker Tomlin to How, for 261. 16. 4½, paid by How in part of money lent him by Walker Tomlin.

The plaintiff offered to release 10 per cent. of the verdict. But the court granted a new trial.

At the August term 1817 the defendant asked leave of the court to add the plea of the statute of limitations to the former plea. The court refused. And on the new trial, the Jury found for the plaintiff $737 37, and costs.

The Superior court of Richmond granted the defendant a supersedeas, and at the April term 1818 affirmed the Judgment. The appeal was from that Judgment.

Leigh for the appellant.

3 *Acknowledging that the plea of the statute of limitations regularly concludes with a verification, and not the country, and that it is improper to tender an issue on that plea, contended that it was nevertheless an issuable plea within the meaning of the act of assembly, requiring the defendant on setting aside an office judgment, to plead to issue immediately. (a)

It had been formerly held that this is not an issuable plea. (b) But a contrary opinion prevailed, and it was decided, that the statute of limitations is an issuable plea, or what is the same thing a plea to the merits, and withal not an unconscientious plea. (c)

In the opinion of the late President Pendleton, any plea which is designed as a just defence and not intended for delay, ought in sound discretion to be allowed as an issuable plea. (d) If therefore this plea had been offered at first on setting aside the office judgment, it should doubtless have been allowed, and such is the constant practice.

Ought the court then, in the exercise of a sound discretion to have allowed the plea at the time and under the circumstances in which it was offered?

In the case of Backhouse v. Jones' executor(e) this court held, that the plea of

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***Statute of Limitations—Delay in Tendering.**—See principal case distinguished in Martin v. Anderson, 6 Rand. 19. See further, monographic *note* on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 591.

The principal case is also cited in Pugh v. Jones, 6 Leigh 309.

Bonds—Presumption of Payment.—In Sadler v. Kennedy, 11 W. Va. 193, it was said: "When an action is brought on a bond if twenty years elapse between the time of its becoming due and of the institution of the action, the defendant may (without pleading the statute of limitations) rely upon presumption of payment, and upon issue joined on plea of payment, payment may be inferred by the jury, from circumstances coupled with the lapse of a shorter period than twenty years. Perkins' Adm'r v. Hawkins' Adm'r, 9 Gratt. 656; Wells v. Washington's Adm'r, 6 Munf. 532; *Tomlin's Adm'r v. How's Adm'r, Gilm.* 8; Hunt v. Bridgham etc., 2 Pick. 581; Jackson v. Pierce, 10 Johns. 414; Telghman v. Frieher, 9 Watts. 442." To the same effect, see the principal case cited in Booker v. Booker, 29 Gratt. 609.

See further on this subject, *foot-note* to Booker v. Booker, 29 Gratt. 605; monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

The principal case was also cited in Hunter v. Snyder, 11 W. Va. 216.

(a) 1 Rev. 508.

(b) 2 Strange, 1242; 1 Wm. Black. 35; 2 T. R. 391.

(c) See Rucker v. Hanna, 3 T. R. 124; Maddocks v. Holmes, 1 Bos. & P. 228. It is stated as a settled point. 1 Chit. Pl. 505.

(d) 1 Wash. 28.

(e) In this court spring of 1805. This case which is referred to, was one in which the appellant

the statute of limitations ought
4 *not to be allowed at any term subsequent to that at which the office judgment ought to have been set aside, unless some sufficient cause appeared to excuse the neglect of pleading it in due time. Did any such sufficient cause appear in this case? for this is the only question.

The defendant had gone to trial on the general issue, thinking that the lapse of time would furnish a legal presumption of payment, and in point of law according to the recent decision in Wills v. Washington's administrator he was right. But on this point the county court divided and gave no opinion. So the defendant was never apprized of the necessity of pleading the statute 'till the Jury found against the presumption on the first trial. Here then is his excuse for failing to plead it at first, and for offering it afterwards.

He pressed with earnestness, that this was not an unjust plea to avoid a just demand, but a just and honest defence to a claim not only stale but iniquitous. Not only the great length of time furnished presumption of payment but there was actual proof of payment, on the first trial.

The defendant too was an administrator and it was his duty to put in this plea, and the statute in one case recognises the difference between persons suing in their own right and in a representative character. For it is the duty of the court to inforce the statute of limitations to protect the estate of decedents whether the executor plead it or not. (f)

The defendant in this case was as well entitled to amend his plea, as if the plea offered had been plene administravit,
5 *and it has been adjudged error to refuse that plea, if tendered at any time before trial. (g)

But amendments to the declaration are allowable in favor of justice even after a trial and a juror withdraw, (h) and surely the rule should be reciprocal, and the defendant should have the same opportunity to amend his pleadings.

Stanard, contra. Admitted the statute of limitations to be an issuable plea and is allowable when offered at the term after office judgment is entered. But the question here is, shall it be allowed after the lapse of years of continuances, and indeed after an actual trial and verdict.

It is contended that the plea should have been allowed, because it is admissible within the sound discretion of the court, and this is a proper case for admitting it.

The first argument offered to shew this a proper case for allowing the plea is, that it is offered by an administrator. But in Backhouse v. Jones the plea was also offered by an executor, yet the court held the plea inadmissible because no good cause was shewn for allowing it. In that case the court admitted there might be cases where the plea should be received. But those cases it is presumed must depend on circumstances which originally prevented the defence, and not on the nature of the claim itself. For this court cannot now judicially know what is the nature of the plaintiff's demand. And it would be to prejudge his case, to allow a defence to be made to it, on the supposition that it is unjust.

As to the staleness of the demand furnishing a presumption of payment; allowing the full force of the argument, the defendant should at least have offered this plea when the new trial was granted, and not on the instant of the second jury's
6 being sworn. Neither party *should be permitted to change the pleadings so as to alter the evidence at the moment of trial.

Plene administravit, is unlike other pleas, for that is protected by the statute enacting, that no administrator or executor shall be chargeable beyond assets for any mispleading, &c. Besides, that plea is wholly affirmative and so requires of the plaintiff no new evidence.

He insisted strenuously, that the court below could not inquire into the nature of the plaintiff's demand as a preliminary step to deciding on the admissibility of this plea. If the court allow such evidence, either party might adduce it, and thus in every case decide the merits of the cause on the facts by the judgment of the court, when in truth they can be ascertained only by the verdict of a Jury. And if this course was allowable, it does not appear in this case that there were facts in the case to condemn the plaintiffs claim; For whatever may be on the record, it does not appear but that the plaintiff proved his claim to be both just and honest. Besides, there is a general verdict for the plaintiff, and it is going too far to presume against the truth and justice of a verdict.

Leigh replied. That he had contended the plea should have been received as an act of justice resulting from many considerations combined, and it has been said that not one of these considerations taken singly is sufficient. That, he thought was not the proper manner of treating such a question; It is a question addressed to the discretion of a court of justice; and though such discretion must ever be regulated by law, it certainly is not by any positive rules of law but rather by the general spirit of law. In such cases, the considerations deducible from convenience, from substantial justice, and from the particular circumstances of each particular case should be allowed their full and combined effect.
7 *The objection that the plea might have produced a continuance of the cause, is completely answered by the decision in Chisholm v. Anthony, and the argument is repelled by the considerations of convenience mentioned by Judge Pendleton. (i)

brought case, at July rules 1799. the office judgment was entered and a writ of inquiry awarded. When called for trial in October 1800, the defendant moved to set aside the writ of inquiry, and plead the statute of limitations, to which the plaintiff objected: the court below overruled the objection, and allowed the plea. The court of Appeals 1805 reversed the judgment. Because no sufficient reason appeared to excuse the delay in pleading the statute, and because the plea relied on 5 years before the plea as a bar, instead of 5 years before suit brought. This case is considered as being overruled by that of Tomlin's administrator v. How's administrator, it was decided by the court of Appeals April 17th 1805 before LYONS, CARRINGTON, ROANE, & TUCKER, Judges.—Edition 1821.

(f) 1 Rev. 492.

(g) Chisholm v. Anthony, 1 H. & M. 27.

(h) Jude v. Syme, 3 Call 352.

(i) 1 Wash. 28.

ROANE, Judge.* The court is of opinion, that the plea of the act of limitations is an issuable plea and such an one as ought to be received in setting aside an office judgment. It is issuable, because the plaintiff may immediately take issue upon it, although under some circumstances he may omit to do it and reply some of the exceptions of the statute.

The court is also of opinion, that it is often and, most probably, is in this case, a very honest and conscientious plea: it may often be the only means of sheltering the defendant from paying an unjust debt.

In the case before us however, the office judgment was not set aside on the terms of pleading this plea: it was set aside on the plea of non assumpsit, and the defendant in offering to add this plea stands on the common ground of applying to add another plea deemed necessary to the defence of his cause. This liberty will not be denied unless the application be unreasonably delayed, and has a tendency to delay the plaintiff in his trial: it will not even then be denied, if it be essential to the justice of the case, and a good reason be shewn for not having pleaded it sooner. That this plea is or may be essential to the justice of the case before us, so far as can be discerned from the facts shewn on the first trial taken in relation to the case made by the declaration, cannot be doubted.

The defendant had also a good reason for not offering it sooner. He had a right to suppose that the end of the plea would be attained by the legal presumption arising from the staleness of the claim. The
8 Jury however *found against that presumption on the first trial, and that without any evidence to shew an acknowledgment of the debt within twenty years. On the second trial they also found against the defendant, either without such last mentioned evidence, or in consequence of such evidence being produced.

In the first view the Jury may have misunderstood the law, on this point relative to simple contract debts, and thus have injured the defendant without any default in him. And if evidence of an acknowledgment of the debt was produced on the last trial, still it may be, that the plaintiff is not entitled to recover. The presumption may have been repelled by such evidence within the twenty years, but beyond the five years embraced by the act of limitations. In this last case nothing but the plea of the act could avail the cause of the defendant. Although a reliance on the presumption therefore would in most cases be sufficient for the defendant, and excuse him for not pleading the bar of the statute, it may not have that effect in all cases. In the case before us, that plea is or may be essential to the defendant's cause, and the court in its discretion ought to have allowed it.

As to the lapse of time which had taken place in this case, a part thereof is accounted for. by the order of reference to arbitrators, and another part by the death of the first administrator, and the probable delay in introducing the appellant as his successor.

And as to the verdict which was first found in this case, the case of Richardson v. Johnson,(k) shews, that that circumstance does not prevent the admission of a plea called for by the justice of the case.

The plea ought therefore to have been admitted by the court, especially in favor of an administrator who had been recently brought into the cause, and who may not when he first pleaded, have been sufficiently acquainted with the affairs of his intestate.

9 *Both Judgments are to be therefore reversed and the cause to be remanded in order to admit the plea aforesaid and for farther proceedings.

*BROOKE absent.

(k) 2 Call, 527.

*The principal case is cited in Olinger v. M'Chesney, 7 Leigh 687. See also, monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

Marshall v. Bussard.

April, 1820.

Wrongful Attachment—Action on Case—Declaration—Averments.*—The declaration in a special action on the case, for suing out a foreign attachment, must aver both malice and want of probable cause, either expressly or by equivalent words.

Bussard brought a special action on the case against Marshall, in the Superior court of Spottsylvania, charging that the plaintiff was entitled to 1245 bushels of barley, then laden on board a vessel lying in the river Rappahannock, within the jurisdiction of the court and of the Superior court of Chancery for the Fredericksburg district, and then being in the possession of M. Dawson, the master of the said vessel, for the purpose of being forwarded to the plaintiff at Georgetown, in the district of Columbia, and the defendant knowing the premises, falsely pretending that the said plaintiff, together with a certain Renner, was indebted to him in a large sum of money, for which he had no remedy but by subjecting the said barley to an attachment from the Superior court of Chancery of Fredericksburg, did, on, &c. sue forth from the office of the said court of chancery a subpœna to attach the goods and effects of the plaintiff and of the said Renner in the hands of the said Dawson, master of the said vessel, which subpœna was served on Dawson, and he thereby compelled to keep and withhold the barley from the plaintiff for a long time, during which it was spoiled and became of no value, and was wholly lost to the plaintiff; and afterwards, to wit,
10 *&c. said suit was dismissed by the defendant as appears by the record &c. "wherefore the said plaintiff says, that by reason of the said unjust and improper suing forth the said attachment without good cause therefor and the consequent attachment and detention of the said barley, in the hands of the said Dawson, he has been greatly injured and hath sustained damage" &c.

The defendant pleaded "not guilty" and also pleaded specially.

That on the 19th October 1814, and long before, the plaintiff and a certain Daniel Renner, trading under the firm of Raynard and Bussard, were indebted to the defend-

ant in the sum of $793 04, which debt was contracted in Georgetown, in the district of Columbia: and that the plaintiff and Renner on the 19th October 1814, and before and ever since resided without the commonwealth of Virginia, to wit, in Georgetown, in the district of Columbia, and being so out of the commonwealth and the said Dawson having in his possession the said barley belonging to the plaintiff, the defendant sued out his subpœna to summon the said plaintiff and Renner and Anthony Buck and M. Dawson to appear &c. and the said subpœna was endorsed by the defendant's counsel with the words "to attach the effects of the defendants Renner and Bussard, in the hands of the other defendants Buck and Dawson, so that they do not dispose of them until the further order of court," which subpœna was served on the said Dawson, of which the plaintiff had notice, and the defendant avers the said bill to have been filed for the purpose of recovering the $793 04 aforesaid, and of attaching the effects of Renner and Bussard in the hands of Buck and Dawson, for the payment of the said demand. And the defendant, on the 19th January 1815, by the judgment of the circuit court of the district of Columbia, held in the city of Washington, to wit, at the county of Spottsylvania, recovered against the plaintiff and
11 Renner the sum of $1600 and *$17 57 costs, to be discharged by the payment of $793 04 with interest &c. which said judgment was for the same debt aforesaid, and the plaintiff afterwards, to wit, on &c. dismissed his said bill in chancery, absque hoc, the deft. sued out no other bill in chancery &c.

To this plea, there was a general demurrer, on which demurrer a joinder. The court gave judgment for the demurrant, and a jury was sworn to try the general issue, which was found for the plaintiff and $1148 09 damages.

At the trial, Marshall's counsel filed a bill of exceptions, setting forth at large the record of the proceedings on the attachment in Chancery, the indorsement on the subpœna signed by Marshall's counsel in Chancery, in the words before mentioned.

The bill states, that Dawson and Buck the garnishees "have on their hands a parcel of barley belonging to Renner and Bussard (or if the partnership be dissolved to Bussard one of the firm" and prays it may be attached &c. upon which, Marshall's counsel moved the court to instruct the Jury, that Dawson the garnishee was not bound by the indorsement on the subpœna to retain the property in his hand if it belonged to Bussard solely. This instruction the court refused to give, Marshall excepted and appealed.

Leigh for the appellant.

The declaration is fatally defective in not stating, that the attachment was sued out, "maliciously and without probable cause," or by equivalent words. At first he had thought those words, by the English practice, necessary only in actions for malicious prosecution; but farther consideration convinced him, that even in the English courts, hey were equally indispensable in actions f this kind.

But however it may be in England, the point is already settled in Virginia; (in the case of Young v. Gregory(a)
12 *the court held, that justifiable was not equivalent to probable cause; and in Kirtley v. Deck (b) it was decided, that the words false and malicious were insufficient, but there must also be added, without probable cause. In the present case therefore, the words "without good cause," are surely no better, than without justifiable cause; indeed, they are not so strong; and a declaration charging the suit to be without justifiable cause, has already been decided to be vicious. But in Kirtly v. Deck the court was of opinion, that both malice and the want of probable cause must concur, and here there is no allegation of malice.

Again, the special plea of the defendant sets forth, that the defendant had a large claim on Renner and Bussard, partners, &c. and finding property in Virginia belonging to that firm, the defendant had sued out his attachment, the indorsement on which, was the act of Marshall's counsel. Now the demurrer to this plea admits the truth of the plea, and so there is a good cause for suing out the attachment admitted upon record.(c)

The fact of the indorsement being the act of the counsel, excludes the idea of there being malice in Marshall.

And the indorsement on the subpœna, did not require the garnishee to retain any property, which was not the joint property of Bussard and Renner; and therefore, Marshall was not liable to Bussard, for any damage resulting to him, from the seizure and detention of property belonging to Bussard solely.

Stanard contra.

Denied that special actions on circumstances like these, were governed by the same principles, which control
13 *suits for malicious prosecution; and therefore, the authorities applicable to such cases, could not govern this.

In this case the declaration and plea must be taken together, and it is a rule of pleading, that when the matter of the plea is incorporated into the declaration, and a good cause of action is made out between them, the plaintiff's action may be sustained.

The English cases are generally brought for the want of probable cause, and not as this is, because there is already another action pending; but where a party is twice arrested for the same matter, it is in itself good cause of action, whether there be probable cause or not, for either of the actions separately.(d)

But the declaration in this case is sufficient of itself. The English cases shew malice and want of probable cause are not the only words which will give cause of action; but that any equivalent words will support the declaration. Here, the plaintiff says the defendant "falsely pretended he had claim" &c. and that suing out the attachment was "unjust, improper and with-

(a) 3 Call 446.
(b) 2 Mun. 10.
(c) 2 Wils. 302; 2 Esp. N. P. 526.
(d) 8 Went. Pl. 310.

out good cause," circumstances from which malice will be implied.

As to the fact of the indorsement being signed by counsel, it is necessarily the act of the party—whether done by the counsel or the clerk, as it is the act of the party to demand bail, tho' the indorsement be by the clerk.

Leigh replied.

Georgetown is as foreign to Virginia, so far as this question is affected, as London or Calcutta, and there can be no question, but that the pendency of a suit in a foreign country will not deprive a creditor of his opportunity of attaching the property of his debtor wherever he may find it. One may well sue even in the same country, both in Chancery and in a court of common
14 law. The *court of Chancery can only compel the plaintiff to elect one of the two tribunals.

The reference to 8 Went. 310, is to a case where the debt was paid before the latitat was sued out, and there was neither good, nor probable cause for the action.—The authority then by no means proves, that bringing two suits for the same cause, is of itself actionable.

ROANE, Judge. (*)

The cases of Young v. Gregory(e) and Kirtley v. Deck (f) are decisive to shew, that the declaration in this action ought to aver, both malice, and the want of probable cause, either expressly or by equipollent expressions. There are no such expressions in the declaration before us; it is therefore, radically defective.

It is alledged by the appellee's counsel, that the plea being demurred to is admitted, and aids the declaration so far as to make the gravamen of the action consist in the appellee's being doubly vexed for the same cause.—Without stopping to inquire whether the plea has this effect or not, that plea does not shew, that at the time of the institution of this action, the suit in the county of Washington in the district of Columbia, had been commenced. It only avers, that the plaintiff got a Judgment in that court, for the same debt on the 19th January 1815, in an action, which may have been commenced after the institution of this suit. This objection is also decisive against the declaration, considered in this last point of view.

We are of opinion to reverse the Judgment, and enter it for the appellee, on account of the insufficiency of the declaration.

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15 *Williamson v. Farley.

April, 1820.

Sale of Slaves—Retention of Possession by Vendor—Fraud Per Se.†—A vendor's retaining possession of slaves, for which an absolute bill of sale is given, is per se fraudulent.

Williamson brought detinue against Farley, for the recovery of certain slaves. At the trial, he offered in evidence, a deed of trust executed by Jacobus Christopher, conveying the slaves in controversy to Williamson, in trust to secure a debt due one Tarwater. The deed was dated 13th January, 1817.

The defendant Farley to prove his title, offered an absolute bill of sale from Christopher to him, dated 6th January 1817; the consideration of which was the sum of $1000. The subscribing witnesses to this deed proved, that at the time of executing it, the slaves were brought into the presence of the parties, and Christopher told Farley, the slaves were his, and he might do as he pleased with them. They proved also, that at the same time and place, Farley hired the said slaves to Christopher for one year, for their food and clothing, and took a bond for their restoration at the end of the year: that the slaves remained in Christopher's possession from the date of the bill of sale, 'till about the 1st February following, when Farley took possession of them. They farther proved, that Farley had paid Christopher for the said slaves between $775 and 800, and that he was the acting partner of a mercantile firm, to which Christopher was indebted, in the sum of $400.

Upon these facts set forth in a bill of exceptions, the plaintiff moved the court to instruct the Jury, that if they believed the testimony, the sale was fraudulent and void as to the plaintiff, because the possession remaining with
16 *the vendor, was a fraud in itself. The court refusing the instruction, Williamson appealed.

ROANE, Judge.* The court is of opinion, that the judgment of the Superior court is erroneous in this, that the instruction asked for by the appellant, was not given. Therefore it is reversed with costs, and a new trial is awarded, in which the instruction aforesaid if required is to be given.

Note. See Robertson v. Ewell, 3 Munf. 1. and Thomas v. Soper, 5 Mem. 28, in corroboration.—Edition 1821.

Bourke v. Granberry.

April, 1820.

Foreign Court of Admiralty—Sentence of Condemnation—Conclusiveness.†—The sentence of condemnation of a foreign court of admiralty, is not conclusive of the facts, that the property and owner were enemies, in a suit between the underwriter and the insured on a policy.

Insurance—Purchase under Sentence of Confiscation—Effect.—A purchase by the insured under a sentence of confiscation, does not take away the right of indemnification for the whole loss.

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*BROOKE absent.

(e) 3 Call 446.

(f) 2 Mun. 10.

†**Sale of Personalty—Retention of Possession by Vendor—Fraud Per Se.**—On this subject, see *foot-note* to Davis v. Turner, 4 Gratt. 442, where the Virginia and West Virginia authorities in point are collected. The principal case was cited on the subject in Land v. Jeffries, 5 Rand. 252, 606, 607, 608; Claytor v. Anthony, 6 Rand. 304; Shirley v. Long, 6 Rand. 755; Sydnor v. Gee, Leigh 547; Lewis v. Adams, 6 Leigh 337, 338; Davis v. Turner, 4 Gratt. 449, 452, 459, 461; Bindley v. Martin, 28 W. Va. 793; Howard v. Prince, 12 Fed. Cas. 651.

*BROOKE absent.

†**Judgments—Conclusiveness—"Golden Rule."**—The general rule is that verdicts and judgments bind conclusively parties and privies; because privies in blood, in estate, and in law, claim under the person against whom the judgment is rendered; and, they claiming his rights, are, of course, bound as he is. But, as to all others, they are not conclusively binding; because it is unjust to bind a party by any proceedings in which he had no opportunity of making a defense, of offering evidence, of cross-examining witnesses, or of appealing, if he was dissatisfied with the judgment; and this is called by the court in *Bourke v. Granberry*, "a golden rule." Munford v. Overseers of the Poor, 3 Rand. 318; Crawford v. Turk, 24 Gratt. 183.

See further, monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

Bourke brought an action of debt against Gransberry, President of the marine insurance company of Norfolk, in the Hustings court of Norfolk, on a policy of insurance. The policy warranted a vessel called the Two Brothers, to be American property, and the underwriters insured from the usual risks of pirates, men of war, enemies, taking at sea, &c. in a voyage from Hispaniola or Jamaica, to Norfolk. The vessel in returning from St. Domingo to Norfolk, was seized as enemies' property, carried into Jamaica, and condemned as prize, by the vice admiralty court of
17 Great Britain. It was sold for *the benefit of the captors, at which sale, Canby the master of the vessel, bought it for Bourke the former owner. At the trial of the cause, the plaintiff offered evidence, to prove the Two Brothers to be an American vessel, and that he was an American citizen. The defendant moved the court to exclude such evidence; because the decree of the vice admiral in Jamaica, was conclusive of the fact, that the vessel was not American or neutral property. The court however admitted the evidence, and the defendant excepted. The defendant also moved the court, to instruct the Jury, that the master of the vessel having purchased it under the decree of confiscation, for the benefit of Bourke the former owner, the plaintiff could not in law recover against the insurers, as for a total loss, but only for a partial loss; the measure of which, was the injury actually sustained. The court refused to give this instruction. The Jury found for the plaintiff, who accordingly had Judgment. The defendant appealed to the district court then held in Suffolk. The counsel agreed upon record, to release all errors except &c., and to submit to the judgment of the court only two questions, viz. whether the sentence of the vice admiral of Jamaica was conclusive to negative the warranty contained in the policy, that the vessel was American. Second, whether under the circumstances, the loss was a total or a partial one. The district court of Suffolk reversed the judgment of the Hustings court of Norfolk, because the sentence in the vice admiralty court of Jamaica was conclusive evidence, that the vessel and cargo at the time of seisure, were the property of the enemies of the king of Great Britain; and consequently, evidence contradicting those facts, was improperly admitted, and a new trial was awarded. The plaintiff appealed to this court.

Writ for the appellant. The plaintiff to sustain his action was bound to prove.
18 1. The contract. 2. The *payment of the premium. 3. The interest of the insured. 4. Performance of the warranties; that is, that the vessel was American property &c. 5. Loss at sea. (a) The 1st, 2d, and 3d, of these points were admitted on the trial. The 4th was also admitted, except as to the vessel's being American property, and the 5th only denied in part, because the vessel was purchased in, for the owner.

At the trial, the plaintiff offered to prove the vessel was American built, and that the owner was an American citizen; and this evidence is to be excluded, because the sentence of the vice admiralty of Jamaica is conclusive against both the facts. As to the last point, the plaintiff contended upon authority, that the capture and offer to abandon, made it a total loss.

There is not doubt at this day, that the sentence of a foreign court of admiralty so far as it operates in rem, that is, so far as the title of a purchaser under the decree is cncerned, is final and conclusive as to facts. But whether it be final as to the contract of insurance is in Virginia a fresh question. The case of Hoe v. Harrison,(b) has decided nothing on this point. The courts of several States have differed on this question. In New-York it has been held to be prima facie evidence only of the facts. Massachusetts, though formerly of opinion that the decree was conclusive, has modified its doctrine,(c) and even in England, the correctness of former decisions seems now to be questioned.

The leading case in England, is Hughes v. Cornelius,(d) but the only question throughout was, whether a sale under the sentence of the French court of admiralty confiscating the ship as prize of war to a Dutchman, would pass the property,
19 so as to bar an action of *trover against the purchaser; and it was held it would. For all nations will from respect to the comity of nations, pay that regard to the sentence of foreign courts of admiralty. But the comity of nations is not at all connected with controversies between underwriters and the insured, when both are of the same country. And if considerations of comity were in general to be respected, the present would be an exception to its liberal operation. For the good faith of nations which gave birth to the rule has been violated, by the British courts of vice admiralty. Their own writers admit, that they have themselves violated the law of nations, of which this principle of comity forms a part. The late armed neutrality proceeded from the violation of neutral rights.(e) Their courts have promulgated to the world, that they will condemn as prize, vessels and property, within the interdiction of their orders in council, whatever the law of nations may be. But if the law of nations be a universal law, the decisions of British courts are not to be respected in deciding on this law, more than those of other countries. And France has decided the question differently.(f) There it is held, that the sentence is not conclusive in favour of the underwriters. The English Judges have not themselves agreed upon the question.(g)

The capture makes the loss total, and the offer to abandon completed the title.(h) The case in 4 Cranch 434, was by an imperfect and divided court.(i)

(a) 2 Marsh. on Ins. 608.

(b) 1 Wash. 19.
(c) 8 Mass. Rep. 536.
(d) 2 Show. 232; Carth. 32; Skin. 59; Sr. Th. Raym. 473.
(e) Marsh. Ins. 310. B. 1 c. 8, § 5.
(f) 1 Emerigon. 458.
(g) 1 Marsh. 290; Westcot on Ins. 223-4; 1 Campb. 429; Phil. Ev. 249. See also JUDGE COOPER'S learned opinion.
(h) Marsh on Ins. 429, 431, 488, 90-1, 500.
(i) See also 4 Cranch, 185.

Wickham, contra. This is a common law question. The common law of England is the law which must govern, and that was long ago settled. The corruptions 20 *of vice admiralty courts is either a question of law or of fact. If of fact, I have only to say it no where appears of record in this case. When did these corruptions begin? By what criterion shall we decide the precise time at which such Judgments ceased to be final because of this corruption?

This is said to be a rule of comity—but it is of no consequence what is the reason of the rule—it is enough for me that there be such a rule. A sentence of condemnation concludes all the world where the facts on which the decree is founded are brought in question. The English cases go that length.(k) Judge Washington, in 4 Cranch 439, has collated the cases fully. The several States in which the question has arisen have concurred in the same opinion. This court cannot look at the evidence given before the foreign court. The libel and the decree only can be looked into.(l)

But the plaintiff cannot recover for a full loss, but only pro rata. He sues for his loss. What has he lost? He has not lost his vessel, for he now has it—he has lost then only what he had to pay for it.

ROANE, Judge. This was an action brought by the appellant against the appellee, in the Hustings court of the borough of Norfolk. It was founded upon a policy of insurance. That policy was upon a vessel called the Two Brothers, bound from Norfolk to a port in the West Indies, and warranted to be "American property." The vessel was captured and carried into the Island of Jamaica, libelled in the court of admiralty, there, and condemned as "enemy's property."

At the trial, the plaintiff offered testimony to prove, that the vessel was, in fact, American property; which testimony was objected to, on the ground that the decree of the court of admiralty was conclu- 21 sive evidence *in this case, of the fact of her being enemy's property, but the court overruled the objection, and permitted the evidence to go to the Jury; whereupon the defendant excepted. The counsel for the defendant also moved the court to instruct the Jury, that the vessel having been sold under the decree aforesaid, and the captain having purchased her for the benefit of the plaintiff, to whom she was delivered by him, he was not entitled to recover as for a total loss, but only in proportion to the sum expended; but the court refused so to instruct the Jury, whereupon the defendant also excepted. A verdict was found for the plaintiff, and the defendant appealed to the former district court of Suffolk, where the judgment was reversed, and a new triai directed; that court being of opinion, that the sentence of the admiralty court was conclusive evidence to prove, that the vessel belonged to the enemies of Great Britain. The parties agreed, in the last mentioned court, to release all other errors than those relied on in the bills of exceptions; and the plaintiff appealed from the judgment of reversal, aforesaid, to this court.

With respect to the point made by the second bill of exceptions, we are of opinion that when the vessel was captured, the case was consummated, by the offer to abandon, so as to entitle the party to go for a total loss; and that the case was not altered by the circumstance, that the vessel was, afterwards, bought in by a friend, or agent, of the assured.

The point made in the first bill of exceptions, requires more consideration, and is deemed by the court, to be extremely important.

It is a principle of general jurisprudence, formerly held sacred, even by Great Britain herself, that questions of prize between subjects or citizens of different nations, are to be governed, entirely, by the law of nations, in exclusion of the local or mu- 22 nicipal laws of any country.(m) *It is another principle, that the courts of admiralty, of each country, acted within their respective spheres, for the great family of nations, in carrying into effect this just and general law. In this state of things each court was entitled to the confidence of the others, and no laws were acted upon or administered by any, but such as were submitted to, and acknowledged, by all.

In this state of things, also, comity, reciprocity, and general convenience, sanctioned it as a general principle, that the decrees of each court should be respected by the others. That principle, however, as originally declared, and as, even now, understood, by some of the nations of Europe, only extended to the decree itself, and not to all the facts and questions, wheresoever arising, on which that decree may have been founded. The decree proceeded entirely in rem; and it was founded in general convenience, that the title of the purchaser, under it, should not be questioned. A contrary doctrine would tend to diminish the actual price for which the property might be sold, and thus, in the event of a restitution, or otherwise, throw an actual loss upon the owner of the property himself.

It is believed that no nation has refused to accede to this doctrine, to the extent which is now stated, on account of the convenience and utility aforesaid. How far the principle as thus limited and understood, may be shaken by a system of profligacy in the courts of any country, discarding every rule but that of their own will, or that of their particular sovereign, and violating the clearest principles of justice, may deserve consideration in future. In the case now before us, that enquiry need not be made.

This convenience, however, is not involved in a collateral controversy, which exhibits the same question, between two individuals in another country, touch- 23 *ing the construction of their contract, nor is this comity at all involved, in such a case. It is sufficient for the most punctilious sovereign, that its decrees have had their effect, and that titles derived under them, are not attempted to be

(k) 2 Ld. Raym. 724; Marsh. on Ins. 344.
(l) 6 Cranch, 206.

(m) 3 Black. Com. p. 69.

disturbed. Another nation may, even upon the same contract, draw a different conclusion, by means of its courts, between two of its own citizens, without offending the dignity of the power which renders the decree.

This is, most emphatically, the case, when the admiralty court rendering the decree, has discarded the law of nations from its code, and only goes by the ex parte laws, or orders, of its particular sovereign. The case is, further, extremely aggravated, when these laws or orders have no other object, than the aggrandizement of the power which promulgates them; and when its courts lend their aid, to further the object aforesaid. In that case, they cease to be judicial tribunals; or, at least, they cease to administer the law of nations. In that case, the court becomes, in fact, a belligerent instrument, and its judgments act only upon the local laws or orders of its sovereign; and all the cases concur in shewing, that a judgment rendered in another country, in a civil action, is not absolutely conclusive in this.

Such is the character of the British vice admiralty courts, and of their decisions, in modern times. These facts are not particularly found, in this record, but they are known to the court, judicially, as a matter of general history. They have been often admitted by the courts, as well as other departments, of our country; and are not denied by even the British jurists, themselves. We are to proceed then upon the assumption of these facts. We are to suppose that the condemnation in question, may have been founded upon the arbitrary orders of the English king in council, and upon the ideas of the right of blockade, which are acted upon by that nation. We are to suppose that the ground of the decree may
24 have *been manifestly unjust and illegal. If, in the case of Mayne v. Walter, (n) it was held, even in England, that where the ground of decision appeared to be, a foreign ordinance, manifestly unjust, and contrary to the laws of nations, the insurer should not be discharged, we ought, in this case, to retort her doctrine upon her. We can admit no difference between a fact brought into a case, by a particular finding, and one which is, indubitably, known to the court, as a matter of general history.

This view of the subject precludes the necessity of deciding, how far, under the former state of things, the decree would have been conclusive, in the case before us. It could not have been so conclusive, without violating the great principle, often sanctioned by this court, that no man is to be bound by a decree or judgment, as to which he had not the liberty to cross-examine. The insured, are only parties to the decree of the court of admiralty, as it were, by a fiction, and for the single purpose of effectuating, and protecting, the sale of the property. That fiction need not be extended both beyond the truth of the case, and beyond those purposes of utility, which it was intended to answer. We ought not to adopt, lightly and implicitly, the late decisions of the British courts, upon this subject, which seem to have grown up with the new state of things, before adverted to. We ought to recollect that Britain is an insuring, while we are an insured nation. We ought not to adopt the British decisions of the present day; but rather to mount up to the days of Hughes v. Cornelius. At that time the validity of the sale under the decree, was, only, in question; and all the general expressions in the judgment of the court, should be understood as restricted by it.

If the question now before the court, be a question of the common law, it ought to adapt itself to the varying circumstances of things, by which it is affected. A change as to it, may well have been
25 produced, by the *nefarious conduct of some nations, in modern times. If it be a question of common law, we ought rather to refer to that code, as it was understood, upon this subject, at the epoch of our separation from Britain. We ought rather to adopt that construction which conforms to the golden principle, that no man ought to be bound by a decision to which he was not, substantially, a party. We ought rather to go by the principle which prevails, in relation to the municipal judgments of foreign courts. We ought to consider this decree, as, in fact, such a judgment. It is founded, only, on the ex parte and particular regulations of the British nation.

If, on the contrary, this be a question under the law of nations, the British courts are not the exclusive arbiters of it. On a question of national law, we refer to other, and more impartial, authorities. We consult the learned on that subject, and resort to the concurring testimony of general jurists. We act upon the unerring maxim, "potius est petere fontes." It is not new for this court to differ from the courts of England, on questions of general law. It was done in the case of Reed and Reed, in favour of the great natural right of expatriation. In that case we scouted the slavish doctrines to be found in the case of Calvin. If, therefore, Britain has decided this question one way, France and other nations have decided it in another; and we are to chuse between them. In making this decision, we are to go by great principles, and not by the conflicting and unsatisfactory decisions of British Judges.

It is a clear principle, peculiarly fitting the present times, that the unjust decisions of foreign courts, is one of the risks insured against: but this right would be cut up by the roots, if we are not permitted, (in this case between the parties to the policy,) to shew the decision to be unjust. That right is without a remedy, unless the decision is open to investigation, in this particular.

26 *Nor ought it to be forgotten, that, by holding the sentence to be conclusive, which sentence was not founded upon a jury-trial, we deprive our citizens of a resort to that tribunal, which is consecrated by our bill of rights. We also deprive them of the inestimable privilege of resorting to viva voce testimony.

These are the general grounds, on which our opinion in this case is founded. They

(n) 4 Bac. Ab't. 670; Parke on Ins. p. 363.

might be stated more at large; but it is deemed to be unnecessary. We have not quoted many decisions, on his subject; but few of the cases have escaped us. The modern decisions in England are, for the reasons aforesaid, discarded from our view. As for those in our own country, they are both ways; and some of them have regarded the English cases, more than great principles. We are to judge for ourselves, in this chaos of judgments, and we submit the result of our best deliberation. That result, while it does not infringe upon utility, comity, or convenience, in the smallest degree, is essential to justice between the parties. We only contend that a party shall have an opportunity to prove the truth of those facts, on which his claim to compensation is founded: and that he may have the benefit of his witnesses, here, whom he could neither summon, nor carry, into a foreign country.

This view of the case precludes the necessity of considering, how far the insertion of the words "or otherwise," in this decree, would, in the event of a different decision, have deprived the same of its conclusive effect.

Our opinion, consequently, is, that the court of Hustings did not err, on either of the points stated in the bills of exceptions; and that the judgment of the district court reversing its judgment, is erroneous. That judgment, is, of course, to be reversed, and that of the court of Hustings affirmed.

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Note. The Judges were unanimous in this opinion; except that Judge Brooke requested the presiding judge to say, that he dissented from so much thereof, as decided, that the decree in question was not conclusive.—Edition 1821.

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27 *Knight v. Yarbrough.

June, 1820.

Power of Appointment—Imperfect Execution—Effect.—W. devised property to his wife with power to sell, &c., or to dispose of among children and grandchildren as she pleased: the wife gave part to a son-in-law, and made no provision for some of the children, and some of the grand-children: this is an imperfect execution of the power, and void.

Appointment—Rights of Appointee in Residue.*—Where an object of the bounty has received any thing by appointment, he can claim a share of the residue, only on bringing what he received into the collatio bonorum.

Same—Improper Execution—Chancery Practice.†—Where the appointment is improperly executed, and a court of equity is called on to correct it equality is the rule.

George Walton made his will, containing among other provisions a clause, bequeathing to his wife Martha, about four thousand acres of land in Kentucky, one half of a mill on Meherrin River, with about six hundred acres of land adjoining it, with all the negroes, debts, stock, &c., not previously devised, "to live upon, pay my debts, and dispose of among my children and grand-children, as she pleases, and should she find it necessary to sell, all or either of the lands, to convey and make titles thereto, to any person or persons whatsoever, which title so made shall be valid to all intents," &c. this will was recorded in July 1797.

Martha Walton afterwards made her will, which was recorded in October 1814, by which she gave to Thomas Walton, (her son) certain slaves, &c., and to his children by name, certain other slaves. To her grand-daughter Fanny Moore, a pecuniary legacy. The other children of her daughter Moore she added, were intentionally pretermitted. To her son-in-law Joseph Yarbrough, she gave the half of the mill and its appurtenances on Meherrin River. The residue of her estate, she desired 28 *might be divided into five equal parts, of which, one was given to her son Thomas Walton; one to the children of her daughter Temperance Yarbrough; one to the children of her daughter Susanna Morton—Hughes Morton being excepted; one to Robert and Thomas Walton sons of her son Robert; and the remaining fifth to her daughter Sally Bitts. Her daughter Martha Knight, and her son John B. Walton, and all her grand-children not expressly provided for, she added were intentionally omitted.

Woodson Knight and Martha his wife, who was a daughter of George and Martha Walton, together with several of the children of Knight and his wife, brought their bill in Chancery, complaining, that the power of appointment conferred on Martha Walton by the will of George, was improperly executed; and praying, that the execution might be decreed to be void. The devisees of Martha Walton were made defendants to the bill.

The Chancellor decreed, that the widow of G. Walton by his will, had power to dispose of the property in dispute among the children and grand-children as she pleased, and that she had well executed the power, except in devising half the mill, &c., to Joseph Yarbrough who was neither a child nor grand-child of the testator, but a son-in-law. He also decreed, that this moiety on the death of Martha Walton vested in the heirs of George Walton; and ordered an account of the profits, &c. of the mill by a commissioner; who was directed, to report the value of the mill, the number of heirs of G. Walton, &c.

In vacation, one of the plaintiffs petitioned the Chancellor for an appeal from this decree tho' interlocutory, because the decree was erroneous, affected the rights of the parties, and an appeal in that stage of the cause might save the expense of the reference. The Chancellor refused the ap-

*Appointment—Rights of Appointee in Residue.—See principal case cited with approval in Davis v. Rowe, 6 Rand. 396.

†Wills—Construction—Power of Appointment.—In Mitchells v. Johnsons, 6 Leigh 461, 472, a testator bequeathed to his wife slaves, etc., for life with a power at her death to dispose of them among the lineal descendants of the testator as she might think proper. The widow renounced the will and took her dower of the testator's real, and her distributive share of his personal, estate. CARR, J., citing the principal case, said that the power of appointment vested in her made a trustee for the lineal descendants of the testator and no act of hers or refusal to act could disappoint that trust: that, notwithstanding her renunciation of the will, he considered that she might have exercised the power of appointment: and, having neglected to do so, equity would interpose and execute the trust: and in doing so, it would take the statute of distribution for its guide, where it was necessary.

For other cases interpreting wills and basing their decisions partially upon the principal case, see *foot-note* to Harrisons v. Harrison, 2 Gratt. 1: Milhollen v. Rice, 13 W. Va. 568. See the principal case also cited in Thrasher v. Ballard, 35 W. Va. 526, 14 S. E. Rep. 232.

peal. In which he was overruled by a Judge of this Court, and now the cause was argued on the merits by Leigh for the appellant:

29 *Who said, it was the manifest intention of the testator, that each child and grand-child should have a share.—And under the clause itself, she could not pretermit any object of the testator's bounty, or make the appointment illusory by giving a trifle. Equality is equity in such cases.

This case is to be argued upon authority: and on English authority, for there is no case in point, which has occurred in Virginia; Fleming and Swan certainly is not.

In Equity, powers to appoint are trusts, (a) and where a power is given to dispose of the subject at discretion, in whatever words, the appointment is improperly executed, if a mere trifle be given to any object of the bounty, and more so, if any object be entirely pretermitted.(b) The only case in which a variance from this doctrine appears, is that of Burrell v. Burrell.(c) But there the devise was, that the wife should make such disposition among the children, as she should think proper, or they best deserve. A guinea only was given to one, and the power was held by Lord Camden, to be well executed; because the wife had a discretion as to the objects, as well as the fund, by the words; and might have omitted the son altogether.

There are many decisions as to what in equality will avoid an appointment; 200l. out of 18,000l. and 100l. out of 24,000l. have been held not to be illusory.(d) But in those cases, something was given to all, which was not done in the case before us; and then, the appointment is

30 *clearly void.(e) The case of Alexander v. Alexander(f) seems opposed to all the cases on this point: for there must be a power given by the will to select some, in exclusion of others, to justify the omission of any one.

This power is not well executed even at law, for there are no special reasons existing, to justify the exclusion of any of the objects. No misbehaviour is imputed to any of them.(g)

Another provision to be sure, will authorise a pretermission. But this must be a provision by the person charged with the appointment.(h)

And the death of the cestui que trust will justify an omission.(i)

The case of Morris v. Owen(k) does not affect this. There a power was given, to appoint among children, and the court held it error, to give a portion to a grand-child; and giving a slave to one of the children during the life of the person charged with the appointment, was held a good execution. In this case, I admit the appointments as to slaves given during Martha Walton's life, to be well executed: but not so of those made by her will. If the will be no execution of the power, the estate must be distributed according to the statute; if it be a defective execution of the power, this court will supply the defect, and execute it equally.(l) And the slaves given in Martha Walton's life must be included, in ascertaining what is equality.

Wickham contra. Beside Morris and Owen, Coles v. Brown is a decision of this court, on the doctrine of appoint-

31 ments, *in which, an appointment was supported in a stronger case for the other side than this.

This is equally a trust, whether the wife have power to select or not. An appointment of a penny to one is good at law, where all are to receive something. But a court of equity it is said will not allow such inequality. Yet it will allow inequality, and that very gross. One ninetieth part of the subject devised, has been supported even in equity.(m) All the judges regret, that such doctrine has prevailed, yet it is admitted. In Spencer v. Spencer,(n) the court expressed the difficulty it felt, on the subject of illusory appointments. The rule deducible from the English authorities, applies only to cases, in which all the objects of the bounty are in equal degree related to the testator, and is inapplicable to a case like this, of children and grand-children.

The word among, does not necessarily mean all, but may be answered by dividing the subject between any number of the persons entitled; and at pleasure, and in her discretion, are different things; one confers an arbitrary, the other a limited power: another point in which this case is distinguishable from the English.

By the Court.* The Court is of opinion, that by the true construction of the will of George Walton, as to the estate which is the subject of controversy, the testator intended, to create a trust in his wife, for the benefit of his children and grand-children; and to empower her, to appoint the same among them, in such proportions as she might think proper; so that each object of his bounty should nevertheless have a reasonable share; that is to say, that she should appoint such share to each child alive, at the time of such appointment; and to the children of such child as should

32 be then dead, and who in *such case are to represent their ancestor; and that it was not his intention, that an appointment should be made to the child, or children of any child alive, at the time of such appointment, or to one child of a deceased child, in exclusion of the others; unless such last mentioned appointment, would

(a) 4 Ves. jr. 708; 5 Ves. jr. 495.

(b) Gibson v. Kinven, 1 Vern. 66. The case of Wall v. Turborne, 1 Vern. 355, 414 is ill reported, as is shewn by the case of Astry v. Astry, Prec. in Chan. 256. See also 5 Ves. jr. 858; 2 Ves. 640; 1 Br. Ch. 450; 2 Br. Ch. 344; 2 Ves. jr. 351, 714; 4 Ves. jr. 771; 5 Ves. jr. 362, 849. All of which shew appointments grossly unequal, and much more, appointments where some objects of the bounty are omitted, to be void.

(c) Amb. 660.

(d) 9 Ves. jr. 382, 4; 10 Ves. jr. 31.

(e) 2 Vern. 513; 1 P. Wms. 149; 1 Atk. 349; 1 T. Rep. 439, note; 1 Mod. 189; 6 Ves. jr. 793.

(f) 2 Ves. 640.

(g) 1 Ves. 59; 2 Eq. Ca. 492-3; 5 Ves. jr. 855-6; 9 Ves. jr. 382.

(h) 5 Ves. jr. 856, 861; Cas. Tem. Talb. 72; 2 Ves. jr. 326; 5 Ves. jr. 445; 9 Ves. jr. 426.

(i) 1 Ves. jr. 299.

(k) 2 Call 520.

(l) 2 Com. Dig. 359-60.

(m) 9 Ves. jr. 382.

(n) 5 Ves. jr. 366-7.

*BROOKE absent.

not operate to deprive the others of a reasonable share.

According to these principles, if Martha Walton the trustee, aforesaid, appointed, by act consummated in her life time, any portion of the trust fund to the child or children of a child of the testator, in the life of such child; such appointment is void; but if such appointment was made after the death of such child, then the grand-children in this case, representing their ancestor, being objects of the trust, and entitled to a reasonable share, such appointment was good; and if made to one or more of such children, in exclusion of others, ought to be confirmed; if a sufficient fund shall remain, according to the principles of this decree, to give the other children a reasonable share of the proportion to which these children shall be found entitled, as representing their ancestor; otherwise, it is to be added to what may be assigned to those representing that stock, and the whole equally divided between them. So too if the trustee appointed, as aforesaid, give any portion of the trust fund to a child of the testator, such appointment is to be confirmed, if sufficient remains to give each object of the bounty, as above-designated, a reasonable share of the whole fund; otherwise such appointment is to be declared void, as not being conformable to the trust.

We are further of opinion, that all the appointments attempted to be made in and by the last will of Martha Walton, ought to be declared void; they being repugnant to the intention of the testator, in the particulars before declared.

We are also of opinion, that if any appointment, made as aforesaid, shall be declared valid under the principles
33 *herein stated, that the object or objects in whose favor such appointment shall so have been made, will not be entitled to come in for a share of the residue of the trust fund, without bringing into account, the subject so appointed; the correct rule being, that when the trustee, who alone is confided in, to make a discrimination as to quantity, fails to do so, according to the confidence reposed, the Court must adopt equality as the rule: it would be a departure from this rule, to divide the residue among all the objects; and this is the more reasonable, in as much as the person having the power may not have intended the inequality which would thus be produced.

The decree is therefore to be reversed, and the cause remanded; that all parties, necessary to a final decision, according to these principles, may be made, and a final decree be pronounced, agreeably thereto.

Parker v. Elliotte.

June, 1820.

Seduction—Trespass—Case.*—The plaintiff in an action for debauching his daughter, may elect to bring trespass or case for the injury.

Elliotte brought an action of trespass on the case, against Parker, of debauching his daughter. There was a demurrer to the declaration, because there was no positive averment of the injury, and because the action should have been trespass, and not case. The court below decided against the demurrer, and the jury found a verdict for the plaintiff.

That the declaration containing no positive averment was fatal in this action on demurrer, was submitted on the authority of Moore v. Dawney.(a)
34 *That trespass and case should not be confounded, was attempted to be proved by the case of Taylor v. Rainbow.(b)

And that the proper action was trespass and not case, Woodward v. Walton, (c) was cited, and relied on as conclusive.

ROANE, Judge. The court is of opinion, that as this action is brought merely for debauching the appellee's daughter, the injury arising from which, was as to the father, only consequential, he might elect to bring an action on the case for the said injury; and that there is no error in the judgment. It is therefore affirmed.

Smith v. Pearce.

April, 1820.

Attachment—Bond—Recitals—Amount.*—Judgment on attachment should not be quashed because the bond given on suing it out, recited only the sum due without mention of interest.

Same—Appearance of Defendant.*—It is error to refuse leave to the defendant in an attachment, to enter bail and plead, without appearing in person.

Smith brought an attachment against the estate of Pearce an absconding debtor. Pearce not appearing to defend the suit, Smith's counsel moved the court for an order of sale of the attached effects; and that the amount of Smith's claim should be paid him. And while the motion was before the court, counsel for Pearce offered special bail, and filed a plea. But the court refused to admit the bail, and plea offered, which was payment; Pearce's counsel, craved oyer of the note and attachment.
35 *And excepted to the opinion of the court, refusing to receive bail, and admit the plea. The bond given by Smith and his surety, on obtaining the attachment, recited the amount of the sum for which the attachment was obtained only, without the date of the note, or any mention of interest.

Pearce's counsel, appealed from the opinion of the Hustings court of Petersburg, to the Superior court of law for Prince George county.

That court, reversed the judgment of the court of Petersburg, and directed the warrant of attachment to be quashed; alleging as cause of error, that no bond correctly reciting the said attachment, was executed by Smith.

ROANE, Judge. The court is of opinion, that the judgment of the Superior court

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***Seduction—Action Ex Delicto.**—Every action by a parent founded upon the seduction of his or her daughter must be an action *ex delicto*. Fry v. Leslie, 87 Va. 274, 12 S. E. Rep. 671, citing the principal case. See also, *foot-note* to Clem v. Holmes, 33 Gratt. 722.

(a) 3 Hen. & M. 127.
(b) 2 Hen. & M. 423.
(c) Bos. & Pull. 476.
*See monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

of law is erroneous in this, that the bond given on suing out the attachment in the proceedings mentioned, was not so imperfect, as to authorise the judgment quashing the said attachment. That judgment is therefore reversed with costs.

And this court proceeding to give such judgment, as the Superior court of law should have given, is farther of opinion, that the Judgment of the county court, is also erroneous, in not permitting the appellee to give special bail, and plead to issue, as he offered to do.

That judgment is therefore also reversed with costs; and the cause is remanded, with directions, to permit the appellee to give special bail, if the same shall be offered; and, that the cause be proceeded in, to a final judgment.

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36 *Guerrant v. Tinder.*

June, 1820.

Malicious Prosecution†—Rebuttal of Evidence to Show Malice.—In an action for malicious prosecution, the plaintiff having given evidence of conversations of the defendant to shew malice—the defendant may prove by the committing magistrate what he swore before him.

Same†—Several Defendants—New Trial.‡—In such an action against several defendants some of whom are found not guilty; on motion for a new trial, by those found guilty, because evidence for them was improperly excluded, a new trial will be granted, as to those found guilty only.

This was an action for malicious prosecution, brought by Jesse Tinder, against Peter Guerrant Sen. Henry Huff, Young Jarratt, Leonard Wilson, and Peter Guerrant jr. The declaration sets forth three different wrongs and injuries to the plaintiff. First, that the defendants, maliciously, and without probable cause charged the plaintiff, before Thomas Thompson a magistrate, with stealing a silver watch of he value &c., whereby they procured his arrest and imprisonment. Second, that they maliciously and without probable cause, procured the plaintiff to be brought before the examining court of Franklin county, and remanded to jail for the felony. Third, that they falsely and without probable cause, procured the plaintiff to be indicted for the felony before the grand Jurors of the Superior court of law for Franklin county. The declaration avers the discharge of the plaintiff by the grand Jury; and that the defendants had not farther prosecuted &c.

The defendants pleaded jointly not guilty.

At the trial of the cause, the plaintiff having given in evidence, conversations of the defendants relative to the felony charged, the defendants offered Thomas Thompson, the magistrate who committed Tinder, to prove what *they 37 deposed before him, on Tinder's arrest. The plaintiff's counsel objected to the admission of his testimony. The court sustained the objection. The evidence was excluded. The jury found Peter Guerrant, sen'r. Henry Huff, and Peter Guerrant, jr., guilty; and assessed the plaintiff's damages at $500. The other defendants were found not guilty. The defendants found guilty, appealed.

This cause was three times argued by Wickham for the appellee, and by Gilmer for the appellants. On the first argument the only question made was, whether it was error to exclude the evidence of Thompson. The court requested arguments afterwards, on the difficulty which presented itself, in reversing the judgment as to the convicted defendants only.

Gilmer for the appellants.

The verdict has given aggregate damages for three several injuries complained of in the declaration, and put in issue by the pleadings. If this verdict would have been bad on a single count stating any one of these injuries separately, it is bad now, for it is entire. Suppose the issue had been joined on a declaration stating the malicious arrest procured from Thompson. The plaintiff must have proved that arrest to have been procured through malice and without probable cause: malice is the foundation of the action; Farmer v. Darling.(a) It may indeed be implied, from total want of probable cause, and it has been held, that the indictment being found "not a true bill," affords inference of want of probable cause. This applies only to malicious prosecutions before grand juries; since it affords no presumption even, of what passed before the committing magistrate. And if it did, the presumption might be repelled by proof.(b) In England, it is the prac- 38 tice, to shew *the whole proceedings before the magistrate.(c) And the plaintiff might, indeed he ought, to have shewn the particular accusation made. The rule must be reciprocate, the defendant then, shall have the same liberty.

It is not allowing the defendants to testify in their own cause: for the plaintiff has put in issue what they swore, by averring it to be false and malicious: how can this be determined without knowing what they have sworn? In slander the defendant might shew he spoke other words than those charged &c.? I do not say the defendants can prove the plaintiff committed the felony, by their own evidence; though they may do even that, if no one else were present when the felony was committed.(d) But I say, that the utmost latitude shall be allowed the defendants in giving evidence to

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*For monographic note on Malicious Prosecution, see end of case.

†**Malicious Prosecution.**—See monographic *note* on "Malicious Prosecution" appended to principal case.

‡**New Trial—Several Defendants.**—In Kemp v. Com., 18 Gratt. 979, it is said: "It is laid down in many of the books, that if there be two defendants in a civil action, and there is a verdict in favor of one and against the other, a new trial cannot be granted to the latter, because the verdict, if set aside as to one, must be set aside as to both. That was the view taken by this court in Boswell v. Jones, 1 Wash. 322; though it held otherwise in *Guerrant v. Tinder, Gilm.* 36."

See further, monographic *note* on "New Trials" appended to Boswell v. Jones, 1 Wash. 322.

‡**Same—Before What Court Motion Should Be Made.**—See, on this subject, the principal case cited in Newberry v. Williams, 89 Va. 299, 15 S. E. Rep. 865; Danks v. Rodeheaver, 26 W. Va. 290, 292; *foot-note* to Johnson v. Macon, 1 Wash. 4. See further, monographic *note* on "New Trials" appended to Boswell v. Jones, 1 Wash. 322.

The principal case was also cited in Danville Bank v. Waddill, 31 Gratt. 478.

(a) 4 Burr. 1971.
(b) Harg. Co. dit. 161, a. n. 4.
(c) Peake. 288.
(d) Peake. 289.

rebut the presumption of malice. It is to negative the inference of malice, that the testimony should be allowed. Suppose a witness were to accuse one of a particular offence, and a magistrate should commit him for another, without any cause: should the wrong of the magistrate condemn the witness. Yet condemned he must be, if he be not allowed to prove the precise allegation he made? The evidence then was clearly admissible.

Shall the venire de novo be against all the defendants, or against those only, who were found guilty?

It is said, here has been a mis-trial; if so, Tinder produced it, and he cannot complain of his own error. It is said too, the evidence rejected might have been advantageous to him: then he should not have objected to it: had he moved to exclude the evidence, and the motion been overruled, he might have appealed. Can he appeal because a motion was denied at his request? Suppose all the defendants had been found not guilty, it is clear he could not then have reversed the judgment, because evidence was excluded on his motion.

39 *What then is the distinction in this case? The acquitted defendants are no longer parties to any pending suit.

An appeal under our statute, stands in place of a writ of error at common law; now a writ of error lies to reverse a final judgment injurious to the party claiming it. (e)

No matter what names are on the record, they only are appellants, whose names are under the ad grave damnum. (f) A writ of error therefore, can be brought only by one who is injured by the judgment. The acquitted defendants, are not injured; their names ought to appear in the record, but not under the ad grave damnum. (g) This is what is done. They cannot be appellants, for no judgment can be more beneficial to them, than that already rendered.

It is said, that the judgment is entire, and must be affirmed or reversed throughout; how can a judgment acquitting A. be entire with one convicting B.? The parties are severed by the verdict, and the judgment cannot re-unite them. Even if it were entire, it might be affirmed in part, and reversed in part. (h)

But Verelst and Smith v. Rafael(i) is conclusive upon the point; it is supported by other authorities, (k) and it would have been error for the acquitted defendants to join in the appeal. The venire then, must be confined to those found guilty by the verdict.

40 *ROANE, Judge.* The court is of opinion, that the plaintiff in this case, having given evidence at the trial, of certain conversations of the defendants, relative to the facts whereon the prosecution for felony was founded, with the view to impute malice to them, it was competent to them for the purpose of obviating that imputation, to shew as well what they actually swore before the magistrate, as the manner and circumstances thereof. This is emphatically the opinion of the court, because regularly in an action for malicious prosecution, the plaintiff ought himself to give evidence of what was sworn on the trial. This evidence being rejected by the court in the present case, the judgment must be reversed, and a new trial awarded, in which the evidence offered is to be admitted if requested.

On the question whether the reversal is to be extended to the judgment in favour of the acquitted defendants also, the court is of opinion, that it is not: in which opinion Judge Brooke who did not sit as to the previous question concurs.

The opinion expressed by the court below, although erroneous, gave in itself no right of appeal by motion for a new trial or otherwise. It gave none to the defendants although it rejected their testimony, and was excepted to by them. It was only when a verdict was rendered against them, which may have been influenced by this rejection, that a right to a new trial arose: until this event, the opinion is to be considered as abstract and harmless. If all the defendants had been acquitted no new trial could have been asked by them: nor could the plaintiff have complained, because the opinion was founded on his motion, and rejected his adversaries evidence. That rejection cannot be deemed to have been injurious to him. It was not that rejection, but the defect of his own proofs in relation to the acquitted defendants, which produced

41 their acquittal. Neither he nor *they therefore, in the case of a total acquittal, could ask for a new trial. It remains, to inquire whether this may be done in the actual case before us, at the instance of the convicted defendants, so as to jeopard again, those who have been acquitted. The only ground on which this can be asked for by the former is, that they have been injured by the acquittal of the others, and have an interest in having them convicted. This ground however was overruled by this court in the case of Boswell v. Jones. (l) It was not deemed in that case a sufficient interest to subject the acquitted defendants to another trial.

If this then was a mere motion for a new trial, it would not be awarded except as to the convicted defendants: and how is the case altered when it occurs in the appellate court?

In the case of Johnson v. Macon, (m) it was stated by the President of the court, that a motion for a new trial on the ground of a mis-direction, is never made before the same Judge, but before the appellate court, upon an exception taken in the court below. We are of opinion that this ground is quite too narrow. The same Judge may upon a deliberate motion for a new trial supported

(e) 2 Saund. 46, n. 6, 101, e. 101, a. n. 1; 2 Ba. abr. 456, B.; Co. Lit. 288, D.

(f) Brewer v. Turner, 1 Str. 238; 2 Str. 1110.

(g) 1 Str. 682.

(n) 1 Str. 188; 2 Str. 808.

(i) Cowp. 425.

(k) 2 Saund. 101, f; 2 Ba. abr. 461, B.

Note. This cause was argued before a reporter was appointed, and I regret, that no notes were taken of Mr. Wickham's reply, which could enable me to give its substance.—Edition 1821.

*BROOKE absent.

(l) 1 Wash. 322.

(m) 1 Wash. 4.

by argument and authority, retract a hasty opinion expressed by him in the progress of the trial. That course too, would save the expense and delay of appealing to a Superior court for that purpose. But as he may not retract this error, an application for a new trial may be also made to the appellate court, and to that end, an exception is provided. On the appeal, the application is still in effect for a new trial: and it would seem, that none are to be subjected thereto by the appellate court, who could not have been so subjected by a direct motion in the court below. In principle there is no difference between the two cases. It is a general principle, that an appeal will only lie, in behalf of a party injured
42 by a *decision, and to the extent of that injury: and this principle equally prevails, in whatever court the motion is made, and by whatever form of proceeding.

We are of opinion therefore, that the Judgment is only to be reversed, and a venire de novo awarded, as between the parties to the appeal.

MALICIOUS PROSECUTION.

I. What Prosecutions May Give Right of Action.
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I. WHAT PROSECUTIONS MAY GIVE RIGHT OF ACTION.

Contempt Proceedings.—A rule for contempt, though the judicial act of the court issuing it, may be the foundation for an action for malicious prosecution, provided the application for the same is without probable cause, actuated by impure and malicious motives, and founded on falsehood or misrepresentation. Tavenner v. Morehead, 41 W. Va. 116, 23 S. E. Rep. 672.

Injunction.—So also, where an injunction is sued out maliciously and without probable cause, an action for malicious prosecution may be maintained. Glen Jean, etc., R. Co. v. Kanawha, etc., R. Co., 47 W. Va. 725, 35 S. E. Rep. 978.

Attachment Proceedings.—The legislature, considering that the remedy afforded by malicious prosecution did not afford an adequate protection against the abuse of a process by an attachment provided by sec. 22, ch. 151, Code 1849, that "the right to sue out an attachment may be contested; and when the court is of opinion that it was issued on false suggestions or without sufficient cause, judgment shall be entered that the attachment be abated." Claflin v. Steenbock, 18 Gratt. 842; Spengler v. Davy, 15 Gratt. 381. The court, in the case first above cited, draws the distinction between the two remedies, saying that the object of the action for damages is to obtain indemnity from the parties, and to inflict punishment upon him for wrongfully and maliciously abusing the process, whereby the plaintiff in the action has been injured and oppressed, while the object of the motion is to arrest the mischief by abating the attachment. On this subject, see monographic *note* on "Attachment" appended to Lancaster v. Wilson, 27 Gratt. 624.

Other Civil Suits.—If a person agree to pay the debt of another to a third party, and either pay or be in a condition to pay it, and, having control of such third party's debt, wilfully ignoring his obligation, maliciously institutes judicial proceedings, and carries them through to a finality in such third party's name for the purpose of sacrificing the debtor's property and destroying his business, such proceedings are without probable cause, and render such person liable to an action for malicious prosecution. Porter v. Mack, 50 W. Va. 581, 40 S. E. Rep. 459.

But if a person who has assumed to pay the debt of another be not in condition for any reason to do so, and at the same time he is the agent for the creditor, and it is his duty as such agent to collect the debt of his debtor, his performance of the duty by legal proceedings is not without probable cause, and will not render him liable to a suit for malicious prosecution, although the debt, interest, and costs may be recovered from him in an action of assumpsit for breach of his contract. Porter v. Mack, 50 W. Va. 581, 40 S. E. Rep. 459.

II. CONSTITUENT ELEMENTS OF THE TORT.

To warrant a verdict and judgment for damages in an action for malicious prosecution it must be proved on the part of the plaintiff: First, that the prosecution alleged in the declaration has been set on foot and conducted to its termination, and that it ended in the final acquittal and discharge of the plaintiff. Second, that it was instigated or procured by the co-operation of the defendant. Third, that it was without probable cause. Fourth, that it was malicious. Scott v. Shelor, 28 Gratt. 891; Vinal v. Core, 18 W. Va. 1.

III. INSTITUTION AND TERMINATION OF PROSECUTION.

Generally.—By the requirement that the prosecution must have been set on foot and conducted to its termination resulting in the final discharge of the plaintiff, is meant that the plaintiff must have been arrested under a process not absolutely void. And by its being ended is meant, not that the plaintiff had been so discharged that no subsequent prosecution for the same alleged crime could have been instituted, but only that this particular prosecution was ended. Vinal v. Core, 18 W. Va. 1.

Prosecution Must Have Ended in Acquittal.—Although an action for malicious prosecution cannot be maintained, unless the plaintiff has been fully acquitted of the criminal charge, yet the plaintiff is not obliged to prove that he was acquitted by the jury promptly, without hesitation, delay or deliberation; and the evidence of a juror to show that the deliberation of the jury was caused by their doubt as to the guilt or innocence of the accused is inadmissible. Scott v. Shelor, 28 Gratt. 891.

Reason for Requiring Termination of Proceedings.—The purpose of requiring allegation and proof of

the termination of the prosecution is to avoid the litigation of the same thing at the same time in separate proceedings. So long as the criminal action is pending the innocence of the accused cannot be litigated in the civil action, since the accused may eventually be found guilty in the criminal proceeding; and, if guilty, no civil action can be maintained. This being the reason for the allegation and proof of finality of the prosecution, it follows that the manner of ending it is immaterial, provided it be finally terminated in favor of the prisoner. But in the case of Ward v. Reasor, 98 Va. 399, 36 S. E. Rep. 470, the court sustained a demurrer to a declaration because it alleged that the magistrate, before whom the accused was brought for trial, dismissed the proceedings "without hearing any evidence," though there were the usual allegations of malice, want of probable cause, and termination of the prosecution favorably to the accused. This action of the magistrate was held by the court to be tantamount to the entry of a *nolle prosequi*, and the court said that where a prosecution is so ended, no action for malicious prosecution can be maintained. For a criticism of this case, see editorial in 6 Va. Law Reg. 356. See also, Scott v. Shelor, 28 Gratt. 891.

IV. PROBABLE CAUSE.

1. DEFINITION.—Probable cause, in a criminal prosecution, is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. Scott v. Shelor, 28 Gratt. 891; Vinal v. Core, 18 W. Va. 1.

In a case brought for maliciously suing out an attachment it was held that justifiable probable cause for suing out an attachment against the effects of a debtor, is a belief by the attaching creditor in the existence of the facts essential to the prosecution of the attachment, founded upon such circumstances as were sufficient to produce such belief in the mind of a man of ordinary caution, prudence and judgment. Spengler v. Davy, 15 Gratt. 381. See also, Claflin v. Steenbock, 18 Gratt. 842.

2. FACTS WITHIN PROSECUTOR'S KNOWLEDGE.—If facts exist which render it probable that a certain party has committed a crime the public interest requires that he should be prosecuted; and if it turns out that he was innocent he has suffered *damnum absque injuria*, even though the prosecutor was influenced by improper motives or malignant feelings. This doctrine is based upon public policy, which requires that prosecution for an offence should not be discouraged, when there is probable cause to charge a particular party with the crime. Vinal v. Core, 18 W. Va. 1. Hence, it may be laid down as a general rule that if the defendant, being a man of ordinary prudence, believed in good faith from his own knowledge and understanding of the facts and circumstances, that the judicial proceeding instituted by him was necessary and justifiable, he cannot be held liable, although it should be afterwards made to appear, in a suit for that purpose by a preponderance of evidence, that such proceedings were without just foundation. Porter v. Mack, 50 W. Va. 581, 40 S. E. Rep. 459; Sisk v. Hurst, 1 W. Va. 53; Vinal v. Core, 18 W. Va. 1; Spengler v. Davy, 15 Gratt. 384. See also, Claflin v. Steenbock, 18 Gratt. 842.

It has been said that as the reason for the averment of want of probable cause is merely because no man can maintain an action for a malicious prosecution where there was probable cause, it is obvious that these words should be made to refer to the state of fact, as it respects the person prosecuted, and not to the degree of knowledge of that fact in the party prosecuting. Mowrey v. Miller, 3 Leigh 561. And this rule, though criticised in Spengler v. Davy, 15 Gratt. 388, was approved in two recent West Virginia cases,—Brady v. Stiltner, 40 W. Va. 298, 21 S. E. Rep. 729; Porter v. Mack, 50 W. Va. 581, 40 S. E. Rep. 459.

But where the facts within the knowledge of the prosecutor are not sufficient to cause a reasonable and prudent man to believe that the accused is guilty of the crime charged the prosecution is without probable cause, and the prosecutor is liable, if the other elements of the tort are present. Thus in a case where the plaintiff was arrested by the procurement of the defendant on a charge of larceny of certain oil, the evidence adduced showed that when he was alleged to have stolen the oil he was in possession thereof as tenant of oil wells, it being oil which he had himself produced. It further appeared that he was bound to deliver one-third of the oil as rent to his landlord whenever called upon to do so, and that he was forbidden by his contract to remove any oil from the premises without notice to his landlord; that without such notice he did remove all the oil, which at a particular time he had on the premises, and appropriated it to his own use, claiming that there was no rent oil then due to his landlord, because more oil had been taken as rent on a previous occasion by the landlord than he was entitled to; and that this had been taken in the absence of the plaintiff. These facts and this claim of the plaintiff was known to the prosecutors. They, nevertheless, had him arrested on a charge of stealing the rent oil claimed to have been due and taken off under these circumstances, and appropriated by the plaintiff to his own use. It was held that there was no probable cause to justify the defendant in procuring this prosecution to be set on foot and a verdict in favor of the plaintiff was sustained. Vinal v. Core, 18 W. Va. 1.

3. INFORMATION RECEIVED FROM OTHERS.—So also, a party is not liable for damages when he has information received from reliable sources, which leads him, as a prudent man, to suspect or believe that the person alleged to have committed an offence, was engaged with others in committing the same, or was in company with others who actually committed the offence. Sisk v. Hurst, 1 W. Va. 53; Porter v. Mack, 50 W. Va. 581, 40 S. E. Rep. 459.

4. BELIEF IN GUILT OF ACCUSED.—To sustain an averment of probable cause, the plaintiff must show such a state of facts as precludes a reasonable ground of belief in the minds of the defendants, warranting them to institute and maintain in good faith the alleged malicious proceedings. Porter v. Mack, 50 W. Va. 581, 40 S. E. Rep. 459.

A belief by an attaching creditor in the existence of facts essential to the prosecution of his attachment, founded upon such circumstances as, are sufficient to induce such belief in the mind of a man of ordinary caution, prudence and judgment, is justifiable and probable cause for suing out an attachment. Burkhart v. Jennings, 2 W. Va. 242.

5. COMMITMENT BY MAGISTRATE.—The commitment by a magistrate, of a person accused of felony, or binding him in a recognizance to appear at court and answer the charge, is sufficient evidence that the prosecution was with probable cause, although the person accused was acquitted by the court, unless in his action for malicious prosecution, he can prove by other evidence that the prosecution was in fact without any probable cause. Maddox v. Jackson, 4 Munf. 462; Blanks v. Robinson, 1 Va. Dec. 600; Womack v. Circle, 29 Gratt. 192.

And the judgment of a justice holding a party

guilty of petit larceny, which judgment is reversed on appeal, is only *prima facie* evidence of probable cause in an action for malicious prosecution by the party so adjudged guilty. Blanks v. Robinson, 1 Va. Dec. 600. This case overrules the case of Womack v. Circle, 32 Gratt. 324, where it was held that a judgment of a justice requiring a party accused of a misdemeanor, to give security for good behavior, though the judgment was reversed on appeal, was conclusive evidence of probable cause for the prosecution unless the testimony before the justice was known to be false by the prosecutor. See also, Womack v. Circle, 29 Gratt. 192.

In an action for malicious prosecution the weak presumption that exists in every case, that every public prosecution is founded on probable cause, is strengthened by proof, that the plaintiff had after an examination by a justice been committed to jail to answer an indictment when found; but this presumption is still capable of being rebutted by other testimony showing that there was no probable cause. Hale v. Boylen, 22 W. Va. 234.

6. WAIVER OF PRELIMINARY EXAMINATION.—The waiver of a preliminary examination by a person charged with crime is also *prima facie* evidence of probable cause. Brady v. Stiltner, 40 W. Va. 289, 21 S. E. Rep. 729.

7. DISCHARGE BY MAGISTRATE.—That the converse of the proposition above laid down, as to the commitment by a justice, is true, and that the judgment of the justice dismissing the complaint is *prima facie* evidence of the want of probable cause for the prosecution, has never been doubted. Jones v. Finch, 84 Va. 204, 4 S. E. Rep. 342; Womack v. Circle, 32 Gratt. 324; Blanks v. Robinson, 1 Va. Dec. 600; Harper v. Harper, 49 W. Va. 661, 39 S. E. Rep. 661; Vinal v. Core, 18 W. Va. 1; Brady v. Stiltner, 40 W. Va. 289, 21 S. E. Rep. 729.

An acquittal before a United States commissioner is likewise *prima facie* evidence of want of probable cause, as the functions of such a commissioner in committing for trial are precisely like those of a justice of the peace. Jones v. Finch, 84 Va. 204, 4 S. E. Rep. 342; Womack v. Circle, 32 Gratt. 324; Blanks v. Robinson, 1 Va. Dec. 600.

8. REFUSAL OF GRAND JURY TO INDICT.—The refusal of the grand jury to indict is *prima facie* evidence of want of probable cause, except where it appears that refusal to indict was after the hearing of the witnesses for the accused as well as for the prosecution; but such *prima facie* evidence is liable to be rebutted by proof. Harper v. Harper, 49 W. Va. 661, 39 S. E. Rep. 661.

When the refusal of the grand jury to indict is opposed to the refusal of the justice to discharge, one rebuts the other, so as to render neither *prima facie* evidence of the existence or want of probable cause; and, if the plaintiff manages in any way to have the evidence for his defense considered by the grand jury, their finding is tantamount to an acquittal by a petit jury, and is not *prima facie* evidence of the want of probable cause on the part of the prosecutor. Brady v. Stiltner, 40 W. Va. 289, 21 S. E. Rep. 729.

9. A MIXED QUESTION OF LAW AND FACT.—Probable cause is a mixed question of law and fact. What are existing facts, of which probable cause or its absence may be predicated, is a question of fact to be decided by the jury. But in those cases where the facts are admitted, or are undisputed or assumed, the question whether they constitute probable cause or not, or whether from them the existence or the absence of probable cause is to be inferred, are questions of law for the decisions of the court and not for the jury. Vinal v. Core, 18 W. Va. 1.

10. WANT OF PROBABLE CAUSE CANNOT BE INFERRED FROM MALICE.—Though, as will be seen later, malice may be inferred from want of probable cause, yet no rule is better settled than that want of probable cause can never be inferred from malice no matter how strong the evidence of malice may be. Vinal v. Core, 18 W. Va. 1; Scott v. Shelor, 28 Gratt. 891; Womack v. Circle, 32 Gratt. 324; Spengler v. Davy, 15 Gratt. 381; Forbes v. Hagman, 75 Va. 168.

V. MALICE.

Definition.—Malice may be defined as some motive other than a desire to have punished a person believed by the prosecutor to be guilty of the crime charged. It is a sinister or improper motive, and may be malignity or a desire by means of the prosecutor to get possession of the goods alleged to be stolen, or any other improper motive. Vinal v. Core, 18 W. Va. 1.

In a legal sense, any unlawful act which is done wilfully and purposely, to the injury of another, is, as against that person, malicious. Scott v. Shelor, 28 Gratt. 891.

Malice Inferred from Probable Cause.—Malice may be inferred from the want of probable cause, but the latter can never be inferred from the plainest malice. The improper motive, or want of a proper motive, inferrible from a wrongful act, based on no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of an action for malicious prosecution. Scott v. Shelor, 28 Gratt. 891; Womack v. Circle, 32 Gratt. 324; Spengler v. Davy, 15 Gratt. 381.

So, in Forbes v. Hagman, 75 Va. 168, which was a kindred action for false imprisonment, it was held that malice might be inferred from want of probable cause. And in this case malice was defined as "*malus animus*, and as denoting that the party is actuated by an improper and indirect motive. The improper motive, inferrible from a wrongful act, based upon no reasonable ground constitutes of itself all the malice deemed essential in law to the maintenance of the action."

Malice a Question for the Jury.—As malice consists in some improper motive or the absence of a proper motive, it is obviously a question for the jury in all cases. And though there be no express evidence of malice, the jury may infer it from probable cause alone. This inference, however, is an inference of fact and not of law and must be drawn by the jury and not by the court; and being an inference of fact merely, it is of course not necessarily to be drawn and is liable to be rebutted. Vinal v. Core, 18 W. Va. 1.

In a case in which the declaration did not allege malice, it was held improper to admit evidence to show that the act of suing out an attachment was instigated by malice. Burkhart v. Jennings, 2 W. Va. 242.

VI. NECESSITY FOR CONCURRENCE OF MALICE AND WANT OF PROBABLE CAUSE.

It is essential to the plaintiff's recovery in an action for malicious prosecution that there should be proof of the concurrence of malice and want of probable cause. Malice alone, or want of probable cause alone, is insufficient to give the ground of action. Vinal v. Core, 18 W. Va. 1.

VII. ADVICE OF COUNSEL.

Advice of Counsel as Evidence of Probable Cause.—The advice of counsel to the defendant to institute the criminal proceedings ought not to be taken into consideration in determining whether probable cause existed or not. Vinal v. Core, 18 W. Va. 1.

Advice of Counsel as Evidence of Want of Malice.—The advice of the counsel to the defendant to institute

criminal proceedings may be considered by the jury in determining the question of fact, whether the defendant was or was not actuated by malice. The fact that the defendant acted upon the advice of counsel is entitled to more or less weight or to no weight at all according to all the circumstances attending it, all of which should be considered by the jury. Among the circumstances referred to the following are believed to be the more important: Whether the advice of counsel was sought *bona fide* or was sought only as a mode of protecting the defendants in a contemplated wrong; whether it was followed in good faith or not; whether it was really believed to be good counsel by the defendant; whether the attorney giving the advice was an attorney of character and standing or otherwise; whether he was or was not candid and disinterested in the opinion of the defendant in giving the advice; whether all the facts and circumstances as known to the defendant were frankly communicated to the attorney, or a portion of them suppressed or misstated; whether the defendant had or had not made a careful investigation of the facts before consulting counsel. Vinal v. Core, 18 W. Va. 1.

Or, as was said in another case, if the defendant relies upon the defense that he acted under the advice of counsel and not upon a fixed determination of his own, the burden is on him to prove that he sought counsel with an honest purpose of being informed as to the law, that he made a full, correct, and honest disclosure to his counsel of all the material facts within his knowledge bearing on the guilt of the plaintiff, and that he was in good faith guided by the advice of such counsel in causing the arrest of the plaintiff. Whether such disclosures were made, or the defendant in good faith acted on such advice are questions for the jury under the evidence in the particular case. Jones v. Morris, 97 Va. 43, 33 S. E. Rep. 377.

Where a party applies to a justice for a warrant for the arrest of another, and details to the justice the whole of the information he has derived from other persons as to the commission of an offence by the party whom he seeks to arrest, and the justice in the discharge of his duty, advises the issuing of the warrant against him, this is such a matter of defence to an action for malicious prosecution as will prevent the recovery of damages by the party arrested. Sisk v. Hurst, 1 W. Va. 53.

VIII. EVIDENCE.

Burden of Proving Probable Cause.—As the law presumes that every public prosecution is founded on probable cause, the burden of proving the want of probable cause in the first instance must be upon the plaintiff. In every such case, therefore, he must show some evidence of the want of probable cause, before the defendant can be called upon to justify his conduct. But as the plaintiff is thus called upon to prove a negative, slight evidence is often regarded as sufficient to prove the want of probable cause. Vinal v. Core, 18 W. Va. 1; Scott v. Shelor, 28 Gratt. 891.

And although the allegation or want of probable cause in the declaration is negative in its character, yet it must be proved or the plaintiff must fail in his action. Scott v. Shelor, 28 Gratt. 891.

Though the facts on which are based the existence or nonexistence of probable cause are those known to the defendant when the prosecution was begun by him, yet he may be presumed by the jury to know all the existing facts, and the burden is on him to satisfy the jury that any particular fact proven to be then existing was unknown to him. Vinal v. Core, 18 W. Va. 1.

Bad Character of Plaintiff as Evidence.—The bad character of the plaintiff is a fact or circumstance to be considered in determining whether there was or was not probable cause, or it may be considered in mitigation of damages. Vinal v. Core, 18 W. Va. 1.

Rebuttal of Evidence to Show Malice.—In an action for malicious prosecution the plaintiff having given evidence of conversations of the defendant to show malice, the defendant may prove by the committing magistrate what he swore before him. Guerrant v. Tinder, Gilm. 36.

IX. DAMAGES.

Measure of Damages—Punitive Damages.—In an action for malicious prosecution for a crime alleged to have been committed by the plaintiff, the measure of damages is such an amount as will compensate the plaintiff for the actual outlay and expenses about his defense in the prosecution against him, and for his loss of time, and for the injury to his feelings, person and character by his detention in custody and prosecution. And if the jury should find that the prosecution was commenced or pursued for private ends or with reckless disregard of the rights of the plaintiff they may, in addition to the damages above enumerated, give such punitive damages as they may think proper for such conduct on the part of the defendant. Vinal v. Core, 18 W. Va. 1.

Evidence to Enhance Damages.—In an action for slander, malicious prosecution and false imprisonment, the plaintiff, in order to show the wealth and influence of the defendant, offered in evidence certified abstracts from books containing the returns of the assessments for taxation on the land and personal property belonging to the defendant for the year in which the trial of the cause took place. There being no objection to the form of the abstracts, or that they did not truly state what they purported, they were held admissible in evidence. Womack v. Circle, 29 Gratt. 192.

Excessive Damages Allowed by Jury.—Where the damages awarded by the jury are excessive the court may set aside the verdict, or it may put the plaintiff upon terms. That is, the court will award a new trial unless the plaintiff agrees to remit a portion of the damages allowed by the jury. Vinal v. Core, 18 W. Va. 1.

But a new trial should not be granted because the damages are excessive, unless they are so large as to furnish evidence of prejudice, partiality, passion or corruption on the part of the jury. This rule applies with special force to new trials by the appellate court. Vinal v. Core, 18 W. Va. 1.

Liability of Joint Defendants for Damages.—Where two persons are sued jointly they are both responsible to the full extent of the damages which the plaintiff is entitled to recover against either, though one may have been actuated by malignity and the other by no malice except such as was inferrible from his uniting with his co-defendant in doing a wrongful act. Vinal v. Core, 18 W. Va. 1.

Evidence of Plaintiff's Bad Character in Mitigation of Damages.—The bad character of the plaintiff may be given in evidence in mitigation of damages. Vinal v. Core, 18 W. Va. 1.

Fraud of Plaintiff in Mitigation of Damages.—Where it appears that there was no probable cause for charging the plaintiff with larceny, but it appears that he was guilty of gross fraud in appropriating the property of another to his own use, which property was in his custody but to which he neither had a just claim nor believed he had any claim, such fraud should be considered in mitigation of damages, to which he may be entitled in an action

for maliciously prosecuting him for stealing such property, and makes it improper for the jury in such case to award punitive damages. Vinal v. Core, 18 W. Va. 1.

X. MATTERS OF PROCEDURE.

1. JURISDICTION.—Where two joint defendants in an action for malicious prosecution have been served with process within the jurisdiction of the court in which the action is brought, the court has jurisdiction of the action, though one of the defendants is a nonresident of the state, and though the cause of action arose in a county of the circuit other than the county in which the court is sitting. Vinal v. Core, 18 W. Va. 1.

2. FORM OF ACTION.—The proper action to bring for an alleged prosecution is trespass on the case, and not trespass *vi et armis*. Shaver v. White, 6 Munf. 110.

3. PARTIES.

Where Third Party Procures the Prosecution.—An action on the case for procuring a malicious prosecution may be maintained by the person prosecuted, against him who procured such prosecution to be maintained. Mowry v. Miller, 3 Leigh 561.

Joint Action.—For a malicious prosecution, two or more persons may be sued jointly in one action, or severally in separate actions. But counts against two or more cannot be joined in the same declaration with counts against each person severally. McMullin v. Church, 82 Va. 501.

Against Party Maliciously Suing Out an Attachment.—An action for malicious prosecution may be maintained against one who, maliciously and without probable cause, sues out an attachment, and causes it to be levied on the property of another. Shaver v. White, 6 Munf. 110; Spengler v. Davy, 15 Gratt 381; Burkhart v. Jennings, 2 W. Va. 242; Claflin v. Steenbock, 18 Gratt. 842.

Joint Action—Motion for New Trial.—Where, in an action for malicious prosecution against several defendants, some of whom are found guilty and some innocent, there is a motion for a new trial by those found guilty because of the improper exclusion of evidence by the court, a new trial will be granted only as to those found guilty. Guerrant v. Tinder, Gilm. 36.

4. DECLARATION.

Essential Averments in General.—To be sufficient in law, the declaration, in an action for malicious prosecution, should allege (1) the prosecution in its particulars; (2) that it was set on foot, instigated, or procured by the defendant; (3) that it had terminated favorably to the plaintiff; (4) that it was without probable cause; and (5) that it was malicious. Womack v. Circle, 29 Gratt. 192; Blanks v. Robinson, 1 Va. Dec. 600; Scott v. Shelor, 28 Gratt. 891; Ward v. Reasor, 98 Va. 399, 36 S. E. Rep. 470; Vinal v. Core, 18 W. Va. 1.

Averment of Want of Probable Cause.—The want of probable cause is an essential averment in the declaration in an action on the case for malicious prosecution. Porter v. Mack, 50 W. Va. 581, 40 S. E. Rep. 459; Ellis v. Thilman, 3 Call 3; Young v. Gregorie, 3 Call 446; Kirtley v. Deck, 2 Munf. 10; Scott v. Shelor, 28 Gratt. 891; Marshall v. Bussard, Gilmer 9; Burkhart v. Jennings, 2 W. Va. 242; Tavenner v. Morehead, 41 W. Va. 116, 23 S. E. Rep. 673; Mowry v. Miller, 3 Leigh 561; Spengler v. Davy, 15 Gratt. 388.

And it seems to be essential that the words "without probable cause" should be used in the declaration. Thus it has been held that a declaration alleging that the acts were done "wrongfully and injuriously without good cause" is not sufficient, as these words are not equivalents for the words required by law. Burkhart v. Jennings, 2 W. Va. 242. And in the case of Young v. Gregorie, 3 Call 446, the court held, that "justifiable" was not equivalent to "proper cause"; and in Kirtley v. Deck, 2 Munf. 10, it was decided, that the words "false and malicious" were insufficient, but there must also be added "without probable cause." See also, Marshall v. Bussard, Gilm. 9. And an allegation that the prosecution was without just cause is insufficient. Ellis v. Thilman, 3 Call 3.

The declaration in a special action on the case, for suing out a foreign attachment, must aver both malice and want of probable cause, either expressly or by equivalent words. Marshall v. Bussard, Gilm. 9; Burkhart v. Jennings, 2 W. Va. 242.

Averment of Malice.—So, also, it is essential that the declaration in an action for malicious prosecution should aver that the prosecution was instigated by the defendant through malice. And the declaration must set forth the alleged malicious conduct of the defendant of which the cause of action is predicated, otherwise it will be demurrable. Tavenner v. Morehead, 41 W. Va. 116, 23 S. E. Rep. 673.

Averment of Termination of Prosecution.—And a declaration charging a conspiracy to sacrifice and destroy the plaintiff's property and business by the malicious use of judicial proceeding must allege that such proceedings were instigated, instituted, and prosecuted to finality by the defendants. Porter v. Mack, 50 W. Va. 581, 40 S. E. Rep. 459.

But where, in an action for procuring a malicious prosecution, the day on which the plaintiff was acquitted is stated in the declaration under a *scilicet*, a variance between the day so laid and the day stated in the record by which the acquittal is proved, is not material; it is sufficient for the declaration to allege that the acquittal took place before the suit was brought. Mowry v. Miller, 3 Leigh 561.

Where, in an action for maliciously suing out an attachment against the effects of the plaintiff, the declaration alleges that the attachment was sued out "wrongfully and without good cause," instead of "maliciously and without probable cause," this irregularity is cured by the verdict. Spengler v. Davy, 15 Gratt. 381.

5. INSTRUCTIONS.—The court should not instruct the jury that probable cause is proved to have existed at the time the prosecution was instituted; but the question as to the weight of the testimony should be left to the jury, unless the facts on which such question depends be agreed by the pleadings, or be submitted to the court by the parties or by the jury. Crabtree v. Horton, 4 Munf. 59.

But upon a supposed or assumed state of facts, if there is testimony tending to prove such facts, and they are pertinent to the question, the court is bound, at the instance of the parties, to instruct the jury whether such supposed or assumed state of facts does or does not amount to probable cause. Vinal v. Core, 18 W. Va. 1.

An instruction to the jury that if they believe the prosecution to have been without reasonable and probable cause they must find for the plaintiff, is not objectionable because containing the word "reasonable," as this does not restrict the ordinary meaning of the words "probable cause." Forbes v. Hagman, 75 Va. 168.

An instruction to the jury that a magistrate having committed the plaintiff, or bound him in a recognizance to answer the charge, "furnished sufficient evidence of the probable cause to induce the prosecution," is not to be understood as excluding from the jury other evidence on the part of the plaintiff to disprove the probable cause inferrible

from such commitment or recognizance. Maddox v. Jackson, 4 Munf. 462.

The judgment of the justice, though reversed, is *prima facie* evidence of probable cause; and an instruction by the court to the jury which properly propounds the law upon this point is unobjectionable. Womack v. Circle, 29 Gratt. 192. See *ante*, this note, "Probable Cause—Commitment by Magistrate."

6. LIMITATIONS.—An action for malicious prosecution, sounding in consequential and punitive damages, although affecting business and property, is such a personal action as does not survive to the personal representative, and is barred by the statute of limitations after one year from the time when the right to bring the same first accrued. Porter v. Mack, 50 W. Va. 581, 40 S. E. Rep. 459; Mumpower v. City of Bristol, 94 Va. 737, 27 S. E. Rep. 581, 3 Va. Law Reg. 439, and *note*.

Taylor Adm'r of Holloway v. Bruce.

June, 1820.

Accommodation Paper—Sale of—Usury*—Case at Bar.—Negotiable notes made by H. & H. indorsed by A. for the accommodation of H. & H. to be sold in market, purchased by B. from a broker who sells them for H. & H. at a greater discount than 6 per cent, are not usurious in the hands of B., without proof that B. knew the facts. Quære.

George Keith Taylor adm'r of Holloway, brought a bill in the Chancery court of Richmond setting forth, that Holloway and one Hanserd were merchants and partners in Petersburg. That they had fallen into peculiar difficulties and had become the prey of usurers. That on 14th April 1811, being greatly pressed for money, they applied to the defendant James Bruce, who was apprized of their situation, for the loan of $3603 78-100 which they obtained at the rate of one and a half per cent. per month. To cover principal and interest, they executed three notes for $14000 each, negotiable at the Bank of Virginia, with John Allison indorser, payable in six, nine, and twelve months. In October 1811, Holloway and Hanserd being in still greater distress (as Bruce knew) applied to him for another loan, which they obtained at an unknown rate, from 20 to 25 per cent. per
43 *annum. To cover this loan, they executed two other notes of the last date, negotiable at bank, with Thomas Atkinson indorser; payable in nine and ten months, &c. &c. The bill demands a discovery of Bruce of the sums actually lent, and of the interest reserved, and generally, that he might set forth all he knew concerning the premises. That the notes be declared usurious, &c.

Bruce's answer denied his having ever had pecuniary transactions with Holloway or Hanserd: and that no communication for a loan ever passed between them.—The notes in question he purchased from J. L. Mertens, who offered them for sale. For the three notes of $1400 each, he gave $3628 80 cents. For the other two of $1250 each, he gave $2143 75. That it was a purchase and not a loan. That he had no particular information as to the pecuniary situation of Holloway and Hanserd. The business was conducted with Mertens, and whether he was their agent or not, is a question with which the defendant supposes, he has nothing to do.

This answer was excepted to, because it neither admitted nor denied a knowledge of Mertens' agency, which was very material, and the exception required the defendant to state, whether Mertens was the agent of Holloway and Hanserd, and whether he bargained with him for the notes in that character. The answer was amended by a supplement, and Bruce said, that he did not recollect or believe, that Mertens informed him that he was the agent of H. & H. or acting for them in the business, nor did the defendant receive any such information from any other quarter.

The deposition of Mertens, proved he had for some time been a broker in Petersburg, and had been much engaged in raising

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***Accommodation Paper—Sale of—Usury.**—In Whitworth v. Adams, 5 Rand. 333, 389, 409, it is said that, as the principal case was decided by a divided court consisting of three judges, it cannot be considered as binding authority. But, in this case (Whitworth v. Adams), the decision in *Taylor v. Bruce* was reviewed and the principle which it lays down confirmed; the court holding that, where a note is made and indorsed for the accommodation of the payee, and afterwards put in the hands of a broker by the payee to be sold in market and is purchased by a third person, having no knowledge that it is an accommodation paper nor for whose benefit it is sold, the transaction is not usurious. In this case all five judges delivered opinions and each of them referred to the principal case. See Whitworth v. Adams, 5 Rand. 349, 353, 365, 380, 389, 404, 409, 411, 419, 420, 422, 426.

In Gimmi v. Cullen, 20 Gratt. 479, 447, the plaintiff applied for an injunction to restrain the defendant and others from proceeding to sell certain real estate under a deed of trust executed by the plaintiff to secure a negotiable note made by him and held by the defendant. The bill charged that the note was usurious having been discounted at 16 per cent. per year. The defendant answered the bill denying that he had any knowledge of the usury in the note and alleging that he purchased it of certain brokers without knowing for what purpose it was made or to whom it belonged. On trial the defendant moved the court to instruct the jury as follows: "If the jury shall be satisfied, from the evidence, that the note on which this suit is brought was drawn and indorsed by the maker and indorser to raise money on a sale of it, and was placed by them in the hands of Lancaster & Co., Brokers, to be sold by them for that purpose; and Lancaster & Co. sold it to the defendant at a discount of more than legal interest, but neither indorsed the note nor made themselves in any way responsible for its payment, nor at any time owned it, or any part of it; and that the defendant purchased it without notice of the purpose for which it was made, or of its character, more than the note and indorsement import, the jury must find for the defendant."

JOYNES, J., delivering the opinion of the court, said in reference to this instruction: "The court did not err in giving the instruction moved by the defendant. It was in accordance with the doctrine by a majority of the whole court, in Whitworth v. Adams, 5 Rand. 333, following *Taylor v. Bruce, Gilm.* 42, and recognized as the settled law of the state in Brummel & Co. v. Enders, Sutton & Co., 18 Gratt. 873."

And in Gordon v. Dooley, 10 Fed. Cas. 785, the court, citing as its authority the principal case, Hansbrough v. Baylor, 2 Munf. 86, and Whitworth v. Adams, 5 Rand. 333, lays down the rule that a man may purchase bonds or negotiable paper in the market at any discount whether they were manufactured for sale or not, and not be guilty of usury.

In accord with these decisions, see Moseley v. Brown, 76 Va. 421; Brummel v. Enders, 18 Gratt. 873, 885, 887, 888, 893, 894, 895, and *foot-note*, both citing the principal case.

See further, *foot-note* to Gibson v. Fristoe, 1 Call 62; monographic *note* on "Usury" appended to Coffman v. Miller, 26 Gratt. 698; monographic *note* on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 622.

The principal case is also cited in Greenhow v. Harris, 6 Munf. 483; Smith v. Nicholas, 8 Leigh 360.

Same—Value Must Be Paid.—The principle has long been settled that an accommodation note, until value is paid for it, is a blank. May v. Boisseau, 8 Leigh 212, citing the principal case.

money for others, by the sale of their notes. That Holloway brought the notes in question to him to raise money on. The general impression in Petersburg was, that H. & H. were pressed for money.—He sold the notes to Bruce, who had often pur-
44 chased *such paper of him, both before and after the negotiation. Believes Bruce was well acquainted with Holloway in his life-time, and is acquainted with the town of Petersburg generally. Mr. Atkinson, the indorser of the last notes is very rich, and it is said is a money lender.—Mertens did not indorse either of the notes.

The deposition of William Haxall, proved Bruce to be well acquainted with Petersburg, and with Holloway particularly.

There are several other depositions and documents in the cause, but the evidence is so fully examined in the opinions of the Judges, that it is unnecessary to state the case farther, than to make the arguments which follow intelligible.

This case was first argued by Call for the appellant, and Wickham for the appellee. The court consisting of ROANE, BROOKE, and COALTER affirmed the Chancellor's decree dismissing the bill. ROANE dissenting, and being of opinion, to reverse the whole decree, and grant the prayer of the bill.

The court on the suggestion, that decisions had taken place in New-York on the question, in which the court there, differed from the opinion of the two Judges who were for affirming the decree, and on several precedents cited by Call, agreed to reconsider the case, and heard a new argument. In which Call and Gilmer were for the appellant, and Wickham, Stanard, and Bouldin for the appellee.

Gilmer for the appellant.

Usury is to be inferred from circumstances, or it could never be proved. Courts must be more astute in detecting usurers as they become more cunning in evading the statute. Where a particular badge of usury is sought to be avoided by a new artifice, that artifice must stand in place of the badge. Thus when men endeavour to avoid the suspicion resulting from a
45 communication for *a loan, by the interposition of an agent, the communication with the agent shall stand for a communication with the principal. So when they endeavour to escape the inference resulting from employing a special known agent, by contracting thro' a notorious general agent or broker, who publicly negotiates such usurious contracts, that too, must stand in the place of a direct communication for a loan with the party. But Bruce must have known in this transaction, that Mertens acted as the special agent of Holloway and Hanserd. Such notes exist for but two purposes. 1st, for real debts. 2d, for accommodation. Bruce could not hesitate in deciding which they were in this case. In the 1st case he was either to suppose H. & H. in debt to Allison: Allison a thrifty lawyer, and not a borrower, to pass notes to Mertens in a fair course of trade, and Mertens a professed broker to be dealing for himself, when he did not pretend the notes were his, and never indorsed them; or 2d, he was to suppose, that the notes were made for sale, and that Mertens acted in his notorious vocation in selling them. Bruce too knew, that H. & H. were embarrassed, and that they were borrowers, no other party to the notes was in either condition.

It is said not to be enough to shew that Bruce suspected this was a cover to a usurious transaction; that we must prove he actually knew it. We never can prove what B. knew, nor even what he actually suspected. But we prove circumstances which must from necessity have been known to him, and being known, he must have suspected the loan was for H. & H.

But whatever may have been Bruce's knowledge or suspicion, it is certain, that in point of fact, these notes were made for the purpose of raising money, and were actually appropriated to that purpose, without any value having been paid for them, before they came to the hands of Bruce, who gave 18 and 25 per cent. less, than their value for them; and this I say is usury per se.

46 *I shall insist the less on the English cases, because they are already before the court, and because there is an important distinction between the English statute and ours, which has been overlooked, and which materially affects this question. I shall mention it hereafter. The case of Young v. Wright (a) is conclusive to shew, that a bill usurious in its first real negotiation, is void in every stage of its assignment. That was a bill drawn by Thomas Wright on Charles Wright at 3 months.—Charles got it discounted at more than 5 per cent. and Lord Ellenborough held it usurious throughout. So in Kent v. Lowen. (b)

But the cases from New-York apply with more force, because they are on a stat-
47 ute similar to ours,* and not *affected by the particular enactments of Eng-

(a) Camp. 139.
(b) Camp. 177.

*There is no clause in the law of New-York corresponding with the penal section of our statute. It enacts that, "no person shall take directly or indirectly, for loan of monies, wares, &c. above the value of 7l. for the forbearance of 100l. for one year, &c." adopting only part of the English statute, which was first enacted 21 Jac. 1, c. 17. The New-York statute, certainly does not in its terms involve the inquiry of the knowledge of either party that the statute is violated. And the particular provisions of the statute of Virginia, strongly negative such an opinion. As the law in this respect is still unsettled, a brief view of the successive statutes of England may be of public utility.

By the 27 Hen. 8, c. 9, § 2. no person shall sell merchandize, and within three months after, buy the same upon a lesser price, knowing them to be the same.

§ 3. No person by way of any corrupt bargain, loan, exchange, chevisance, shift, or interest, of any wares, or by any other deceitful way, shall take in gains for the forbearing of one year, for his money, or other thing, that shall be due for the same wares or other things, above 10l. in the hundred.

§ 5. If any person shall do any thing contrary to this statute he shall forfeit the treble value; and shall suffer imprisonment, &c.

13 Eliz. c. 8. All bonds and assurances, in any thing against the act of 27 Hen. 8, c. 9, shall be void: and those violating it punished, &c.

21 Jac. 1. c. 17, was designed only to alter the rate as its preamble shews.

§ 2. No person shall take directly or indirectly for loan or any monies, wares, &c. above the value of 8 per cent. and all bonds, &c., for more shall be void. And every person who shall receive by way of corrupt bargain, loan, exchange, chevisance; or by

land. They shew, that where a note is made for the purpose of raising
48 *money, no matter how many hands it may pass thro' without being negotiated, if the first actual negotiation of it be at a usurious discount, the note will be infected with usury, in the hands of such a holder, whether he knew the purpose for which it was made or not.(c)

This doctrine has been called absurd, because it invalidates notes obtained by the holder without knowledge of the illegal purpose for which they were made. But the same thing is done wherever an innocent person takes a note originally void, because for a gaming or usurious consideration; for in such cases his innocence will not entitle him to recover. But there is a difference between voluntarily making such illegal contracts, and without knowledge that they are illegal, receiving the paper which they have produced. In one case the person incurs the penalties of the act, in the other the contract only is made void; but it is equally void in both cases. It is like the case of a forged bank note, which is not good in payment of a debt; and when it has been received the knowledge of the forgery is no part of the inquiry to be made; but if there be a prosecution for passing it the scienter must be proved.

There is a difference between the civil and the penal part of our statute, which has not been remarked, and which distinguishes our law from that of England. The penal clause (d) enacts, that if any one shall by any corrupt bargain, covin, &c. receive more than six per cent. he shall forfeit, double, &c. The civil clause (e) declares, that no one shall take directly or indirectly, for loan of money, &c. more than six per cent. and all bonds, assurances, &c. by which higher interest is reserved, shall be void. The penal clause then, requires
49 that there *should be a corrupt bargain, or agreement, and covine in the party, before he can incur the penalty of the act.—Corrupt, refers to the will, for nothing can be corrupt which is done with a fair and honest intention. And covin Lord Coke tells us, can be only by two or more.(f) This is unquestionably the meaning of the penal clause of our statute, and an opinion has prevailed without ever being considered, that there must be the same corrupt agreement and covin to avoid a contract as usurious; when in fact the civil clause of our statute has no such words, but renders all contracts void where more than six per cent. is reserved on loan, without reference to the intention of the parties. That a corrupt agreement is necessary to avoid a contract, is a construction derived from the English statutes. It is said in Murray v. Harding,(g) "that the corrupt agreement is the foundation of all usurious contracts," to prove it Croke James(h) is cited. All the cases in Croke James, were before the statute of 21 Jac. 1. They were of course on the statute 13 Eliz. c. 8, which only re-enacted the statute of 37 Hen. 8, c. 9, which had been repealed in Edw. 6, now the statute of Hen. 8, had no clause like ours, avoiding contracts; it only forbade taking more than 10 per cent. by corrupt bargain, loan, covin, chevisance" &c., nearly in the words of our penal act: accordingly, in England to this day, the corrupt agreement and covin must be charged in the plea;(i) for tho' the statutes of James and Charles, have avoided contracts where illegal interest is directly or indirectly reserved, all their acts are in construction, taken together, like the bankrupt laws,(k) and the statute of Henry 8th, has governed the interpretation of all, and by that statute as well as that of Eliz. the corrupt agreement was indispensable. In Virginia then, I maintain, that where the ques-
50 tion is, whether a *contract be usurious or not, the quo animo with which it is made is not material; the only enquiry is, is the contract a loan, and has more than six per cent. been reserved?

What is a loan, is a question of law. The word loan embraces three species of bailment; commodatum, as lending a horse, &c. in which the same horse is to be returned: mutuum as lending wine, &c., where an equal quantity of the like kind is to be returned: usura as where wine, money, &c. are lent, and something more is to be returned than was received, for the use. If I give an order on a wine merchant

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any deceitful ways or means, or by covin, or any deceitful conveyance, &c., more than 8 per cent. shall forfeit the treble value.

The 12 Car. II. c. 13, altered the rate to six per cent. and retained nearly the same words.

The 12 Ann c. 16, was nearly in the same words; but changing the rate to 5 per cent.

From which statutes, it is manifest, that there was no distinction between the civil and the penal clauses in England, until the 21 Jac. I. and all the cases to shew the necessity of the corrupt agreement, were before the passage of that act.

The first statute made in Virginia on the subject of usury was in the year 1730, Geo. II. which fixed the rate at 6 per cent. and is founded on the 21 Jac. 1, which had been copied in all the subsequent acts of England. The same words are reiterated in the act of 1734, in that of 1748, which reduced the rate to 5 per cent. and with a few unimportant verbal variations, they are retained in all our acts since.

It is for our courts to say whether they will regard the statutes of Hen. 8, and Eliz. in the construction of an act, passed in Virginia in the reign of Geo. II. containing entirely different provisions; or whether they will look to the words of the act itself, as containing the real meaning of the legislature. Even in England recent decisions shew the corrupt agreement to be a mere form of pleading, and does not imply a knowledge in the party, that the contract is usurious. For this Marsh v. Martindale, 3 Bos. & P. 159, is a clear authority. In that case the jury expressly found, that the plaintiff was innocent of the intention of violating the law, But Lord Alvanley says, that an agreement to take more than 5 per cent. is a corrupt agreement, within the meaning of the act, whether the party think he acts contrary to the statute or not.—And that the agreement in this case was corrupt, whatever was the intention.

The Virginia statute having made an original distinction between the civil and penal clauses: using a number of technical words implying collusion, and fraudulent agreement in the penal which are wholly omitted in the civil clause: the inference is strong, that the corrupt will is necessary to convict of an offence, but not to vitiate a contract altogether prohibited, with whatever intention it may be made, or whatever form it assume, so it be a loan, and more than 6 per cent. be reserved.—Edition 1821.

(c) See Bennet v. Smith, 15 John. Rep. 355; Munn v. Commission Company, 15 John. Rep. 44; Jones v. Hake, 2 John. Ca. 60; Wilkie v. Roosevelt, 3 John. Ca. 68.

(d) 1 Rev. 374, § 2, ch. 102.
(e) Ch. 102, § 1.
(f) Co. Lit. 357. b.
(g) 2 Bl. Rep. 865.
(h) 253, 508, 678.
(i) 3 Bos. & P. 145; 1 Saunde. 295, b.
(k) 3 Wills. 254.

who has my wine in his cellar, and agree to take an equal quantity of wine at a future day in return, it is a loan of wine. In this case it is not the paper on which the order is written which I exchange; it is the wine. So if I give my bond to pay money hereafter for money advanced now, it is a loan of money; but if I give another's bond instead of my own, is it not the money in his hands, as it is the wine in the merchant's cellar, that I exchange? Technically then, it is a loan; money payable hereafter is exchanged for money advanced now. And the reason why such a contract has not been held to be usurious where illegal interest is reserved, is not that the contract is a sale as is commonly said, but because it is not within the policy of the law: as in England, greater discount than 5 per cent. by country bankers tho' within the words, has been held not to be within the prohibition of the act.(1) The assignment of a bona fide note of another, at any discount is not within the policy of the law; but such notes are strikingly contrasted with mere accommodation paper, made to be discounted at an illegal rate. If you make a fair and full consideration necessary in the first negotiation, none but good notes can come into the market, but if accommodation paper may be sold at any discount, notes not worth a cent in the dollar, 51 will be sold, and *persons in distress, will pledge in anticipation, the labours of years for a trifle; the very mischief designed to be prevented by the act: the bond of another may have been given for property not worth half its amount; but one's own bond to pay money hereafter for less money now, never can be: a bond may even have been given without any consideration at all, so all the obligee gets for it, is clear gain: and if the obligor gets full consideration it is not for him to deny its validity in the hands of an indorsee; and when the indorser is sued, he pays only what he received. These are the reasons, why the transfer of another's bond, fairly obtained, at any discount, is not usurious; and why, the transfer of one's own bond payable hereafter, for a smaller consideration than a deduction of six per cent. from the principal received, is usurious.

In the case before the court, the contract is technically a loan; and it is not within any one of the exceptions, which take it out of the law of loan. Indeed, if the whole force of the statute can be evaded by taking notes made to procure money, at any discount, under the pretext that it is a sale and not a loan, the statute will be rendered nugatory.

The doctrine now contended for on the other side, is so palpable an evasion of the statute, that it could never obtain, if it were now a fresh question. It has been suggested however in the previous argument of this question, that the case of Hansborough v. Baylor (m) has closed this case, on the point upon which, we principally rest it. I was struck in reading the record of that case, with the totally different moral aspect of the cases; and found they were in many very material respects unlike. Hansborough's answer so far from being ambiguous and shuffling, is candid and fair. He swears, that he did not even suspect Rootes was Baylor's agent; that if he had, he would not have bought the 52 bond. Hansborough *bought of Rootes, a Lawyer; the bond was offered him by Rootes the obligee; Rootes himself was the only indorser, Rootes assured him it was bona fide; that if Baylor did not pay it, he would. Bruce on the other hand bought the notes in question, of Mertens a public broker; he knew H. & H. were pressed for money and were borrowers. The notes were indorsed not by Mertens, nor payable to him, nor did Mertens guaranty their fairness, or payment; Hansborough bought Baylor's bond where he could not inquire of B. about it. Bruce bought these notes in Petersburg, in the very teeth of all the parties, and yet he made no inquiry. In Hansborough's case, there is not a single suspicious circumstance; in Bruce's, not one is wanting. Hansborough and Baylor then, decides nothing in this case. It shews, that there may be circumstances in which one who holds another's bond without having given value for it, may transfer it at an illegal discount, and yet it shall not be infected with usury. But Hansborough had done every thing which a fair dealer could be required to do, before he took the bond; he had every reason to believe the bond was really the property of Rootes. To have rescinded the bond would have been to enable Rootes and Baylor to practise a fraud upon Hansborough. Here Mertens did nothing to deceive Bruce; he is voluntarily blind, if blind at all, to the true nature of the transaction.

It has been argued, that our doctrine will destroy the negotiability of such paper. It can have that effect, only on usurious notes, which ought to be proscribed.

It is said too, that it is now a universal practice to buy such notes in market. But no usage can repeal a statute. The more general the practice, the more loudly does it call for the interposition of this court. If men will falsely interpret laws, that they may practise extortion and rapine, they should pay for their temerity. To conclude: Bruce knew that Mertens sold these notes for H. & H.: whether he knew it or 53 not, the transaction is *a loan; for the property in the notes was never changed until they came to his hands, so it was a promise to pay money hereafter for money now, by H. & H. to Bruce, tho' conducted by a broker. It is therefore within the words and meaning of the act. Hansborough v. Baylor has not decided that every transfer of a note made to be sold is lawful, but that it was so in that case: and not a mitigating circumstance which existed in that case, exists in this: without such a construction of the law, it is nugatory; since men have only to contract loans by the hands of others, and call them sales, to evade the statute.

Call on the same side. The first question I make in this cause is, what amount shall Bruce recover supposing these notes not to be usurious. At law the defendant could have gone into proof of the actual consider-

(1) 2 T. Rep. 52; Peak. Rep. 200.

(m) 2 Munf. 36.

ation given for them, for a bill must be for value, otherwise it is nudum pactum and void. And though it be prima facie evidence of good consideration, that is a privilege granted them for the benefit of trade, and to be entitled to it, they must be confined to purposes of trade.(n)

The act of Assembly establishing the blanks prohibits the discount of bills at more than 6 per cent. interest. The legislature then could not intend, that others should discount them at a greater rate.

If a bill is given without consideration, the indorsee cannot recover if he give nothing for it.(o) He will, to be sure, be presumed to have given value, until it be proved, that he gave none.(p) The holder then, cannot recover more than he or some prior holder gave for the bill. Thus if A. give a note to B. without value, who passes it to C. without value, who passes it usuriously to D. who sells it for full value to E.—E.
54 shall recover. *But if he does not give full value for it, he can recover only what he paid for it, for that is all he is damnified. 1 Esp. 261. So in an accommodation note, where the fact is known, the holder recovers only what he gave. Thus(q) a bill drawn under duress, was not held to be void in the hands of an indorsee for value, but the plaintiff was required to prove a good consideration given, he could not do so and was nonsuited. So (r) a bill for accommodation, though that fact be known, is good in the hands of a holder, if he give good consideration. The reason is, that the act of the agent is the act of the principal, consequently, the principal is bound by it; Bruce then is bound by the act of Mertens, who did not pretend to sell these notes as his own. It is like the case of professed horse-sellers in London, where the principal is bound by the agent's warranty. Here Mertens was a professed agent, for principals in such transactions.

Whenever suspicion attaches to a bill, inquiry must be made to remove it.(s) A note was indorsed after due; it was held a suspicious circumstance and the defendant let in to prove fraud. And putting a note into the hands of a broker at this day, when they have become instruments for evading the statute, and having it publickly sold in market, is a suspicious circumstance.

Besides, the indorsement here was in blank, and if suit were brought on it, the holder could recover, only by proving he gave value for it, and that he came fairly by it:(t) and selling such paper at an undervalue is a fraud upon the indorsers, for the maker is not so able to indemnify the indorsers, as if he received full value. Upon the case as made out by the appellee himself then, he is entitled to recover only the value actually given for these notes.
55 *But he is entitled to nothing for the notes are usurious.

I admit there is no difference in the principles of evidence in usury and in every other case. Assumpsit must be as clearly established by legal evidence as a felony. But the first question in every case is, what is to be proved, to make out the case. By the statute, bargaining for more than 6 per cent. on a loan, directly or indirectly is usury. The mode and form of the loan is immaterial, if the intention be to take more than legal interest, no device can take it out of the statute. In Marsh v. Martindale,(u) it was clear the lender did not intend usury—but the substance of the contract being itself usurious, it was held to be infected and void, without the concurrence of his will. But these notes were made to be discounted at an illegal rate, and are within the principles settled by the English cases. There is a difference between notes made to be sold for as much as they will bring, and notes made to be sold at illegal discount, as these were. The first may nevertheless be sold at a legal rate, these could not be, as was admitted when they were made. When the bill is made expressly to be sold at illegal discount, and is actually so sold, there is the concurrence of both parties to the illegal contract, the usury is consummated, and a sale by the broker of the maker, is a sale by the maker, and the purchaser cannot deny the agency —for buying of an agent, under such circumstance, he must inquire into the fact. A note made for sale is of no force until sold, and if sold for less than legal discount, it is tainted in its origin, and nothing can make it good.(v) From these cases it is clear, that if none of the previous parties can maintain an action on it, and the plaintiff had illegal discount, it is usurious in his hands.

But suspicion stands for proof until it be removed, Ord. 84; Camp. 375, 554.
56 The broker is notoriously *the mere agent for a concealed principal. The fact, that brokers in such capacity was of itself enough, to render any note suspected, offered by a broker: but these were the notes of embarrassed and borrowing merchants, indorsed by affluent men, not borrowers, and offered for sale by a broker, who did not pretend to have any interest in them. Here were circumstances surely suspicious enough, to put Bruce on inquiry. And usury my be proved by circumstances like every thing else.(w) If the sale be out and out, there can be no usury, because there is no obligation to refund—but when the note is indorsed, the principal and interest are safe at all events, for the risk of insolvency is colourable only.

If the lender take an order on the debtor of the borrower it is usury, 1 East, 195. This is denied because notes and bonds are assignable bona fide without being tainted with usury. But in that case there must be a suit against the maker, and due diligence used, before there can be a recovery against the assignor; and then, the recovery is only for the consideration actually given. But for a negotiable note, the indorsee recovers the whole amount with charges of protest &c.; and that, without

(n) 1 Fonb. 332; 2 Fonb. 490; Chit. on bills 86.
(o) Chit. 88, 86.
(p) 1 Marsh. 210.
(q) 1 Camp. 100, and Maxw. 69.
(r) 3 Esp. 47.
(s) 3 T. Rep. 80, 4; Mass Rep. 370.
(t) 3 Burr. 1523; Chit. 87; 2 Show. 235; 4 Esp. 56.

(u) 3 Bos. & P. 161.
(v) 15 John. Rep. cases cited by Gilmer.
(w) 1 Call. 73; 2 T. Rep. 52; 1 Atk. 151; 1 Bay. 446.

suit, for demand and refusal entitle him to sue the indorser.

But the evidence in this cause proves the notes were the property of H. & H. when offered to Bruce. So Bruce coming by the bills by an illegal transaction, could not recover at law.(x) The case of Rucker v. Smith cited on the other side, was of a fraud on the assignee, and in Baylor v. Hansboro', there was no proof, that the bond was made for sale. And even if that case were an authority directly against us, the court decided in Pollard v. Baylor, that where the decision was recent, this court would re-examine and if proper, re-
57 verse it. *Such a decision, could here do no injury, for the indorsee would receive the amount actually paid by him.

The argument on the other side was to this effect.

First, as to the point of usury. Usury by the law of Virginia is a crime. Purchasing bonds and notes like these has already been decided to be lawful, Gibson v. Fristoe.(y) Hansborough & Baylor. Yet here is an attempt, to convict Bruce of a crime in purchasing these notes, without proof of knowledge on his part, that he was, in purchasing them, committing such crime. There can be no crime without the concurrence of the will—there can be no usury without the intention of a loan; yet here, where no loan was intended, and consequently no concurrence of the will to the commission of the crime, a man is to be punished criminaliter, and to forfeit his claim. Several cases from New-York have been cited to prove this position. But they do not support it. The case of Bennet v. Smith,(z) is but a dictum of the court: for the notes were made to be discounted on a previous agreement: there was knowledge in the party of the usurious purpose. So in all the other cases relied on, it was proved, that there was a knowledge in both parties of the illegal and vicious purpose. The same answer applies to the case of Young v. Wright, 1 Camp. The corrupt agreement existed when the note was drawn, that it should be discounted at a usurious rate. The case of Kent v. Lowen from 1 Campbell, was also usurious between the original parties to the note.

It has been said that the fact of the purchase of these notes being made from a broker was of itself suspicious, and held the buyer to inquire. The cases do not support the principle. That from Maule & Selwyn proves only, that the factor cannot pledge the goods of his principal, which no one disputes. In that from 1 East, 335, it was clear from the manner of insurance,
58 that the agent was *a mere agent, and such information would equally have applied to any one else, as to a broker. The case from 2 Camp. 33, was one of a vendee's being informed while buying the goods, that they did not belong to the factor, and without this information, he would have succeeded, although he made no inquiry. The result of all the cases then is, that wherever the subject of contract is vendible, whatever may be the price, there can be no usury, unless the sale be a pretext for eluding the statute—both parties must intend a loan, and that must be proved.

On the second point as to the true measure of Bruce's claim it was insisted, that if there was no usury in the case—a court of equity should dismiss the bill, that being the only ground on which its interposition was asked. If Bruce was entitled to no more than he paid, it was a good defence at law, as to the excess claimed.

COALTER, Judge.* Seeing no reason to change the opinion I formerly gave in this case, I shall only add to it some few remarks on the broad ground taken in the second argument, and on the cases referred to for its support.

The objection made to the jurisdiction of the court in this case I am of opinion cannot be sustained. The assets in the hands of the appellant might be affected by his failure to take the course he has done; for if the court shall be of opinion that usury has been practised, the assets must be increased by half the amount at least of the usurious interest. Being then interested in this amount, and finding that the surviving partner, fearful of jeoparding his own credit, and that of his indorser's, declines to take a measure calculated to benefit the estate, the appellant represents; and as it might be unjust and unreasonable, at a future day, to throw this loss on the surviving partner, because he failed to do an act tending perhaps to an immediate
59 and greater injury, *even to the partnership itself; or an act which from his knowledge of the transaction, he might have thought he could not in honor or in conscience do; the appellant was right not to risk this remote and more doubtful chance of doing justice to his intestate's estate, and was therefore justified in pursuing the most effectual, and probably the only certain mode of securing it. The great question then is whether usury was practised or not.

The bill charges that on the 14th April 1811, Holloway & Hanserd, being greatly pressed for money, applied to the appellee Bruce for the loan of $3603 78, informing him of their distress; which they obtained at the unconscionable interest of 1½ per cent. per month, and that in October of the same year, being as was known to the said Bruce, in increased distress, they applied for a loan of a further sum, which they obtained at a heavier rate, to wit, from 20 to 25 per cent. per annum.

The, defendant in his answer, denies that he ever had any money transactions with Holloway and Hanserd, or either of them, and that no communication for a loan ever passed between them or either of them and him. He admits he purchased five notes made by Holloway and Hanserd, three of them bearing date the 14th April 1811, payable in six, nine, and twelve months, without interest, and indorsed in blank by John Allison; and the other two bearing date the 7th October, in the same year, without interest, in nine and ten months, indorsed in like manner, by Thomas Atkinson. They

(x) Burr. 1523; 7 Ves. 473; 1 East 961; 3 Ves. 373.
(y) 1 Call 62.
(z) 15 John. Rep. 355.

*CABELL absent.

were all negotiable at the branch bank of Petersburg.

For the first three of 1400 dollars each, he gave $3628 80, and for the last two of $1205 each, he paid $2143 75.

The defendant further admits that he has occasionally purchased negotiable paper in market; believing that he violated no rule of law or morality thereby, and avers, that so far as he was concerned or ac-
60 quainted with this *transaction, it was a fair purchase of the notes and not a loan: and that with regard to the circumstances of Holloway and Hanserd, he had no particular information. He expected the notes would be duly honored or he would not have bought them. He says he purchased them of John L. Mertens, but whether he was the agent of Holloway and H. or not, and on what terms, he presumes are questions with which he has nothing to do.

The answer in this last particular was excepted to, "because under the charge of usury made in the bill, the plaintiff considers it highly important to ascertain, by the defendant's answer, whether Mertens was the agent of H. & H., and whether the defendant made the bargain with him for the said notes in that character."

The defendant amends his answer and says he doth not recollect or believe, that Mertens informed him that he was the broker or agent of H. & H. or either of them, or acting for them in the business; neither did he receive such information from any other quarter.

Thus stands the case upon the bill and answer. Every material allegation of the former, being denied in the latter, and consequently that must stand as true unless contradicted by the requisite countervailing proofs. It is true the defendant admits in his answer, that he received the notes at a discount which would be usury, if the transaction had taken place in consequence of a personal interview between him and the makers, as is alleged in the bill, whether a loan of money had been mentioned or not; there being no difference between the execution of a note before the money is advanced, and the pretended sale of that note by the maker at an usurious discount; and the execution of such note afterwards, in order to secure the money advanced with usurious interest. The former would be clearly a shift to evade the statute: it would be no answer for the party to say,
61 *that there being nothing said about a loan he considered it a fair purchase of a note in market. He must know in the case supposed, that the note was given for no other consideration but that of the money so advanced: so too if the transaction had been between the known agent of the makers of the notes, acting for them in the negotiation, the same result must follow; but in this latter case, the knowledge in the purchaser of the agency must be acknowledged or proved, in order to put the case on the same ground of decision with one of an immediate communication between the parties: and it was to extract an acknowledgment of this important fact, if it existed, that the exception to the answer was taken. I think it would have been more proper unless an immediate communication between the parties was still intended to be insisted upon, to have amended the bill charging this knowledge, and also charging the knowledge of facts, which might have led the defendant to suspect it, if the plaintiff supposed proof of a knowledge of suspicious circumstances was enough.

That there was a known agency in this case is denied; and therefore had the case stood on bill and answer it must have been decided not to be an usurious transaction; unless the purchase of a negotiable bill, indorsed in blank, as this was, (the purchaser being ignorant that it was sold by the maker) at a discount greater than legal interest, be usury.

If a note of this kind is made and sent into market, say for the express purpose of being sold, and it is sold to A. at a discount not exceeding lawful interest, it is a good note in the hands of A. whether he purchase from a stranger, from the makers, or from their known agent. This is the situation of the most numerous class of notes negotiated at our banks, being made not on real transactions between maker and indorser, but for the accommodation of one or both of them. But suppose that A. afterwards, being under the necessity
62 of raising money, sends *this note into market again, still remaining indorsed in blank, and it is sold at a discount beyond lawful interest, this sale is not usury in the purchaser either as to the maker or holder. Or suppose A. sells his tobacco to his merchant B. on a credit, and receives in payment the note of B. given to C. and indorsed by him in blank, in payment. Say even that B. has such note in his possession, amounting only to the price agreed on for the tobacco, but made for the purpose of being sent into market, and finding he can purchase this crop of tobacco and would rather send that into market, delivers the note to A., such note executed after sale of the tobacco would surely be good in the hands of A. and so would that executed before, especially if the price of the tobacco had been fairly agreed on without reference to that note in particular, so as to shew that there was no usurious shift in relation to it. And if A. in either case sends such note into market, (indorsed in blank by C.) a purchaser of it, even from A. himself, at a discount greater than legal interest could not be deemed guilty of usury, even as to A. according to what I understand to be the uniform course of decision in this court, much less as to the maker and indorser.

Notes of this kind then, in the form which those in question bear, may be sold in market at a discount beyond legal interest, without subjecting the purchaser either to the odium or to the pains and penalties of usury. Had these notes been passed off by H. & H. dollar for dollar in payment of a debt contracted before or after their execution; or discounted at 6 per cent. as before stated, they would have been good and binding on the makers. They were then not usurious and void when made, for if so nothing afterwards can make them good. But like every thing else they were capable

of being the subject of an usurious contract made concerning them. Whether they
63 have been the subject of such *contract is the question before us, and that must be proved as in all other contracts and cases of that nature.

Sales of property of this kind, to wit, notes, bonds, stock, or other money securities are generally effected, in large towns, by brokers. Persons who are not the owners and known not to be the owners of the property sold, but who act for the owner, and whose name from a prudential motive, is frequently withheld, and the transaction is perfectly fair and legal; and I can neither find any case nor principle which would justify me in placing a sale made by such public agent, if he may be so called, on a ground different from one made by a private agent. All the sales above supposed might have been lawfully made by the public known broker, and under a direction too, to conceal the name of his principal.

There must be something then, beyond a bare purchase of a note of this kind, at a discount above legal interest, to stamp the transaction with the stain of usury, and in the case before us, according to the answer, the exception thereto, and the amended answer, (for the bill makes no specific charge on the subject,) the inquiry raised is, whether these notes were or were not procured from the makers through the agency of a known agent, acting for them in the negotiation? The answer denies a knowledge of this agency; and to my mind there is no proof of such knowledge, which could have weighed a moment in a trial at law, much less to overthrow the defendant's answer which until disproved must stand as testimony in the cause on the other side. If the answer was not sufficiently responsive it ought to have been excepted to.—In fact the bill makes no charge on this subject requiring a response, the exception puts the question on the ground of a known agency; the answer denies information of this agency, by the agent himself, and also that it was received from any other quarter, and nothing is charged or alleged from
64 which such knowledge might be *inferred; if it was competent for the court to infer any thing so as to support the charge of the crime of usury.

If the plaintiff had other grounds than those resting on the knowledge of the agency whereon he could establish the charge of usury, he ought to have amended his bill, and charged those grounds, so that issue might have been taken thereon, and the party have the benefit of his answer or of his demurrer if he was not bound to answer. At present the case must rest on that point only; unless indeed as is above stated, the purchase however fairly made, was per se, usurious, being at a greater discount than legal interest.

It has been urged in argument, that the defendant under the circumstances disclosed in the testimony, had good grounds to suspect that he was in reality purchasing the notes from the makers, and not from a bona fide holder, and that if he was even ignorant, it was wilful ignorance, and he shall be as much criminated thereby as with actual knowledge.

By this, I understand is meant to be affirmed in the first place, that these grounds of suspicion, as they are called, amount to sufficient proof that he knew the fact in question; and secondly that if he did not know, he ought to have inquired, and not doing so he is guilty of usury.

First, what are these circumstances, and are they sufficient to overthrow the answer; or to establish the fact if the answer had been silent on the subject, and not excepted to?

The notes had on them the names of undoubted men, who probably would not themselves send them into market to be sold at a sacrifice. Agreed. But if they had been given by the merchants to planters for tobacco, and sent by the latter, or by any persons to whom the latter might have passed them into market, they would have remained in the same form in which they now are, if the seller did not wish to make himself responsible, and the pur-
65 chaser *would have been satisfied, as in this case, with the indorsers. But the more the credit and caution is raised the greater would be the impression that the transaction was real. Would cautious men indorse for merchants whose circumstances were known to be such as described in the bill? Traders involved in pecuniary difficulties, who had become a prey to usurers.

The very standing of these indorsers was enough to satisfy any one not in the secrets of the leger, that this house was in good credit, and I have seen no proof in this cause, even now, to satisfy me as to their real condition, or whether they have wound up rich or poor. But merchants, since examined, say, that at that time, they were pressed for money, and because they knew it, Bruce, who responding to that part of the bill denies any particular information on that point, also knew it. A. purchases property to which B. has an equitable claim, it is proved that this equity was known to a great many of the neighbours of the seller and B.; and it is also proved that A. residing at a distance, is well acquainted in that neighbourhood: will this charge A. with actual knowledge, especially when he denies it? Again, a house may be pressed for money and yet be able to purchase on credit, and give notes such as these in payment—at least as long as they can procure such indorsers as those on these notes. How then a knowledge in Bruce of every thing that any witness (except Mertens who made no disclosure), says he knew, can effect this case I know not.

All the cases prove, that to constitute usury two wills must concur. It is not enough to prove circumstances known to one of the parties only, and which if known to both would show an assent in both to an usurious transaction. No one could with safety purchase property if he could be thus circumstanced, his money taken from him, heavy penalties and great odium incurred, when he, so far as he knew, was doing an act, not reprobated by the
66 *law, but sanctioned by the uniform decisions of this court.

In Hansborough v. Baylor,(a) the Judges

(a) 2 Munf. 36.

who gave opinions said, that the nature and substance of the transaction must be got at —the views of the parties must be ascertained—an intention to borrow is not enough; there must also be an intention to lend, and if the purchaser of such paper be ignorant of the intention to borrow he cannot be considered a lender: both must agree to the usurious transaction. So in Gibson v. Fristoe, Judge Pendleton says, if it be a mere sale of property, and bonds are as much property in this respect as any thing else, altho' at an under value, it is not usury; but if the bargain proceeds from, or is connected with, a treaty for a loan it is.

Second.—But there were sufficient grounds of suspicion to excite inquiry, and therefore he is guilty. I see no reported case, or principle of decision to justify this doctrine. The general position is, that the will must concur; but for will we substitute ignorance, ignorance I will for the present admit, arising from negligence or fault, but still ignorance.

The party then is punished not for actual known usury, but for his culpable ignorance of facts, which if known, would have made him guilty of usury. It will not do to say that this wilful or culpable ignorance is knowledge of the fact. If the circumstances prove knowledge, then it is not ignorance of any kind. But the proposition is that culpable ignorance is to be considered equal to actual knowledge and punished accordingly.—This is dangerous ground to tread upon when we are about to inculpate a fellow-citizen.

By the wise humanity of our laws, every man is presumed to be innocent until the contrary appears. But who can say here what were the grounds of suspicion known to Bruce? There is a total absence of proof as to him of any knowledge of such facts — others knew facts and
67 *we in the first place impute their knowledge to him, and then because that is sufficient to raise suspicion in our minds, we say he must have suspected also; for if he did not suspect tho' others might, he is not guilty of a fault, he may be unfortunate in being unsuspicious but not criminal, I think we cannot convict of crime on such grounds as these.

But if suspicion in the party is to inculpate him as much as knowledge, ought not the bill to charge that fact, that the party might answer to it, as he has done as to his knowledge? And is not testimony to this point out of the issue? But what is this fault arising from a failure to inquire? If A. is about to purchase property and has received such information of a prior equity in B. as would make an inquiry proper, he is bound to make it: why? because the other party is interested in asserting his claim and preventing the purchase. The reverse is the fact in the sale of notes. The seller is interested in concealing a fact which would exclude fair purchasers from the market, and would leave him a prey to usurers; and therefore a true state of the case could not be expected. Why then require such course to be pursued, unless some good will grow out of the establishment of the rule? And what good could result from establishing such a rule, when the party would be interested in withholding the truth, and might, by getting a friend as the holder, to take the note into market, or by a thousand other ways, elude the most diligent inquiry?

Nothing of this kind was held necessary in the case of Hansborough v. Baylor, in which case it appears the bond was made for sale, and not on a real transaction, but the purchaser there, as in this case, was ignorant of that fact.

Suppose we establish the rule that inquiry shall be made, and it shall turn out on inquiry, that the purchaser is told that the note is for a real transaction, and a
68 fair *subject of purchase but in the trial the reverse is proved, would it be usury, unless it was proved that the purchaser knew this, and that the inquiry was a mere device and shift? To my mind such inquiry, unless made necessary, by this court, when the inevitable result would be, that the truth would be concealed, would be a strong circumstance to prove a device. But suppose the party believes the note is sold by the maker, when it is not, but is in fact a legal transaction, will this mistaken belief make it usury? That was not held to be enough in the case of Price v. Campbell.

I am therefore opposed to any rule which is to operate retrospectively, unless I can see that such rule is so well founded in reason and propriety, that its existence, as a rule of correct conduct, may be supposed to exist previously in the minds of correct men, in regulating their transactions in life. I am the less disposed to do so, because this court in the above case has not hinted at such a necessity: and finally, because unless we are now to exclude money securities from the market, because a bad use may frequently be made of them, I can see no good, no security, against the evil, which is likely to result from its adoption.

Any course which the legislature in its wisdom may adopt, to exclude paper of this kind from market, will only operate prospectively, and I therefore prefer leaving the subject to them.

Taking it at present, that paper of this kind is a fair subject of traffic, but one which may be much abused, for the purpose of eluding the statute against usury, I shall be ready on all fit occasions to lend my aid in preventing this abuse—farther I cannot go. I must take care, that in weeding the tares, I do not destroy the wheat also.

For these reasons I was, formerly, for affirming the decree; but a new argument has taken place, of which I shall take a brief notice.

69 *The broad ground now taken is, that where a note is indorsed for the accommodation of the maker, in which case, the indorser having given no consideration for the note, could not maintain a suit against the maker, that such note can in no way be sold at a discount beyond legal interest, without subjecting the purchaser to the penalties of usury, although he may have believed himself a fair purchaser of a note available in market—and it is alleged that some cases in New-York, and also some

reported in Campbell, go this far, and that they have correctly settled the doctrine.

Jones v. Hake, is the first and leading case in New-York. There a note was sent by the maker to a money broker to raise money, after retaining it some time it was returned with a declaration, that if the maker would get another name on it, to wit, that of P. S. he could get him the money at 2 per cent. per month. The name was obtained, and the note returned to Haskins the broker, who advanced part of the money, and afterwards the residue, but the agent of the maker in this transaction did not know whether Haskins was the owner of the money or acted as agent for another, but he knew no other person as the lender.

Haskins was offered as a witness to prove, that he as broker for the maker sold the note to Hermison at a discount not exceeding legal interest, and Hermison, who was released and not interested, was also offered to prove that he gave full value, and that there was no usury. They were both rejected—and the Judge directed the Jury, that they were to consider Haskins as the lender, and as illegal interest was taken by him, the note was void in its inception, and bad though in the hands of an innocent purchaser. The jury found, however, for the plaintiff and on a motion made for a new trial, two Judges were of opinion, that on the evidence admitted the instruction was correct; but that there was error in rejecting the witnesses, and that the case ought to be
70 *tried on the whole evidence, considering Haskins as merely the agent of the maker and a competent witness.

The other two judges concurred that the witnesses were improperly rejected; but saw no ground for a new trial, for if Haskins was the agent of the maker, he was bound by his acts, and considering him in that relation only there is no proof of usury; the secret transactions between a principal and his agent, cannot influence the contract he makes for his principal with others. If all the Judges had concurred therefore, this case would only prove, that if the maker offers his note for discount, and it is discounted at usurious interest by the person to whom it is offered, it is usury—which is a principle I have admitted.

The case of Wilkie v. Roosevelt,(b) is precisely of this character. Marx & Co. the makers of the notes, were indebted to Goodrich the broker, and the note was taken from them by the latter, at a discount of 3¼ per cent. per month, and passed for full value to the plaintiff. It was there properly held, that Goodrich was the lender, and so the note being bad in its inception, could not be made good by being passed for full value to an innocent holder—a doctrine never disputed. However, even in this case, LEWIS, Chief Justice and LIVINGSTON dissented, though no opinion is reported as having been given by them.

The next case is that of Man v. the Commission Company. That case I understand to have been decided, on the point of usury in favour of the plaintiff. The Judges go on to lay down certain dicta, which seem broad in their character, it is true; but as they had no case before them to which those dicta could apply, and as the only authorities they refer to for them, were those of their own court above noticed, it is not to be presumed that they intended them to go beyond those cases, and if
71 *they did, I think those dicta are not only unsupported by, but contrary to all the leading doctrines here and elsewhere.

Indeed in this very case, they say, the principle is too well settled to be questioned, that a bill, free from usury in its concoction, may be sold at a discount below the legal rate of interest, and the reason is this: as the bill was free from usury between the immediate parties to it, no after transaction with another person, can as respects those parties invalidate it.

The case of Bennet v. Smith in the same book p. 357, was of this nature. There F. applied to H. to lend him money, he declined lending, but told him if he had any good notes he would buy. A few days after, F. brought notes executed by the defendants, which H. purchased at a discount of 21 per cent. but knew not as he said but that these notes were given to F. in the ordinary course of trade. A witness proved that F. applied to the defendants for a loan of their notes for $363: saying he had agreed with H. to sell notes to him at 21 per cent. discount.

This was held to be usury, and though broad doctrines are here also stated to have been settled in that court, yet this case might well be held to be one of usury. A loan was asked, it was shifted to a pretended purchase of paper, which the party had not then executed, the premium was agreed on and the paper soon after procured.

All the cases then in this court, were cases of usury in the inception, except one, and in that some broad dicta are thrown out, which, to the extent they are now said to go, are unsupported by any adjudged case.

The fallacy of the argument which goes to the full extent this case requires, it appears to me, must rest in this; not that a party fairly and innocently purchasing a note indorsed for the accommodation of the maker, is himself guilty of usury, and subject to the penalties of the statute, but that he is like the innocent purchaser of
72 *a note—usurious in its inception between other parties. For how a man can be guilty of a crime, when his act may or may not be innocent according as facts shall turn out thereafter, and of which he is ignorant, I cannot imagine. For instance; suppose these notes, indorsed by Allison, were for accommodation, but those indorsed by Atkinson for full value, and both purchased at the same moment, and under the same circumstances; can it be possible that the transaction as to one shall turn out afterwards to be proper and legal, and that as to the other the penalties of the act shall be incurred?

But to avoid a note for usury the penalties of the act must be incurred by somebody: there is no avoiding it without guilt

(b) 3d Johnson 66.

somewhere. In the case put, though Allison, the indorser, would not have subjected himself to those penalties, nor would Mertens, the broker,—Bruce must have done so, otherwise the note cannot be void. Could a jury, on a plea of not guilty, and the answer must at least be equal to such plea, find him guilty, and subject him to those penalties, on the evidence exhibited in this cause?

I think they surely could not: but suppose they could find, on those facts, that he knew he was in reality purchasing an accommodation note from the maker himself, still that will not satisfy the doctrine contended for. According to that doctrine, they must find him guilty, although he knew no such thing, but on the contrary believed he was doing what has been repeatedly sanctioned by this court. In other words they must find him guilty although they believe him to be innocent.

I shall not take a minute view of the cases in Campbell and the other cases cited, being satisfied, that they all turn on the ground that some person, in the original concoction of the note, has been guilty of a crime, and offence against the law, and although various circumstances, tending to prove that, will strike different minds in different ways, yet guilt must appear
73 in the concoction *of the business, and must be brought home, by full proof, to some one originally concerned in it.

As to the recovery being limited to the sum given for the notes, I consider it not necessary to decide what would be the case as between the holder and his immediate indorsee, this suit being by the maker against the holder. As to him the notes are either bad for usury, or good in toto as it at present appears to me. Besides, if this be a good defence it will be open at law, and not concluded by the dismission of this bill.

The decree must therefore be affirmed and this case put to rest, though from the division of the court, the law in this important point is not settled.*

BROOKE, Judge.

When this case was before decided I gave a silent assent to the decree of the Chancellor, because I did not perceive that there was any difference of opinion in the court on the principles, which were to govern it; from the very able opinion of the dissenting Judge, I have not been able to deduce a different conclusion. After the utmost attention to the argument, which has since been submitted to the court, and the most deliberate reflection on the cases adduced, I have not seen cause, in any material degree, to change my first impressions. The facts charged in the bill are as follows: it is alleged that Holloway and Hanserd, being much pressed for money applied to the defendant Bruce for a loan of $3603 78 which they obtained at the usurious interest of 2½ per cent. per month, and executed their
74 notes for $1400 each, negotiable *at the Bank of Virginia, with John Allison as indorser—the first note payable in six months, the second in nine months, and the third in twelve months after date; that the first and second notes were paid at maturity; and the third lodged in the bank; that afterward, the said Holloway and Hanserd, being in increased distress applied for a second loan which they obtained at more exorbitant interest, from 20 to 25 per cent. and executed two other notes, with Thomas Atkinson as indorser, payable at nine and ten months, negotiable at bank, which are also deposited in bank for payment: that Hanserd, the surviving partner of the firm, will not avail himself of the act against usury lest it should injure his credit, and that if the notes are paid out of the company subject, it will be ruinous to the estate of Holloway and prejudical to his creditors. To these allegations the defendant Bruce answered; he denies any knowledge of any communication for a loan, admits that he purchased the notes of Mertens the broker, at the discount stated, insists that it was a fair purchase without any particular knowledge of the circumstances of Holloway and Hanserd, or that the broker was their agent; that notes of persons of unquestionable solidity might have been purchased at a greater discount. To this answer an exception was taken, on the ground, that it was not sufficiently explicit as to the defendant Bruce's knowledge of the agency of Mertens the broker. In his second answer, he avers, that he did not recollect or believe that Mertens informed him, that he was the broker or agent of Holloway and Hanserd, or of either of them, or that he had received information to that effect from any other person. Whether this last answer was sufficient or not, it is not material to discuss, as no exception is taken to it; there is certainly an appearance of caution in it which deducts from it somewhat, the credit, that otherwise would have been due to it; had the plaintiff insisted on a discovery in his bill, he ought to have excepted, and he might have extorted
75 *from the defendant a more direct and full answer; in the shape which he has given to it he might, if not satisfied, have again excepted; and the defendant would have then had the opportunity of shewing if he could, that in effect his answer was as full as a more elaborate statement of the circumstances could have made it: but the plaintiff took issue on it and relies on the evidence of Mertens, the broker, and of Haxall and others, which last is not material, to support the charges in his bill: if they are proved there can be no doubt of the usury. The objection by the counsel for the defendant, that the allegata in the bill do not agree with the probata, will be found upon examination, not to be of importance: the difference between a direct communication between Holloway and Hanserd and the defendant Bruce, and an indirect one through Mertens, if proved to be their agent, will not be material; Mertens' testimony is most essential,

*It was in this case understood by the bar, that the concurrence of less than a majority of the whole court, though it would determine the rights of the parties in the particular cause, could not fix a precedent for future decisions. Consequently, the court now consisting of five members, but only three sitting in this cause, the opinion of the two concurring Judges would not close the questions discussed in the case, should they arise in another controversy.—(Note by the Reporter.)

and if it is not as full as it might have been, the plaintiff had the power to make it so by a more minute and precise examination of him. He proves, I think, that he was a general broker in Petersburg, in which place the parties, except the defendant, Bruce, resided; that he was in the practice, as broker, of selling for those pressed for money, bills, notes, &c. and that he had frequently sold notes for H. & H., and that knowing the defendant Bruce purchased paper, he applied to him to purchase the first notes, described in the bill of the complainant, for the purpose of seeing whether he would give more for them than had been offered by others; that he purchased them at the price stated; that afterward he applied to him to purchase the second set of notes mentioned, and that he also purchased them at the discount stated in the bill, a discount not greater than was given for as good paper as any in the town: paying by a draft on Marx & Co. of Richmond; that he considered these transactions as sales commonly made of bonds and notes at a discount, and not as transactions between a broker 76 *and a person leaving money in his hands to share with; that he made it a rule to make no communications to a person purchasing; that it was generally supposed, that the drawers were in distress for money, but did not know that Bruce had any particular knowledge of it; that the indorsers of the notes were considered to be in good credit, &c. Haxall says it was generally understood in Petersburg, that the drawers were distressed for money, that the defendant Bruce was well acquainted with them. The other testimony adds same particular instances in which he had purchased or discounted paper at a premium. The first question upon the testimony, I think, is, was the defendant Bruce informed that he was dealing with H. & H. for the notes in question, or had he such knowledge of the real transaction, as to subject him to the charge of a corrupt intention to violate the act against usury? My own impression is, that though he may have known the fact, that the notes were the property of the drawers, yet it is not so proved as to convict him of the charge. Upon the evidence, the notes might have belonged to others who had received them for value, and preferred selling them, and waiting until they came to maturity. Direct proof, I admit, is not required in these cases, but the inference ought to be as strong, as would be required to convict a party of the breach of a penal law in other cases. His knowledge that the drawers were pressed for money, if directly proved, does not produce the necessary inference that the notes were known to be their property; his knowledge of the high credit of the indorsers, if it had been fixed on him by the testimony, would repel the idea that the notes were sold for their benefit; but, yet, the testimony of Mertens shews, that he often sold notes and bills for the benefit of persons, whose names were not on them; it would be, I think, hazardous to pronounce, that the defendant Bruce knew that the notes in question were not notes of that description, that ought at least to be satisfactorily shewn. If 77 it *were proved that he knew the indorsers were not pressed for money, the inference would be a more direct one, that he knew they belonged to the drawers, and that in dealing with Mertens the broker, he was dealing with their agent: If I could come to this conclusion, I should have no doubt of the usury, but not being able to fix upon the defendant Bruce the intention to commit usury, I shall proceed to consider the cases that have been relied on, some of which have been supposed to subject him to the consequences of committing usury. In the absence of testimony that he intends to do so, the case from 1 Raymond cited by Mr. Call shews, that a bill may be sold without indorsement, and that the doctrine sanctioned in this court is not new in the case of Gibson and Fristoe. Mr. Pendleton said that in a mere sale of property, and bonds are, in this respect, as much property as any thing else, altho' at an under value, it is not usury here, because price is a thing unfixt, and depends upon the convenience of the contracting parties; that bills and notes are as much so I presume will not be disputed. Judge Roane in the case of Price v. Campbell, said, that in cases of this kind we are at liberty to infer usury from the circumstances of the transaction; but in making this inference, we are confined to the inquiry whether there is a corrupt contract or agreement for usurious interest. No inference can be drawn from these cases, that an opinion was entertained by the Judges, that usury might be committed without proof of a corrupt agreement or contract in violation of the statute. These cases upon authority legalise a bona fide sale of bonds and bills —and notes stand on the same footing, nor are any of the cases cited to the contrary—whether contracts for the purchase of bills, bonds, or notes are a colour or pretence for an usurious loan, or a fair and honest transaction, is always to be decided by their circumstances. See Cowper's 78 Rep. 12 and 770; Doug. *708 and 3 Term Rep.(c) If a fair purchase, no matter what the discount, it is not usury. All the cases seem to proceed on this idea, and upon examination, I think it will be found, that there is no case in which a party, not participating in the corrupt concoction of the contract, has been deemed a usurer: that the statute against usury will protect a party to an usurious contract though ignorant of the usury is not denied; but that under such circumstances it will subject the party to the consequences of committing usury is no where decided. In the case of Ackland v. Pierce, 2 Camp. 559, Le Blanck, Judge, said, it was not material that the drawer of the bill, Prince, was ignorant of the usury which was between Waine the acceptor, and one White who discounted it. In that case, if I understand it, had the bill been a perfect bill before the usurious agreement between Waine and White to discount it, it would have been a valid bill; it was the corrupt agreement to discount it at a greater than legal interest, in the inception of the contract itself, that made it usurious; it was a shift to evade the statute.

(c) Tate v. Wellings, 581.

Thus Lord Kenyon held in the case of Parke v. Eleason and others,(d) that a bill legal in its inception, indorsed by A. to B. for an usurious consideration, and by B. to C. without notice of the usury, and afterwards paid by C. to the assignees of B. who was bankrupt, though void as between A. and B. was valid in the hands of the assignees, who were clothed with the rights of C. the innocent indorsee Whether the notes in the present case were legal in the inception will be noticed hereafter; a contract usurious in its inception cannot be rendered valid altho' in the hands of an innocent indorsee without notice:(e) but on the contrary if it be originally fair and not usurious, no intermediate usury can affect it in the hands of a bona fide holder.

(f) These last cases are referred to not
79 *as authorities, but because they were cited by the counsel, and conform to the English decisions. The principle seems to be settled, that whether on the one hand, even a bona fide holder of a bill must lose his remedy if there be usury in the concoction or inception of the bill except as against the party to whom he paid value, on the other if the contract be fair between the original parties to it and no usury in that contract, it will be valid in the hands of a bona fide purchaser, though at a greater than legal interest. The latter conclusion follows, from the settled law that a note may be sold. If the notes in the present case were tainted with the usury in their inception; if there was a corrupt agreement between H. and H. and the indorsers, Bruce must lose his debt as against the drawers; and if also, he had participated in that agreement, or had knowledge of it, he would be condemned as a usurer. None of the cases cited go farther: in the case in 1 Camp. 141, much relied on, King, the broker agreed with the acceptor to get the bills discounted at 40 per cent. the arrangement was made before the bills were accepted, it was a device to evade the statute: if Bruce had discounted the notes at legal interest, there could have been no pretence that they were usurious; was he a party to any agreement that they should be discounted at a higher rate; was he apprised that they were made so to be discounted, or that they were the bills of the drawers, from which to have inferred that fact. In the case of Hamilton v. Le Grange,(g) it is said by Justice Eyre, that in construing any particular circumstances in order to found a conclusion of fact, especially in cases in which usury is alleged, we ought to deal with those circumstances according to the common sense of mankind. Pursuing the rule, the circumstances detailed by the broker, cannot lead us to any certain con-
conclusion, that Bruce knew the notes to
80 have been made for sale and *certainly not to the conclusion, that he was a party to the making of the notes for that object. As before remarked, Mertens expressly states, that he was in the practice of selling notes also of a different description; notes as I understand not made for sale, but real business notes which were not indorsed by the owner. Bruce was in the trade of buying paper, and it appears, gave for the notes in question, what the best paper free from the taint of usury sold for. It is impossible to infer from these circumstances, that he meant to practice usury in this case. However careless about the violation of law, he would not without an adequate motive hazard the loss of his money. In the case of Hansborough v. Baylor, though not fully reported, it must, I think, be admitted that the ignorance of the latter of the transaction between the former and Rootes, was the real ground on which it was decided, that the purchase of the bond by Hansborough was not usurious; the bond was made to be sold at usurious interest. Judge Tucker says, that whatever even Baylor's intentions were, Hansborough was ignorant of them; and though the former might even have intended to borrow upon usury, the latter seems only to have intended to make a fair purchase. The case in 3 Johnson (Wilkie v. Roosevelt) is not in conflict with this case; the purchaser was apprised of the object for which the bill was made, and though Wilkie was a bona fide holder, he could not recover as against the makers. There was usury in the concoction of the note, in which those under whom he claimed participated.—Marx & Co. made a note to the defendant which he indorsed—the Company then sent it to Goodrich a broker, who received it at 3¼ per cent. discount, and in discharge of a debt due by the drawers to him and indorsed it to the plaintiff. The case in 2 Johns. Jones v. Hake is of the same character; the general remark by one of the Judges that a note made to be discounted
at illegal interest, is usurious, in the
81 hands of a bona fide holder, is *to be taken in relation to the actual case before the court. It applies to cases in which, as in the preceding, the purchaser of the bill was a party to the agreement or knew of the purpose for which the bill was made. In 15 Johns. Mun v. the commission company, it was decided that a bill valid in its inception is valid in the hands of an innocent indorsee though discounted at a higher rate than the legal interest. In Bennet v. Smith and Phelps, it was said that a bill was waste paper until discounted, if nothing was due from the drawer to the payee, but I understand it to be law, that a party who indorses a bill for another makes him his debtor to the amount, because of his responsibility to pay. In the present case it could not be insisted on by the drawers that they were not indebted to the indorsers. If the notes had been discounted in bank, or Bruce had discounted them at legal interest, such a pretence could not have been set up. The want of actual consideration between the drawers and indorsers is not material, after the bill has gone into the hands of one who has paid value for it, even though a fraud be committed by the indorser in the bill: yet this court held in the case of Williamson v. Robertson that the drawer was liable upon the principle, that he who trusts most, must be the loser in a controversy with a

(d) 1 East. 94.
(e) Wilkie v. Roosevelt, 3 Johnston 206, and Bay's Rep.; Payne v. Tervant, 23.
(f) Tatty v. May, 1 Bay's Rep. 486.
(g) 2 H. Black. 144.

party who gave value for the bill without any knowledge of the fraud.

I have not noticed Mr. Call's second point, because I am of opinion it does not arise here; whether Bruce can recover more than he paid for the notes is a question which may be decided at law, and it is not alleged in the bill that Hanserd the surviving partner will not avail himself of any other defence, except the plea of usury; upon the whole, I am still of opinion, that the Chancellor's decree is correct and ought to be affirmed.

ROANE, Judge. This is a bill brought by the appellant, as administrator of
82 E. B. Holloway deceased, *against the appellee and others. It charges, that the late house of Holloway and Hanserd, of which the appellant's intestate was a member, being greatly pressed for money, became a prey to usurers and that, among others, they applied, on the 14th April 1811, to the appellee, who was apprised of their situation, for the loan of $3603 78, which they obtained from him, at the usurious and unconscionable interest of 1½ per cent. per month, and to cover which loan, they executed three notes for 1400 dollars each, with John Allison Esqr. as indorser, payable at six, nine and twelve months, respectively, as by a memorandum in the hand writing of the said intestate, and referred to as part of the bill, appeared. The bill makes a precisely similar charge in relation to another sum obtained on the 10th October 1811, at the still more exorbitant interest, as is alleged, of from 20 to 25 per cent. per annum: the said house, as is further charged being then in increased difficulties, and that this was known to the appellee; and to cover which loan, notes were given, with Thomas Atkinson Esqr. as indorser, payable at nine and ten months respectively after date.

The bill prays "that the appellees may full answer make to the premises;" and again, it prays generally that the appellee may set forth "all that he knows respecting the premises."

To the important allegations of the bill respecting the pecuniary distresses of the house in question, the appellee makes no other answer, than that he had no particular information as to their circumstances. By this form of expression he endeavoured to evade the interrogatories aforesaid; although it is proved in the cause, that he must have been conusant of the general notoriety which prevailed, in relation to those distresses. To so much of the bill as charges in substance, by (referring to the memorandum above mentioned), that Mertens, who is therein named, was the
83 agent of Holloway and Hanserd, *in the transaction aforesaid, the appellee only responds, in his original answer, after admitting that the negotiation was effected with him; that the question, whether he was their agent or not, was one with which he had nothing to do. And when pressed by the exception of the appellant for a more explicit answer on this point, he still only states, in his amended answer, that he does not recollect or believe, that Mertens informed him, that he was their agent, nor that he received information from any other quarter: all of which may be strictly true, and yet the appellee may have undoubtedly considered Mertens as their agent in that transaction: he must have so considered him from the combined circumstances hereafter more particularly stated, and, especially, from the facts that Mertens was the known agent or broker for others, and seldom or never traded in paper of his own. To so much of the bill, as charges the transaction to have been a loan, covered by the notes in question, the appellee, after using the common slang (if I may use so common an expression), respecting the legality and even morality of purchasing notes, at ever so enormous a rate of discount, only says, that it was a fair purchase of the notes, and not a loan; whereas the receipt from a man of his own notes, payable at a future day, in consideration of money advanced, is only a loan evidenced by a note and not a purchase; and whether it is a loan or a purchase, is, besides, an inference of law, which the party is not competent to swear to. Again: the appellee says in his answer, that no communication for a loan ever passed between H. & H. and him. This may be true, and yet such communication may have passed from their agent: and, also, this assertion may be bottomed upon the erroneous supposition first stated, that the obtaining from a man his own note, for money advanced to him, is a purchase of the note and not a loan of money. Besides, there may well be a loan, without any formal communication
84 therefor. A *receipt by one man of 10l. and a promise to pay 20l. therefor, at the end of the year, without more being said, or passing between the parties, is to all intents and purposes, a loan. Words in this case are not necessary: in the language of the books res ipsa loquitur. A formal communication for a loan is only necessary to be shewn, when a transaction has the form of a sale or the like, and the device is to be detected by shewing the real cause which brought the parties together. (Ord on Usury, 74; 1 Call 62, Gibson and Fristoe.)

By these and such like equivocations, prevarications, and mental reservations, the appellee has sought to shelter himself, from the consequences of a full and frank answer to the charges contained in the bill. While I do not say that these equivocations operate an admission of the truth of the facts to which they relate, they on the contrary oppose no certain and positive denial to those facts. They give a character also to the answer which is very unfavorable to it, even in relation to such parts as would, otherwise be free from objection. The spirit of the maxim "falsum in uno, falsum in omnibus," forcibly applies to it, and disparages the whole answer. At the same time, I must claim the right to say, that if this answer were one of the purest model, I do not know that its matter would at all vary my conclusion upon the subject.

The case made by the bill, is, that of an usurious loan of money, covered by the notes in question: and the ground taken by the answer, is, only, that the transaction was a purchase of the notes. The answer however does not state, that the appellee purchased

them from Mertens, (the broker,) from the respective indorsers of them, or from any other person, being the actual owner of the said notes. The answer could not have taken this ground, as is abundantly shewn by the testimony. The question we are called upon to decide is, therefore, whether a note which has never been consummated in favor *of another person, for a valuable consideration, nor is purchased from that other, but receives its existence for the first time, in consequence of a usurious transaction, of which it forms a part, and which is only given by the drawer at the time of that transaction, and as an evidence of the contract, is free from the objection of usury? The question more particularly is, whether a contract which is manifestly usurious in itself, ceases to be so, in consequence of the borrower's putting in the hands of the lender, for the more easy proof of the promise, a writing, evidencing the existence of that promise?

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This is the true question before us, upon this record. I shall therefore steer entirely clear of the question, whether a man owning the bona fide note of another, has a right to sell the same, at an usurious rate of discount. This question has been affirmatively settled, and I do not mean to go into it, at this time: but I am authorised to say, that even a transaction having the form of the sale of such a note, may be set aside, as a device to elude the act of usury by showing, that the purpose of borrowing and lending brought the parties together. This was decided in the aforesaid case of Gibson and Fristoe: and ths doctrine applies a fortiori to the case of a transfer of a man's own note.

That the notes in question in this case were of the latter character and not of the former, is undoubtedly inferable from the circumstances, and is positively proved by the testimony. Of this fact the appellee could not have been ignorant: but it is entirely unimportant whether he were so or not, if in fact, such was the nature of the transaction. I will first shew what are the circumstances which go to establish this fact, and then refer to the positive testimony.

In considering the circumstances which warranted a presumption that these were the notes of H. & H., and of none other, and therefore, were neither consummated before this transaction, nor free from the objection of *usury, it is objected in the present place, that usury is not to be presumed. I admit that there is no testimony: but, it is most clear, that usury may be presumed from the circumstances, where they are sufficiently strong; and it would be strange indeed if it were not so, when even the crime of treason or murder may be inferred from circumstances. We are told in Ord on usury,(h) that circumstances are to be relied on to prove a contract to be merely a shift to evade the provision of the statute: Again, it is said, (i) that many circumstance weigh in questions of usury, and that the courts formed their decisions upon all the circumstances of each case, without saying what weight any single circumstance would have. This is not only the established doctrine on this subject, but the same author has given us an enumeration of the circumstances most usually relied on in such cases: as for example the slightness of the hazard, the inadequacy of the price, and the distresses of the party.(k) Their distresses are proved to have existed in this case, and are always important in giving a character to the transaction. They compel the borrower to enter into the usurious contract: he is no longer considered particeps criminis in the transaction;(l) he is scarcely a free agent, and is held to be in the emphatical language of the books, "a slave to the lender."(m)

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That circumstances are to be resorted to in cases of this description results from necessity, and from the fact that they are often the only evidence to be expected. In 4 Hening's Statutes at large (n) it is said, "that usurious contracts are always made in secret, and with such caution, that they can seldom be detected in the ordinary course of evidence;" and hence a bill for their discovery has been provided. In the case before us we cannot expect positive evidence. We cannot expect the appellee *to say that he was informed, that the notes were the property of the makers, and not of the broker or indorsers; for that was a fact about which he asked no question, lest it might be affirmatively discovered, and afterwards rise up in judgment against him. We cannot expect to show that the borrower obtruded this testimony upon him, because, for the same reason that would have broken up the treaty. We cannot expect the broker will volunteer this information to the usurer: he knew his interest too well, and he now tells us that it was his practice never to let the lender know who the borrower was. Nor are we to expect this information from other witnesses: they are sedulously kept out of the way in such transactions. Unless, therefore, we resort to circumstances, we may get no testimony whatever, and had as well, at once repeal the statute.

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If circumstances are permitted to operate, those existing in this case abundantly shew, that H. & H. were the borrowers, and neither Mertens, (the broker,) nor neither of the endorsers of the notes in question; and that this must have been known, without the possibility of doubt to the appellee. It is proved in the cause, that the appellee was well acquainted with the circumstances of the mercantile houses in Petersburg, and that he must have known that H. & H. were much distressed for money. On the contrary, it is shewn, that both of the indorsers were in easy circumstances, and one of them, at least, very wealthy, and even himself, a money lender: and as for Mertens, he not only acted as a broker, but he tells us, expressly, that as he acted as a broker, the appellee could not well suppose, that the notes were sold on his own account. Is it possible from these

(h) Page 69.
(i) Ib. 87.

(k) Ord 69, 74, 84.
(l) Ord 116.
(m) Doug. Rep. 698; Smith v. Bromley.
(n) Page 390.

facts, from others for which I refer, particularly, to the record, and from the relation, circumstances and situation of the parties, that the appellee could have doubted, for a moment, that it was H. & H., and not the other parties who were making this
88 ruinous sacrifice? It is not; nor *is it even pretended by the appellee himself. The notes, in question, so far from being shewn to have been the property of the indorsers, are not shown to have been even in their possession: and as to Mertens, when they were in his possession, it was as agent for H. & H., and for the single purpose of being discounted for an illegal premium.

But we are not compelled to rely on circumstances, only, as to the ownership of the notes in question. Mertens, himself, proves (and he is both a competent witness, and his deposition is made evidence in the cause, by consent), that all these notes were put into his hands by Holloway. No ownership by any other person is even pretended. H. & H. were, therefore, the owners of the notes, or rather of the blank paper, at the time and this was well known to the appellee. This knowledge, however, is quite unimportant, if the fact be so, as the cases to be presently cited unquestionably prove. Every argument which goes to shew that an innocent indorsee of a note given on an usurious consideration, without his knowledge of the usury, will be bound thereby, holds a fortiori as to a party to the transaction. We cannot in general suppose him ignorant of the real character of the transaction. The proof of such knowledge would be, in most cases, impossible; and to require it would operate a repeal, pro tanto of the act of usury.

If then it is settled, in this case, that H. & H. were the real owners of these notes, or of this paper, at the time of the negotiation, and no other person; and, much more, if that fact was known, as it unquestionably was, to the appellee, the case is brought to a simple point. In that view it was not a consummated and bona fide note of another, which was sold by the owner, and which in its origin and consummation was free from the taint of usury, but it was a blank piece of paper, which as an effective note, was coeval with, and only ushered into existence by the usurious
89 contract, and was only delivered *to the appellee as an evidence of that contract. In that view, also, it was, in relation to the indorsers, only an accommodation note. Although their names were on them, they paid no consideration therefor, had no interest therein, nor possession thereof, and could bring no suit upon them. The first person who paid a consideration therefor, was the appellee, and he is the first person who, but for the usurious consideration, could have maintained an action upon them. The names of the indorsers being only added thereto, as a further security, they could neither bring any suit upon them, independently of the usury, nor assign them to any person having notice of their real character. All this was decided by this court in the case of Norvel v. Hudgins.(o) In that case it was decided, that the existence of the indorser's name, upon the note, was no conclusive evidence of ownership; and that is the only ground on which the appellee's counsel argued, contrary to the facts proved in the cause, that these notes may have been the property of the indorsers, or of some person other than the makers. Notwithstanding the existence of these names, on the notes before us, the makers might, (upon the testimony,) have thrown them into the fire.

The difference, as to this particular, between an inchoate note standing under these circumstances, and a real bona fide note, of one man held and sold by another, is so clearly settled by adjudged cases, that I will now only proceed to cite them.

I will first rely on some cases decided in the Supreme court of the State of New-York. They are equally entitled to credit, from the highly commercial character of that State, and the ability of the judges who decided them. I quote them, also, for the further reason, that they entirely accord with my opinion. These decisions depend upon the statute of usury of the State
90 of New-York, *which one of the counsel said he had examined, and found to be, substantially, the same with our act.

In the case of Mun v. the Commission company, &c.(p) it was decided, that the true test in cases upon bills and notes, was whether the bill or note was perfected, before it was discounted at usurious interest: that as it is settled, that a bill or note which is free from usury, in its concoction, may be sold at an usurious discount, for that as it was free from usury between the original parties, no after transaction can, as to these parties, invalidate it; so, it is equally clear, that if a bill or note which is made for the purpose of raising money on it, is discounted at an usurious rate of interest, and where none of the parties whose names are on it, can, when it becomes mature, bring a suit upon it, provided it had not been discounted, in that case such discounting would be usurious, and the bill void: and that if a bill or note in which the indorser has no interest, but merely lent his name for accommodation, is discounted at an usurious rate of interest, the purchase thereof is void, because until the time of the purchase, it remained a mere blank piece of paper. This is, precisely, the predicament of the notes before us.

In the case of Bennet v. Smith,(q) the principle of the foregoing decision is entirely recognised and ratified; because a note made for the purpose of being discounted, at a usurious rate, and indorsed for the accommodation of the maker, was void in its original formation, and it was held that it was quite immaterial whether the purchaser knew of the manner in which the notes were made or not. I infer, therefore, that it is the criterion before mentioned, and not his knowledge, which decides the fate of the transaction.

In the case of Jones v. Hake (r) where A. made his note payable to B.; which

(o) 4 Mun. 496.

(p) 15 Johnson's Rep. p. 54.
(q) Ibid. p. 355.
(r) 2 Johnson's Rep. p. 60.

91 was indorsed by him, and C. *and D., and sent by A. to a broker to raise money upon, and E. bought it at an usurious rate of discount, in an action by G. this note was held to be usurious and void. It was held by the court, that this note was indorsed for the accommodation of A. alone; that no money was paid therefor by any of the indorsers; that it was a contract between A. by his agent, (the broker,) and E. who lent the money, and took the note as his security; that the lender E. was in reality the first holder of the note, for value, or who could sue upon it; and that this pretended sale was, therefore, a shift to evade the provisions of the statute.

This case seems entirely in point with the case before us. I am unable to discover even a scintilla of difference between them.

Again; in the case of Wilkie v. Roosevelt (s) where A. made his note to B., who indorsed it for the accommodation of A. and A. passed it by means of a broker to C., at an usurious rate of discount, it was held, that although the note was indorsed by B. for the accommodation of A., it passed immediately from A. to C., and that the transaction was in its inception usurious, and the note consequently void. It was further held that B. was merely a collateral security for the accommodation of A., that he, B. paid no consideration for it, but that it passed to the broker to be discounted at an usurious rate of interest, and when discounted, it passed immediately from A. to the purchaser. It was so held, I presume, on the further principle, that a note which is in possession of a man's agent is still in his possession. This case is also full up to the very point before us.

If gentlemen are more fond of cases from Westminster-Hall, than of these northern lights, as one of the counsel was pleased to term them, I will now endeavour to gratify them.

92 *In the case of Young v. Wright in court of K. B. in England,(t) where A. drew a bill of exchange on B., payable in three months, to his (A.'s) order, and A. indorsed it to C., who indorsed it to the plaintiff; and A. having put it into B.'s hands for whose accommodation it was drawn, and D. swore that he was in the habit of discounting bills for B. at an usurious rate of discount, and had agreed to get it discounted at 40 per cent. for B., and that, on these terms, it was passed to E., it was held by Lord Ellenborough, that at the time the bill was drawn there was a corrupt agreement that it should be discounted at usurious interest, by which it was vitiated, into whose hands, soever, it should come.

In principle there is no difference between this case, and those first cited, or the case at bar. There is no difference between the issue of a note which is preceded by an usurious agreement, and one whose emanation is coeval with such agreement, and forms a part of the usurious transaction.

In the case reported 1 Marshall's Rep. 210, in the C. B. in England, it was held that as the object of the makers of the note was to accommodate the payee, he (the payee) could not have sued them. This accords with all the cases before cited, and with the aforesaid case of Norvel v. Hudgins. It shews that a note indorsed for accommodation is not such a complete and perfected note, as would avoid the objection of the statute, under the distinction I have taken.

In full accordance with the foregoing decisions in both their branches are the opinions of the elementary writers upon the subject. Thus in Ord(u) it is held, that where a note is originally good, no usurious transaction between the intermediate parties can affect the title thereto in the hands of a bona fide holder; and again, (p. 100) it is held that a security which is originally valid, cannot be avoided by a subsequent usurious contract. So on the 93 *other hand it is held (ib. p. 92) that a contract which is usurious in its inception cannot be afterwards rendered valid, in the hands of a bona fide indorsee, without notice. Every thing therefore, depends upon the perfection and consummation of the note, anterior to the usurious transaction.

I have said that although the appellee, in the case before us, had full knowledge of the usurious nature of the transaction, that knowlege was entirely unimportant. The case of Acklan v. Pearce (v) entirely proves that position. In that case a bill of exchange was held void in the hands of a bona fide assignee, it being drawn in consequence of a usurious agreement, although the drawer to whose use it was made payable, was ignorant of such agreement, and the court held that if the bill must be valid because the parties to it cannot be shewn to have had notice of the usurious agreement, it would afford an easy recipe, to evade the provisions of the statute. The same doctrine is entirely held in the case of Lowe v. Waller. (w)

Nothing now said by me conflicts, in the smallest degree, with the decision of this court in the case of Hansborough v. Baylor. I have the original record in that case, now before me. By that record it appears, to have been a fair and naked case, of a sale of bonds. For any thing appearing in evidence, in that case, Rootes may have been, as Hansborough swears, he believed him to be, the bona fide owner of Baylor's bonds. Rootes was a farmer, and not a broker, as Mertens was. He too assigned the bonds, which is generally done by the owner, and never by a broker; whereas Mertens did not assign the notes, in the case before us. Hansborough also swears (and his answer is corroborated by the testimony,) that he did not treat with Rootes, as the agent of Baylor. He denies that he treated with him for a loan, and asserted that his only object was to purchase 94 the bonds; *and he expressly denied, that the transaction was a device, to elude the provisions of the act of usury. In all these important particulars, that case stands strongly contrasted with the case

(s) 3 Johnson, 66.
(t) 1 Camp. 140.

(u) P. 96.
(v) 1 Camp. 590.
(w) Doug. 708.

before us. In that case Hansborough swore to facts whch could not have been sworn to, by the present appellee. It is not shewn in that case, that Rootes was not the owner of the bonds; that they passed to him without consideration; or that the transaction was in its origin invalid. In these points also the two cases entirely differ. It is true that Hansborough admits, that he was informed that Rootes was not the owner of the bonds, after the time of his purchase: but this information may have been erroneous: and it is not established to be correct, by the testimony. That case, therefore, being one of a simple sale of bonds, as far as appears in evidence, decides nothing as to the case before us.

The single circumstance of there being an excess of the legal interest received in this case, determines the contract to be usurious.(x) Again, it is said, that intentionally taking more than six per cent. for the use of money, alone, makes the contract usurious.(ib. 88.) This doctrine is more emphatically shewn by the decision, that where more than six per centum is reserved, by the mistake of the scrivener, and contrary to the intention of the party, the contract is not held to be usurious.(ib. 59.) In such case the exception proves the rule. It shews that although there must be a corrupt intent in the contracter to constitute usury,(ib.) that intent is inferred, from the single fact, that more than legal interest is reserved. Such a reservation, to say the least, throws the labouring oar on the adverse party; it throws the onus probandi upon the appellee, in the case before us.

Although, therefore, the form of the transaction, in the case before us, is that of a sale of notes, and although in the case of the perfected notes of one man
95 bona fide *held by another, they may be sold by him, at any rate of discount, when considered as a fair and insulated transaction, the latter is not the case in the present instance, and the form of its transaction will not elude the provisions of this statute. We are told by Lord Mansfield in the aforesaid case of Lowe v. Waller, that the real question in cases of this kind, is, what is the substance of the transaction, and not what is its form and colour. He also tells us that where the substance of it is a borrowing and lending, at an usurious interest, the wit of man is not capable of taking the case out of the operation of the statute. We cannot "wink so hard" to borrow another expression from this great judge, as not to see that the substance of this case (now before us) was to borrow money at an usurious interest, or to use the language of the broker (Mertens) "to raise money by shaving paper."

In the time of Lord Mansfield the most usual form of usury, in England, was by a pretended sale of goods,(y) the most usual form here is, perhaps, by a pretended sale of notes. Formerly we are told by the same judge (z) when one mode of usury which was most common was prohibited by a statute, it put the usurers upon other contrivances to evade the statute, and he adds that experience has taught the legislature in England, in their modern acts upon this subject, not to specify and prohibit particular modes of usury, because that only led to evasion, but the better way was, to enact generally, that no shift or device should enable men to get more than six per cent. on a loan. The same idea is kept up in Ord (a) and he adds, the English legislature were on this ground induced to use the more general terms "directly" or "indirectly" to prohibit the practice of usury. The words of our act are equally general and comprehensive. It requires only the attention of the courts, to decide what
96 *is the substance of the transaction, to look beyond the mere form and to further the policy of the legislature. The courts ought to test each case by its particular circumstances, under that general criterion which the legislature has deemed it best to establish, instead of detailing and prohibiting particular modes of usury.

Acting upon this principle, I cannot, for a moment, doubt, but that this case is, emphatically, within the statute. The substance of the transaction is, most clearly, that the appellee was to lend to H. & H. the money in question, for a considerable time, which they promised, (by means of the notes before us) to repay him with an usurious and an exorbitant interest. The furnishing the appellee with explicit evidence of his right, under the contract, cannot cleanse that contract of its impurity. We have undoubtedly gone far enough in sanctioning the sales of the consummated notes of others, bona fide held by the seller. at an usurious rate of discount. This, it must be confessed, is a sufficiently fruitful source of usury. I again beg it may be distinctly understood, that I do not now mean to touch that question. That question is not new, and, perhaps, may not be considered open. I will not, however, go further and permit a man to sell, not his own note, for a note pre-supposes a real payee, as well as a drawer, but his own blank paper at an illegal rate of discount. I will not, by this means, disrobe the consideration on which it is granted, of its usurious taint, and repeal pro tanto the act of usury. If an infamous transaction is not merged and purified by giving a bond upon it, which, generally, in itself, supports a good consideration, far less is it, when only a note is given as an evidence of that contract. In all cases of bills or notes, their consideration must be shewn to be good, save only, in the case of bills of exchange, when they have passed into hands other than
97 those of *the original parties thereto.

(b) As to the appellee, he must shew that the consideration on which the notes in question were founded, was not liable to objection: the converse of this is however, shewn, on the part of the appellant. Under the form of selling a man's own notes, I will not legalise a contract, whereby in substance, for 10l. now received, he is to pay 20l. at the end of six months; and that too, out of his own coffers. The proposition

(x) Ord 47.
(y) Doug. 710, Lowe v. Waller.
(z) Ibid.

(a) P. 68.
(b) Chitty 16.

is monstrous, and cannot for a moment be entertained, by those who disclaim the power to repeal an act of the legislature. There could be no objection to my granting my note for 20l. for the 10l. received as aforesaid, did not the grant carry with it, the right to receive the money; to receive more than the sum lent, with an interest at the rate of six per centum per annum. There would be no objection to the transfer, if it carried with it the paper and the paper only.

When I formerly gave an opinion in this case, I signified my willingness, in the spirit of accommodation to the other judges, to consent to an issue to try the question. That overture was not accepted by them, and I now, explicitly, withdraw it. I cannot now consent to such an issue; because it is proved to my conception, as clearly as human testimony can do it, that the transaction in question, both in its origin and consummation was founded in usury. It is equally clearly proved, that this was known to the appellee, the chief actor,and mover in the business: but it is wholly unimportant as aforesaid, whether he had that knowledge or not. My opinion therefore, is, to reverse the decree, and render one pursuant to the prayer of the bill. The appellee, in my judgment, should be made to disgorge his illegal and iniquitous gains, and receive only his principal money, which is secured to him,by the express provisions of the statute. That, however, is not the opinion of the other judges.

98 *Their opnion is, that the decree dismissing the bill should be affirmed; and it is to be affirmed accordingly.

Long v. Colston.*

June, 1820.

Covenants—To Make Deed—Performance—Case at Bar.—L. covenanted with C. "to make over by deed of bargain and sale, certain lands in England, and that L.'s wife should annex such covenants and warranties as would ultimately assure the premises to C.:" in consideration of which, C. covenanted to convey other lands in the U. S. to L. The execution of a deed of bargain and sale by L. and wife, with her privy examination and relinquishment of dower in Virginia, is such a performance by L., as entitles him to an action against C., for refusing to convey the lands in the U. S.

C. having bound himself to pay $20,000 in money and lands, for the lands in England, will be entitled to relief for any deficiency in their value, short of that sum.

This is a declaration in covenant, containing two counts. The 1st sets forth, that Long and Colston on the 8th July 1797, entered into a covenant which recited, that Chilcott Symmes of G. Britain, on the 24th June 1742, devised certain lands, &c., to Richard Chichester in fee; that Richard Chichester devised them to his son John; that John Chichester died under age, leaving a daughter, (Mary) his only child, who married Burgess Ball: and died, leaving two children, a son named Burgess, and a daughter called Elizabeth. Burgess Ball the younger, heir to Mary Ball, died in 1790, under age, and without issue; whereby the lands in Dorset and Devonshire in England, (which were the subject of the contract between Long and Colston) became vested in Elizabeth B. Ball, at the death of her father, who was tenant by the courtesy. Elizabeth B. Ball married Armistead

99 *Long the plaintiff. The lands had been sold, and the proceeds vested in English funds, by act of Parliament. The covenant witnessed, that Long and wife, should on or before the 31st July 1797, make over, by deed of bargain and sale to Colston, all the lands, tenements, &c. aforesaid in Devonshire, Dorset and the town of Exeter, or the proceeds thereof, vested in the English funds; and that Long and wife should annex all such covenants and warranties, as would ultimately assure the premises to the said Colston. Colston in consideration of this covenant on the part of Long, bound himself to pay the sum of $20,000 upon the execution of the conveyance aforesaid, payable in $5000 cash, and $15,000 in Kentucky lands, and other lands in the north western territory, to be selected from a schedule at the price of $2 per acre: for which Colston was to make all necessary conveyances. The declaration then averred, that Long and wife executed and delivered to Colston, on the 8th July 1797, an indenture of bargain and sale, by which deed, and the privy examination of the wife in Culpeper, she released her dower; and both Long and wife made over by deed of bargain and sale, &c., the lands in Dorset, Devonshire and Exeter, or the proceeds in the English funds to Colston and his heirs, according to the true intent of the covenant: and that the wife did annex all such covenants and warranties as would ultimately assure the premises, &c. The declaration farther averred, that after the execution of this indenture, Long had selected from the schedule of lands, a certain number of acres (of which the defendant had notice,) and demanded a conveyance of them from Colston; which Colston refused to make, and so had broken his covenant.

The 2d count contained the same recital, with an averment, that Long did execute to Colston, the deed of bargain and sale, transfer and assignment, with the covenants and warranties mentioned, (omitting the privy examination) according to the

100 true intent and meaning *of the covenant; and demanded the conveyance of the western lands by Colston, which he had refused, and so had broken his covenant, to the plaintiff's damage, &c.

The defendant craved oyer of the covenant and deed; and to the first count of the declaration filed eleven several special-pleas, which in substance were: That the defendant had performed his covenants, and protesting that the plaintiff had not performed his, and that all the interest of Elizabeth Long in the lands, &c., did not pass by the deed of bargain and sale, averred, that at the time of executing the original conveyance, part of the property mentioned in the covenant was real estate lying in England, vested in Mrs. Long a feme covert, which could be conveyed, only by a fine levied by Mrs. Long; or by a privy examination before the Lord Chancellor, or some other Judge. That part of

*The principal case was cited in Tunstall v. Pollard, 11 Leigh 28.

the land which was the subject of the contract, had by act of Parliament been sold for the payment of legacies, &c., and the surplus, had by the same act, been ordered to be reinvested in lands. Which money thus ordered to be converted into land, was also assignable only by special methods, appointed by the laws of England. That a privy examination in England was necessary to pass Mrs. Long's title. That being a married woman at the time of executing the covenant, she was by the law of England incapable of making a contract, and the covenant and warranty were as to her and her heirs void; therefore Long had not performed his covenant, which was precedent to the defendants. And lastly, that the defendant executed his bond (with Henry Lee as surety) to the defendant, which he had accepted; to which bond there is a condition annexed, stipulating, that for the entire value of the said lands in sterling money, the defendant should pay to the plaintiff, only one pound current money, for each pound sterling; and the defendant averred, that the value of the lands, &c. in sterling money, was less than 21001.
101 current money of Virginia. *And farther the defendant averred, that before the demand by the plaintiff, he had paid him 15001. current money; and conveyed to him 1000 acres of land contained in the schedule, at $2 per acre, amounting to 6001. on account of the said contract; which exceeded the value of the lands covenanted to be conveyed by Long, and so had performed his covenant.

There were eleven special pleas to the second count, which (except the 10th) were the same in substance with those to the first count.

The 10th plea to the second count, averred in addition to that filed to the first count, that the value of the lands, &c. in England, had been ascertained by decrees in Chancery, and was less than 21001. which had been paid to Long; and therefore the defendant had performed his covenant.

The plaintiff protesting, that he had performed his covenant, and that all Mrs. Long's right passed by the deed; replied to the 1st plea, that the defendant had not performed his covenant, and concluded to the country. To all the other pleas the plaintiff demurred, and craved oyer of the bond mentioned in the tenth plea.

The defendant joined in the issue of fact tendered to the first plea, and joined in the demurrers.

To the pleas to the second count, the plaintiff after protesting that he had performed his covenants, and that the estate of himself and wife in the English lands, &c., did pass by the indenture and privy examination; that he had done every thing required of him by the covenant, to entitle him to recover; that there was no final decree of the Chancery of England, ascertaining the value of the English estate in sterling money, according to the covenant; and concluded to the country. To the general replications, that the plaintiff had performed his covenants, and that the defendant had not, the defendant joined the issue tendered.

102 *To the several applications of the plaintiff, that the property in England did pass to Colston by the conveyance mentioned in the second count; that there had been no final decree in the English Chancery ascertaining the sterling value of the English estate; according to the true meaning of the covenant, the defendant demurred.

The questions of law arising on the demurrers to the first count, were adjudged for the plaintiff: and those on the demurrers to the plaintiff's replications to the defendant's pleas to the second count, were adjudged for the defendant, the court being of opinion the second count was bad.

The defendant then moved the court, to admit him to plead other pleas; the motion was continued to the next term; when the court allowed the defendant to plead, that Long and wife did not on the 8th July 1797 or at any time before 31st July 1797, make over by deed of bargain and sale, transfer and assignment, all the lands and tenements aforesaid, or the proceeds thereof, vested in the funds of England; and that they did not by deed as aforesaid, bargain and sell, transfer and assign, all their right and interest in the premises, to the defendant and his heirs, against the claims of them the said Long and wife, and their heirs, with such covenants and warranties annexed, as would ultimately assure the premises to the defendant, &c., but failed so to do, contrary to the tenor of the covenant, &c.

The plaintiff replied, that he and his wife did on the 8th July 1797 execute a deed of bargain and sale: and that on the 17th July 1797, Elizabeth Long, by her privy examination, &c., in Culpeper, relinquished her dower in the premises; which deed and privy examinations, as set forth in the declaration, were a deed of transfer and assignment, within the meaning of the covenant, and a performance by the plaintiff; he concluded to the country, and the defendant joined.

103 *The Jury found a verdict for the defendant, who had judgment. But the plaintiff filed two bills of exceptions in the progress of the cause.

The first stated, that the plaintiff gave in evidence the original covenant in the declaration mentioned; the copy of the indenture of the bargain and sale by Long and wife; the certificate of the acknowledgment in court of the execution of the said indenture by the plaintiff; and of the privy examination of Mrs. Long to the deed; together with her acknowledgment of its execution in court; and the delivery by both of them, prior to the 31st July 1797. The plaintiff also gave in evidence the bond by Colston and his surety, Lee; a power of attorney from himself and wife to the defendant; with a certificate of her privy examination to it, executed before 31st July 1797. All of which writings, were spread upon the record. And then the plaintiff moved the court to instruct the jury, that according to the true construction of the covenant, the execution and delivery of the deed of bargain and sale, with the warranty, and privy examination, and the acceptance of the deed, by the defendant, was a performance of the condition on the part

of the plaintiff, which entitled him to recover; on proving a selection of the lands in the schedule, and a refusal on the part of the defendant to convey. The court refused the instruction, and the plaintiff excepted.

The second bill of exceptions stated, that the defendant having offered certain depositions, to prove that the wife of Burgess Ball the elder, died in 1775 during the life of her husband, leaving two children, Burgess Ball jun. and Elizabeth the plaintiff's wife; that Burgess Ball the son died in 1793, and his father died in 1801. That Elizabeth the plaintiff's wife, died in 1806. Whereupon the plaintiff moved the court, to instruct the Jury, that the deed of bargain and sale, with the privy examination, passed to the defendant such an estate in the premises, or in some part of
104 them, as entitled the plaintiff *to his action, upon proving a demand of a conveyance of the western lands, and a refusal by the defendant to convey which were admitted. The court refused this instruction also, and the plaintiff excepted.

The plaintiff appealed from the judgment of the General court, where this cause was tried by consent of parties.

It was argued in the court of appeals by Tazewell and Wickham for the appellee; and by Jones (of Washington) and Stanard for the appellant. The Reporter regrets extremely, that no reporter was appointed at the time of the argument, and consequently he cannot give to the profession even a sketch of the profound and comprehensive views taken of the cause by either counsel.

By the court.* The court is of opinion, that upon the true construction of the covenant upon which this suit is brought, the appellant was entitled, on the facts set forth in the bill of exceptions, to this action against the appellee; and that his recovery in this action cannot, in any manner be affected by a regard to what may be the value of the estates in England, the appellee being bound immediately on the execution of the deed, as contemplated in the covenant, to pay the $5000 in cash, and $15,000 in lands at the price of $2 per acre, as stipulated in the covenant, whatever may be the real value of the estates in England. As to the objection on the part of the appellee, that this action did not lie until the title to the English estate was conveyed by means of fine and recovery, according to what is alleged to be requisite by the laws of England to pass the estates aforesaid: that objection is equally reprobated by the terms of the covenant itself; by the cotemporaneous exposition of the parties in relation thereto; and by the delay of the appellee for so great a length of time, to take the objection aforesaid.

105 *But while the court is of opinion that the recovery of the appellant in this action, is not to be delayed for the final adjustment of the estates in England, and that the amount of the recovery in this action, cannot be at all affected by what may be the value of the said estates, yet the court for the satisfaction of the parties, expresses its opinion to be, that if it shall appear on the final adjustment of the said estates, that the value thereof is less than $20,000, the appellee will be entitled to relief for such deficiency; the court being of opinion that the $20,000 aforesaid was only intended as an advance, subject to the final adjustment of the value of the said estates, and not as a gross sum intended to be given therefor.

The judgment of the General court is therefore to be reversed, and the cause to be remanded for a new trial, on which the instructions formerly refused, are to be given if required.

*BROOKE absent.

Lyons v. Brown.*

June, 1820.

Deeds—Construction—Case at Bar.—A deed conveyed lands (excepting several prizes drawn by fortunate adventurers in the maker's lottery,) a prize drawn by a ticket proved to have been delivered to one of the trustees and superintendants of the lottery, without its appearing whether the ticket was sold or not, is within the exception. [Quære.]

The heirs of Peter Lyons, who was surviving trustee of William Byrd, brought ejectment for lot No. 547, in the city of Richmond. At the trial, the lessors gave in evidence the following documents and facts. A deed from William Byrd dated 18th September 1756, to Peter
106 *Randolph, John Robinson, John Page, Presley Thornton, Charles Carter, Peyton Randolph, and Charles Turnbull; conveying to them, all his (Byrd's) lands in Chesterfield, Henrico, &c. in trust, for the support of his family, and payment of his debts; with power to sell and convey any of the lands in Chesterfield or Henrico. Also a deed dated 4th May 1770, from William Byrd, and the surviving trustees of the former deed, to Edmund Pendleton, and Peter Lyons; conveying to them all the land in Chesterfield and Henrico, which had been conveyed by the deed of 1756, and which remained unsold, and which they "have now a right by virtue of the said deed to sell, (except the several prizes drawn by fortunate adventurers in the said Byrd's lottery") in trust, to secure the payment of certain debts. The lottery here mentioned was proved to have been drawn in conformity to the scheme promulgated by Byrd; by which, he proposed to dispose of the "land and tenements under-mentioned, being the entire towns of Rocky Ridge, and Shockoe;" then followed a schedule. The lottery was advertised to be drawn in June 1768; it was not drawn however, until November 1768. It was farther proved, that the ticket No. 1963 drew prize No. 547, the lot in controversy. That this ticket with a number of others was delivered to John Page, one of the trustees in the deed of 1756, and a trustee particularly named to superintend with others, the drawing of the lottery, and of whom it was advertised, tickets were to be purchased; but whether Page sold this ticket, or returned it to Byrd, did not appear. It was further proved, that a number of lots in Richmond, on the eastern side of

*The principal case was cited in Carter v. Ramey, 15 Gratt. 348.

Shockoe creek, conveyed to the trustees by the deed of 1756, were not included in the lottery.

Upon this evidence, the court on motion of the defendant, instructed the Jury, that even if the ticket No. 1963 was returned unsold and held by Byrd, or his trustees, at the time of drawing the lottery, the 107 prize drawn by it, *was not conveyed to Pendleton and Lyons by the deed of 1770; because prizes drawn by fortunate adventurers in the lottery were expressly excluded from that deed. The jury found for the defendants, who had judgment, and the lessors of the plaintiff appealed.

The court consisting of Roane, Brooke, Cabell, and Coalter, were divided in opinion. Roane and Brooke being of opinion to affirm the judgment, and Cabell and Coalter for reversing it, so the judgment stood affirmed.

COALTER, Judge.

In the year 1756, William Byrd, being about to leave this colony, and being much in debt, for the purpose of providing a fund to maintain himself and family, and to pay his debts, conveyed to Peter Randolph, John Robinson, John Page, Presley Thornton, Charles Carter, Peyton Randolph and Charles Turnbull all his plantations, lands and tenements, lying in the counties of Chesterfield, Henrico, Lunenburg, and Halifax; together with negroes, stock, &c. to receive the profits, or to sell, mortgage, or otherwise dispose of the said property, for the purposes aforesaid. The trustees, by virtue of the power thus vested in them, did, in the absence of said Byrd, sell considerable portions of this property, as appears by the recital in another deed hereafter mentioned.

On the return of said Byrd to this country, to wit, sometime prior to June 1768, but how long does not appear, it was deemed advisable to sell a part of this property by way of lottery; and a scheme was published, signed by William Byrd, which is designated, "a scheme for disposing by way of lottery, of the lands and tenements under-mentioned, being, the entire towns of Rocky Ridge, now Manchester, and Shockoe, now a part of Richmond; lying at the falls of James River, and the lands thereto adjoining." By this scheme a great many improved lots and tene- 108 ments on both sides of the river, *are designated as large prizes, many of them very valuable; together with 10,000 acres of unimproved land, laid off, in lots of 100 acres each, as also sundry valuable islands, fisheries &c. The other prizes were half acre lots estimated at 251. each.—The whole property being estimated at 56,7961. The number of prizes were 839, and of blanks 9161, making 10,000 tickets. The price of the tickets does not appear. The scheme says, the lottery will be drawn in June 1768, under the management and direction of Presley Thornton, Peyton Randolph, John Page, Charles Carter, and Charles Turnbull, trustees for the same, who will execute conveyances for the prizes drawn by the fortunate adventurers in the lottery. Tickets to be had of the trustees, also of Col. Arch'd. Cary, John Wayles, and the subscriber. The lottery was drawn in November 1768.

After the drawing of this lottery, to wit, on the 4th of May 1770, a deed was executed by William Byrd, John Page, Peyton Randolph, Charles Carter, and Charles Turnbull, surviving trustees of the one part; and Edmund Pendleton, and Peter Lyons, surviving administrators of John Robinson, of the other, whereby the former, after reciting the above deed, and that the trustees did in consequence of said trust, and in the absence of said Byrd, receive the rents and profits of his estate, and did apply the same towards the discharging of his debts, but finding that the debts could not be paid thereby, they sold considerable parts of his lands, slaves, and stock lying in Halifax, Chesterfield, and Henrico, and in order to save the residue of his estate, did advance considerable sums, and entered into large suretyships, &c.; and particularly, that the said John Robinson did advance several sums of money which remained due, at his death, to the amount of $20,000 or thereabouts; of which his administrators demand payment, and that the residue of said Byrd's estate should be sold to raise it, they, the said first named parties conveyed to 109 said Pendleton and *Lyons all that tract of land on James River, near the falls, in Chesterfield, containing acres, more or less, and all the other lands, tenements, lots and messuages lying in the said county of Chesterfield, and in the county of Henrico, belonging to said Byrd, or to the said trustees, and all other the lands, slaves, &c. comprised in the said deed of trust, not before sold by the trustees, or either of them, and which they have now a right, by virtue of said deed, to sell and convey, except the several prizes drawn by the fortunate adventurers in the said William Byrd's lottery.—In trust to be sold, &c. if the money shall not be paid on or before the 10th day of December next following, and if paid, the estate to be revested in the trustees in the same manner as if this deed had not been made, &c.

It was proved, that the property conveyed in the above mentioned scheme was a part of the property conveyed to the trustees, in the first deed above-mentioned, and that the ticket 1963, in that lottery, drew the lot 547, which is the subject of controversy, and is described in the declaration as lying on Shockoe Hill. It was also proved, that the said ticket was delivered to John Page, one of Byrd's trustees, together with a number of other tickets, being a quire of tickets from 1729 to 2004 (amounting to 275 tickets,) as were other quires of tickets to others of his said trustees, but whether the said ticket was ever sold by the said Page to any other person, or returned to the said Byrd or to his trustees, did not appear by any direct testimony. It was likewise in proof, that a number of lots in the town of Richmond, on the eastern side of Shockoe Creek in Henrico, which had been conveyed by Byrd to his trustees by the deed of 1756, were not included in the lottery, and were still held by the trustees at the time of drawing the lottery, and of the execution of the deed to Pendleton and Lyons.

Whereupon the court, upon motion of

the defendant, instructed the jury, "That even if the said ticket No. 110 *1963 was returned unsold, and held by the said Byrd or his trustees at the time of drawing the lottery aforesaid, yet that the prize which was drawn to its number, by whomsoever the ticket was held, and whether sold or not, was not conveyed by the said deed to Pendleton and Lyons, administrators of Robinson, being expressly excepted out of said deed to them, by the clause of that deed, which excepts prizes drawn by fortunate adventurers in the said lottery." The question now before us is whether this instruction be correct.

Its propriety is maintained on various grounds. First, It is said to be a legal presumption from which the court itself can and must infer the fact, that all the tickets were sold, and consequently that the court had a right to instruct the Jury, that whatever might be their opinion as to that fact on the evidence before them, yet the legal conclusion being, that all the tickets were sold, and consequently that every prize was drawn by some fortunate adventurer, no part of the land embraced in the scheme passed; in other words, that such legal consequence is paramount to any proof of the actual state of the fact which the plaintiff might offer, and that the court have the exclusive right to infer the fact, and by its instruction as to the law arising therefrom, withdraw the fact as well as the law from the Jury.

Second, And which seems to me to be the real opinion of the court; that even if the Jury had a right to decide on that fact, and might be satisfied that the ticket had never been sold, but had been returned and was held by the trustees at the time of the drawing of the lottery, yet, that fact, however settled was unimportant, because the trustees, for the benefit of the trust fund, having an interest in the tickets thus returned, so far as prizes should be drawn by such ticket, are to be considered as fortunate adventurers within the true meaning of the exception.

Thirdly, It was contended, that they are to be considered as fortunate adven- 111 turers, because the object of *the lottery being to pay debts, the creditors had a right to charge the trustees with the aggregate price of all the tickets—i. e. with 50,000l. If the price of the tickets was 5l. each, and that they were compelled, by the scheme, to take all unsold tickets on their own account as they were to draw the lottery on a given day, and to pay over the amount to Byrd and his creditors; and that, being purchasers, they were consequently fortunate adventurers, having a right, individually, and not for the benefit of the trust fund, to the lots drawn by tickets not sold to others. That this is also a conclusion of law, which the court had a right to draw, so as to apply the exception to all the lands covered by the scheme.

Fourthly, It was contended, that the lottery lots, if they might be so called, were intended to be excluded entirely by the exception, as the grantees did not intend to involve themselves in controversies with ticket holders, and that the terms in the deed "and all the other lands, tenements, lots and messuages lying in said county of Chesterfield, and in the county of Henrico," &c. must be construed as to this word, lots, to mean the lots on the eastern side of Shockoe; and that therefore no other lots passed or were intended to pass by the deed; and that the words "except the several prizes drawn by the fortunate adventurers in the said William Byrd's lottery" were intended to exclude entirely all the lots and lands comprised in the scheme of the lottery, notwithstanding the grantors then held for the benefit of the trust fund, lots and lands of that description, undrawn by purchasers of tickets, and which they might have sold and conveyed, had such been the intention of the deed. That as this too, arising from the construction of the deed, is to be settled by the court, it was right to instruct the Jury, that, whatever may be the fact as to the sale of the ticket, yet by the deed no part of the prize property passed.

As to the first of these propositions no authority has been adduced to shew, that the fact to the contrary notwithstand- 112 ing, *the law has settled it, that no lottery can be drawn until all the tickets are sold. I believe the general practice will shew that even the managers fix their own time for drawing, they invariably begin that operation before all the tickets are sold. But if the law be as is contended in such cases, it would not be so, if by the scheme itself, it was to be drawn on a given day, sold or unsold—this scheme however, fixes the day. Robinson's estate may have been embarrassed, and his administrators pressing, and whether this was so or not, was a matter of evidence. A deed made about 18 months after, states that they had been pressing: and they probably were unwilling to assent to an indefinite postponement of a sale.

Purchasers of tickets, under the scheme, had a right to have it drawn, whether all the tickets were sold or not; so that in fact it may have been a scheme to draw, sold or unsold, and this of itself would repel the presumption contended for. But whether the ticket was sold or not, was an important fact in the cause, and if this presumption could at most be only prima facie, then the evidence on this point ought to have been left to the jury, and the court ought not to have proceeded as is supposed, under this head of inquiry, on the assumption of the fact.

As to the second proposition, and which I have no doubt was the real ground of the opinion of the court, if the words "fortunate adventurers," in the deed, intended to exclude as well lots drawn by purchasers of tickets, as lots covered by tickets not sold, it amounts to an exclusion of all the lottery property. But this might leave nothing for the deed to operate upon, but the lots in Richmond on the eastern side of Shockoe Creek. It does not appear, nor can it well be presumed, that, after taking out the 400 half acre lots in Henrico, on Shockoe, the 17 improved lots, perhaps consisting each of many acres, and the 10,000 acres to 113 be laid off into 100 *acre lots, making, in Henrico, exclusive of Islands, &c. perhaps, 10,300 acres, and the forge with two

thousand acres in the county of Chesterfield, with 12 improved and 300 half acre lots, amounting, together, perhaps to 2200 acres, and making an aggregate on both sides of the river of 12,500 acres or thereabouts, that he had other lots in either of those counties, except the Richmond lots aforesaid. This however was a matter of fact and may have been in proof, and if it should appear that nothing else was left for the deed to operate on, then a construction which would render nugatory a whole conveying clause in the deed above recited, except so far as it conveyed the lots in Richmond, surely could not be maintained. But if there was other property for it to operate upon, and all this was for the jury and not for the court, and we know not what the evidence was, still it is not pretended that there were other lots in Chesterfield than those embraced in the scheme; but the deed conveys lots in Chesterfield and Henrico, and it also conveys every thing else that the trustees had a right to convey, and if they could convey lots not covered by purchased tickets, and to which of course no one but themselves had a right, then a construction which would go to defeat such express words in a deed, is equally unsound. For if they hold these lots, as is supposed by the proposition under consideration, for the use of the trust fund, and the creditors, they had not only a right, but would be compelled to sell it for the payment of the debts, if necessary. The deed admits this necessity existed, and purports to be a sale for payment of debts; how that exception can be construed to exclude more than what they had not a right to sell; how the obvious and natural meaning of the words "fortunate adventurers," can be interpreted to mean as well those who were selling, by way of lottery, as those who adventured their money in purchase of tickets, and that such construction is so imperatively forced upon us, that the 114 manifest *intention of the conveying clause, which was to pass whatever the party had a right to sell, must be defeated thereby, I confess I cannot see.

Thirdly. An argument surely cannot be required to prove that the manager of a lottery, or any other person superintending a sale of property for the payment of debts, is obliged to take at a given price, all the property he cannot sell, and account for the money; and especially if the party procuring his agency agrees, that the lottery shall be drawn whether sold or not, which would exclude the idea that he becomes the purchaser of the whole, if no tickets are sold, or if the residue, be unsold; for if this would not be the correct understanding in such case, the scheme of the lottery itself at once amounts to a sale to the managers of it, at the exorbitant price at which property in such case is generally set down. The third proposition, therefore, will not justify the instruction.

And the fourth I think is equally unavailing to that purpose. This proposition involves a construction of the deed as to the intention of the parties. Why should the party whose duty and object it was to raise promptly a large sum of money due to his intestate, and who then by the first deed, had a lien on all lots and lands not drawn by purchasers of tickets, wish to exclude this, perhaps the most available fund, from the deed to them? and how can such intention be inferred, from the express words of the deed, by which the grantors convey every thing they have a right to convey? The very statement of the proposition carries on its face, as it seems to me, its own refutation.

But it may be said, that although the particular instruction of the court cannot be supported, yet, as the plaintiff in ejectment must shew a good title in himself, and having failed therein, the judgment against him is correct, and must be affirmed, although the ground or reasons for that judgment in the court below, are erroneous. Let me ask though, how 115 and in what respect has *the plaintiff failed to shew a title? The legal title to this lot must be somewhere; for if not it would be escheatable as has been contended.

It was originally in William Byrd, as is admitted on all hands. It passed from him to the trustees under the first deed. If it did not pass out of them to Pendleton and Lyons by the deed of 1770, it is yet in them, or the survivor or the heirs of the survivor. The scheme of the lottery did not divest their title, nor did the drawing of the lottery; but if any one purchased from them the ticket that drew this lot, that person acquired thereby a right to a conveyance from them; and there is an exception in the deed covering such right, which excludes from the operation of the general words of the conveying clause, this lot, so as to reserve in the grantors, the legal title for the benefit of this purchaser, who, under the scheme, was promised a title from them. But if no such equity exist in a purchaser; if the trustees, in that case, held this property for the payment of debts, were compellable to it for that purpose, and did sell it for that purpose, then the title passed by the deed of 1770.

But the plaintiff has not proved, that the ticket was not sold, and therefore he has not proved his title. In the first place, admitting for the present, that the plaintiff must prove this negative fact, how does it appear that he did not. There was evidence to this fact before the jury, of what nature, by whom produced, or whether by both parties does not appear. The court cut up any evidence that was before them, and forestalled any that might be adduced, by stating, that be the fact as it may, no title passed. Suppose the jury, on the evidence before them, had found the fact, that this ticket had not been sold, but had been returned to, and was held by the trustees at the time of the lottery, but that under the instruction of the court, they found for the defendant; we could not support the judgment solely on the principle 116 *I am now combating. If we could not, let me again ask upon principle, can we now say that the jury would, or ought to have found one way or the other, had the case been left open? Much less how can we ourselves establish the fact one way or the other? But I deny that the plaintiff either before the jury or here, must prove

this negative. It is true, if we have doubts, he must satisfy us that the law does not conclude this fact against him; but as a pure matter of fact, we cannot examine into it, unless on a demurrer to evidence, which does not exist in the case. Before the jury, he is not bound to prove the negative because he cannot, and to oblige him to do that, would be to declare the deed of 1770 void; not because the title was not in the grantors, but because portions of this land having been sold but not conveyed, it has now become legally impossible to sell the residue of this fund for the payment of debts. A court of Equity cannot decree, because, though that court can make many parties, it must make all the world parties, and some person may have purchased; the person therefore who has got possession resists both trustees. He resists the old trustees, because if they have sold, and admit that to be the fact, they cannot recover as the party would contend, when there is a complete outstanding equity against them. They have sold and received payment, and whether a conveyance be asked of them or not, is nothing to them; it is a trust satisfied as to them, and they have only to convey when requested. If they say they have not sold the ticket, and that therefore there is no equity of that kind, they were at once opposed by the deed of 1770, which, if the property be thus situated, passed the title. But when the trustees under the deed of 1770 sue, they must prove the negative, which being impossible, their defeat follows. If this be law, then perhaps it will follow, as has been argued, that this property must escheat, although the title is certainly in one or the other set of trustees. But 117 all this confusion *and difficulty is at once put to rest, by the sound doctrines of the common law; that a negative need not be proved, but that he who insists on the benefit of a positive averment, as here, that this ticket was sold, or who seeks to protect himself by an exception in his favour, must prove the affirmative, and bring himself within the exception. Perhaps this party would have succeeded in his efforts to do so before the jury, though we might be induced to doubt it, from his resort to the instruction asked of the court.

But if he really have no pretension of this kind, but seeks to hold property to which he has no just claim whatever, on the ground that some other person may have an equitable claim to it; and that he by holding possession long enough, may defeat every body, I think such pretension ought not to be sanctioned here. If the present plaintiffs recover, they will hold the title for any having the equity, which it is hardly to be presumed at this late day is outstanding; and if none such, for the other cestui que trusts, who must be greater favorites in a court of justice, than claimants resting on the above principles.

On the whole I am for reversing the judgment. But this court being divided it must be affirmed, and this suit, though not the law of the case, settled.*

ROANE, Judge.

This is an action of ejectment, brought by the appellants as heirs of P. Lyons, the surviving trustee of Pendleton and Lyons, under a deed of trust of 4th May 1770, executed to them by the trustees of W. Byrd, under a deed of 18th September 1756. It claims against the appellee, a lot numbered in the plan of the city of Richmond 547. A verdict and judgment was rendered for the defendant, on which the plaintiffs appealed to this court. The verdict was ren- 118 dered under an instruction *of the superior court, which will presently be more particularly noticed.

If the appellants, the heirs of Lyons, have not a complete title to the premises, they ought not to recover in this action. They ought not to recover, although Byrd's trustees, from whom they claim, should be shewn to have such title, and the appellee should also be shewn to have none. Possession in him is a good title, in this action against any plaintiff except the true owner. This is the established doctrine on this subject. It is emphatically laid down by the court of King's bench in England, in the case of Haldane v. Harvey.(a)

The present appellants may not have such a title, for want of adequate words in their deed to convey it, or for want of a right to the subject, in those under whom they claim. On both these grounds, the title of the appellants appears to me to be defective. The first defect is alone sufficient; but I will also consider, whether the trustees of Byrd themselves had a title, which could have passed by the deed of 4th May 1770, had its terms been more comprehensive.

Those trustees it is admitted, had the legal right to the land in question, under the deed of 18th Sept. 1756. This land with a great deal of other land was conveyed to them by Byrd, to be disposed of for his benefit. By the scheme of a lottery referred to in, and made a part of the bill of exceptions, they offered this lot for sale, together with a great many other improved and unimproved lots, and other valuable property. It was the object of the scheme to dispose of all the land therein mentioned by way of lottery, and not a part only of that land. The object of the lottery was, to use the words of the scheme, to dispose of "the land" therein mentioned; that is, of all the said land, and not merely a part thereof. Again, the scheme purports, to dispose of "the entire towns" of Richmond and Man- 119 chester; and not the *said towns, in exclusion of the lot in question, and other lots under like circumstances. The construction contended for by the appellants, excludes the lot in question, and departs from the said scheme; whereas, that contended for by the appellee, includes the said lot, and conforms to the scheme aforesaid. The facts proved in the cause, as stated in the bill of exceptions, entirely accord with the construction last mentioned. It was proved, as the exception states, that the lottery was drawn "in conformity to the terms of the said scheme"; and therefore, as the said scheme extended to the whole land, and lots, it was proved, that it was drawn as to the whole land, including this lot also. Again, it was proved more particularly,

*See the note to the case of Taylor v. Bruce, p. 73. —Reporter.

(a) 4 Burr 2487.

that the ticket No. 1963 "drew the lot" now in question. This fact is utterly inconsistent with the idea, that the ticket by which this lot was drawn, was not disposed of, in this lottery aforesaid. It is considered under this finding, as having been so disposed of, even if it were retained by Byrd himself, or his trustees aforesaid. These positive, and unequivocal findings, are not at all impugned by the farther statements, that the ticket 1963 was delivered to John Page, one of Byrd's trustees, together with a number of others; and that it did not appear by any direct testimony, whether the said ticket was sold by Page, to any other person, or that it was returned to the said Byrd or his trustees. In this uncertainty, we ought perhaps to consider Page as the owner of the ticket, in whose hands it is last shewn to have been, and who undoubtedly had a right to retain it, or sell it to himself.(b) This statement is entirely consistent with the idea of a sale to Page himself, to Byrd, or to the trustees themselves, by means of the election to be presently noticed, and which would constitute him or them adventurers in the lot-
120 tery. This conclusion *must be drawn from the facts found, and from circumstances, notwithstanding it did not appear from any direct testimony, that the ticket was sold to others. Notwithstanding this defect of proof, it might well be inferred, that the ticket was sold to, or retained by, one or other of the parties aforesaid.

The instruction of the superior court is entirely borne out, by the facts proved in the cause. Those facts could not have been found, unless the ticket in question had been disposed of, by being sold to others, or retained by the parties themselves. Both the judgment, and the proofs on which it rests, repel the idea, that the lottery was only drawn in part; that it was not drawn as to the ticket in question. It has been said, that such an inference arises from its being stated in the scheme, that the lottery was to be drawn in June 1768, whether as is alleged, the tickets were all sold or not; this last inference is not warranted by any thing contained in the scheme; on the contrary, as it is proved in the cause, that the drawing did not take place 'till November 1768, I would make an inference entirely opposite. I would rather infer, that the delay took place to give time to sell those tickets; and that within that time, they were all sold.(c)

By the scheme found in the case, tickets were to be had also from Cary and Wayles, who were not trustees. If Cary and Wayles did also receive tickets, which they did not sell to others, nor return to the trustees, before the drawing, but stood by, and
121 saw the lottery drawn, *would it not be held, that they had elected to purchase those tickets themselves. A contrary construction is not only reprobated by the finding, that the lottery was drawn in conformity to the scheme, as aforesaid, which scheme purports to sell all the tickets, but also might have been highly iniquitous as to Byrd. His object was to sell his own property, for a certain sum; but this construction would deprive him of a part of the purchase money, when his whole property might nevertheless have been swept away by the fortunate tickets of others. There is no reason why all or any of these individuals might not sell tickets to themselves. It very often happens that the person instituting a lottery, is himself an adventurer in it.(d) He may not otherwise be able to effectuate the object intended. He may be the vendee as well as the vendor of a lottery ticket. In this case as well as in others, the maxim applies, that when two rights concur in the same person, they are to be considered, as if they were in different persons.

If Byrd's trustees had a title to this lot therefore, instead of Page, who is shewn to have been the last possessor of the ticket which drew it, it was only by virtue of the drawing. It is not shewn in this case, that they drew the lot in question; but if they did, their title thereto did not pass to Pendleton and Lyons by the deed of 4th May 1770. That deed only conveyed such property as had not been, before sold by them, and which they had at that time, a right to sell—not by virtue of their success in the lottery, "but by virtue of the deed of 1756." Their right under that deed had been extinguished by the lottery, even if the trustees, themselves, drew the lot in question; and therefore it did not pass, because it had been, "before sold," by means of the
122 lottery; *and because it was not property, which they had a right to sell, under, and by virtue of the deed of 1756." There is nothing in the exception in the deed, respecting prizes drawn by the fortunate adventurers in the lottery, which can vary the construction. It is at most a mere pleonasm; and it applies to Byrd and his trustees as much as others, if the principles I have stated be correct. Even if they drew this lot, in the lottery aforesaid, this exception expressly withholds this property from the operation of the deed of 4th May 1770. Nor is that construction at all affected by the insertion of the term "lots," in the conveying part of that deed. It is expressly proved, that there were other lots, not comprehended in the lottery to satisfy this call in the deed.

This construction of the deed of 4th May 1770 was explicitly recognised by this court in the case of Mayo v. Murchie.(e) It was adopted by me for the same reasons substantially, which are now assigned. One of the other Judges now present, also ad-

(b) I have understood, that suing for this, and other lots, on Page's representatives are now this ground.—Note by S. R.

(c) In the record in the case of Southall v. M'Keand, 1 Wash. 336, now before me, is an exhibit which states in full all the fortunate numbers in Byrd's lottery. In that exhibit the ticket 1963 (now in question) is stated to have drawn the lot 547, which is also now in question. And in Wythe's Reports 126, it is said by the Judge, that "after the lottery was drawn, the Managers for the information of purchasers published in print the list aforesaid." Are we wiser than those Managers? And are we not estopped to say, that the lottery as to the ticket, was not drawn?—Note by S. R.

(d) It is proved in the before mentioned case of Southall v. M'Keand, that Col. Byrd was such an adventurer; and that he drew in the said lottery a valuable lot called Byrd's warehouse.—Note by S. R.

(e) Munf. 358.

mitted in that case, that if the land then in controversy, had been a "prize drawn" in the lottery, (as the lot in question is explicitly proved to have been) it would not have passed to Pendleton and Lyons, as he supposed it did; in which last idea however, he was overruled by the other Judges. It seems clear therefore, both upon the authority of that case, and upon principle, that this lot, even if the title thereto were shewn to have been in Byrd's trustees, under the lottery, did not pass by the deed of 4th May 1770.

As for the legal title which is asserted to be in Byrd's, trustees, under the deed of 1776, and in consequence of their not having made a deed for the lot to the holder of the ticket, it will be time enough to discuss that point, when those trustees shall become parties. As however, a naked legal title would not probably prevail in
123 their *favor against the cestui que trust,(f) it would probably not prevail against the present appellee, even if those trustees were now plaintiffs. It would probably not prevail, because they would not be considered as the true owners. It would be wrong to oust the appellee of his possession, in favor of a plaintiff, who, notwithstanding this naked legal title, could not recover against the holder of the ticket, and must yield up the land to him. The possession of the appellee is only to be yielded up to the true owner. On this point however, I only give my present impressions: it is not now essential to the decision of the cause. I am for these reasons of opinion to affirm the judgment.*

Jacobs v. Sale.

June, 1820.

Continuance†—Failure of Plaintiff to Give Security for Costs.—Error to rule a defendant to trial on a motion for continuance, when the plaintiff has failed until the term at which the motion is made, to give security for costs, after a rule to do so.

Sale brought case against Jacobs, in the county court of Henrico. After the common order was confirmed in the clerk's office, Jacobs appeared by attorney at the March term 1817, and before pleading, obtained a rule against Sale as a foreign plaintiff, for security for costs. In this situation, the cause was continued generally, at the succeeding August, and November terms. In March 1818, the defendant moved, to
124 have the plaintiff's action *dismissed, for want of security; when the plaintiff's counsel became surety for costs. The defendant then moved, to have the cause continued; assigning as his reason for being unprepared, the failure of the plaintiff to give security for costs until that moment. The court overruled the motion; the cause was tried, and the jury found for the plaintiff. The defendant appealed to the Superior court of law which affirmed the judgment. There are several exceptions, but that to the opinion of the court, overruling the motion for the continuance, is the only one material.

ROANE, Judge.* The court erred in ruling the appellant to trial, instead of granting him a continuance. The judgment is reversed, and the cause is to be sent back for a new trial.

(f) Cowp. Rep. 46: Hart v. Knott.

*Note. JUDGE BROOKE concurred with ROANE; and CABELL with COALTER without giving opinions. —Reporter.

†**Continuance.**—See monographic *note* on "Continuances" appended to Harman v. Howe, 27 Gratt. 676. The principal case was cited in Bank v. Mathews, 3 W. Va. 28.

Early v. Early.†

October, 1820.

Wills—Loan of Slave to Legatee for Certain Time, Then to His Heirs—Effect.—Lending a slave to a legatee until he become 50 years of age, then to his heirs for ever, gives the use to the legatee, until the time arrive: and does not give the absolute property, from the death of the testator.

John Early, surviving executor of Joshua Early, filed a bill in Chancery, against Jabez Early, Samuel Garland, Samuel Read, and William Booth, stating, that Joshua Early, had by his will, lent to Jabez Early, a negro woman named Venus, until he (Jabez) should attain the age of fifty: to be under the control of his
125 executors *and in case Jabez died under 50, the executors were to make a title to his heirs. That Jabez is still under 50, embarrassed in his circumstances; and that Venus has been taken under an execution against Jabez Early, and purchased by Garland, (as the agent for certain plaintiffs in the execution,) who sold her to Read, who sold to Booth. The bill prayed, that the defendants might be compelled to give security for the forthcoming of Venus and her increase, when Jabez Early should attain the age of 50, and be restrained in the meanwhile, from taking her out of the state.

The clause of the will after lending Venus to Jabez Early, subject to the control of the executors, and directing, that no title should be made until he attained 50 years of age; and that if he died before that time, the executors should make a title to his heirs, was in these words: "I lend him one negro girl, by name Venus, now on his plantation, to him until he arrives to the age of 50 years, for the express purpose of supporting his family, and to his heirs for ever." The Chancellor of the Richmond district was of opinion, that the absolute property passed to Jabez Early by the testament; and dismissed the bill.

Bouldin for the appellant. The word "heirs" often means "children;" "children," sometimes means "issue:" we must take either in the construction of wills, in the sense in which the testator used them. Here the testator clearly means, to give the use for a specific number of years to Jabez, and the absolute property to his children. The limitation is not too remote, and the devise to the remainder-men is good.

Call, contra. The words convey the whole estate; for they give the absolute property to Jabez, when he reaches 50; he is therefore the legal owner ab initio,
126 and *this by operation of the rule in Shelly's case. Words in a devise are

*CABELL absent.

†**For monographic note on Legacies and Devises, see end of case.**

to be construed according to their natural sense(a) unless some obvious incongruity would result; the word "heirs" in this testament, cannot be restricted to children; and taking it to mean "heirs," in the common acceptation, the whole estate passed to Jabez.

Bouldin replied. The rule in Shelly's case has no application, where the first devisee or legatee, takes less than a life estate. At 50 years of age, Jabez Early may have no heirs; he may not be dead, and the persons described as "heirs," are then to take, whether he be dead or alive, which they cannot do, as Mr. Call interprets the word. "Heirs," then, is not used in the legal sense, but the whole clause shews the testator uses it as descriptive of children.

ROANE, Judge.* The court not concurring in opinion with the court of Chancery, that the absolute property of the slave Venus, in the proceedings mentioned, passed to Jabez Early by the will of the father, until he should have attained the age of 50 years, reverses the decree with costs; and remands the case to the said court of Chancery, to be further proceeded in, pursuant to the principles now stated.

LEGACIES AND DEVISES.

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(a) Doe v. Jessep; 12 East 298.

*CABELL absent.

Cross References to Monographic Notes.

Debts of Decedents, appended to Shores v. Wares, 1 Rob. 1.
Executors and Administrators, appended to Rosser v. Depriest, 5 Gratt. 6.
Marshaling Assets, appended to Carrington v. Didier, 8 Gratt. 260.
Wills.

I. DEFINITIONS AND GENERAL PRINCIPLES.

A devise is a gift by will of real property; a devisee is a person to whom real property is devised. A legacy or bequest is a gift by will of personal property; a legatee is a person to whom personal property is bequeathed. The term "legacy" is identical in meaning with "bequest," and primarily is applicable only to personalty; but it may refer to real estate, if the testator so intended. 18 Am. & Eng. Enc. Law (2d Ed.) 709; 2 Min. Inst. (4th Ed.) 997.

Legacy Distinguished from Gift Causa Mortis.—A legacy resembles a gift *causa mortis* in that it is made in contemplation of death, is revocable during the life of the donor, and is subject to his debts in the event of a deficiency of assets. It differs from a gift *causa mortis* in that the property remains in the possession of the testator until his death, while actual delivery of the property by the donor in his lifetime is essential to the validity of a gift *causa mortis*. A legacy, moreover, has to be proved in a court of probate, while in the case of a gift *causa mortis* the title to the property passes to the donee by the delivery, defeasible only during the lifetime of the donor, and becomes absolute immediately upon the donor's death, without the intervention of his personal representatives. "The donee takes the gift not from the personal representative, but against him, and no act or assent on the part of the latter is necessary to perfect the donee's title. A gift *causa mortis* is a claim against the representative; a legacy is a claim from him." 14 Am. & Eng. Enc. Law (2d Ed.) 1058. See Jones v. Irvin (Va.), 4 Va. Law Reg. 525; Thomas v. Lewis, 89 Va. 1, 15 S. E. Rep. 389. See also, monographic *note* on "Gifts" appended to Barker v. Barker, 2 Gratt. 344.

In Jones v. Irvin (Va.), 4 Va. Law Reg. 525, it was held that a letter addressed to A. and B. directing them to send C. certain specified articles, although written in contemplation of death, which immediately followed, could not be sustained as a valid gift *causa mortis*, there being no delivery either actual or constructive of the articles themselves. The letter, however, was held to be testamentary in character and effective as a will.

In Ruth v. Owens, 2 Rand. 507, a gift *causa mortis*, which would otherwise have operated to reduce the share of the estate to which the testator's widow was entitled, was construed to be in effect a legacy.

Legacy Distinguished from Acknowledgment of Debt.—A codicil recited: "I herein mention a debt of $600 I owe the Presbyterian church of Charlottesville, Va., and I wish it duly paid, without interest, out of my estate, to that church after my sister's death." *Held* that, though a church cannot take as a legatee under a will, this is not a legacy, but a debt, and the codicil alone is sufficient proof of its existence. Perkins v. Seigfried, 97 Va. 444, 34 S. E. Rep. 64.

Effect of Bequest or Devise of Income, Rents, etc.—"A bequest or devise of the income or interest of a fund or the rents and profits of real estate operates as a bequest or devise of the fund or property from which such income, rents, etc., are derived, unless, by reason of some limitation as to time or otherwise, it appears that the testator did not intend that the *corpus* should pass to the legatee

or devisee." 18 Am. & Eng. Enc. Law (2d Ed.) 711; University v. Tucker, 31 W. Va. 621, 8 S. E. Rep. 410.

A testator by his will gave to a devisee in clear and express words a life estate only, and by his codicil provided that money paid to the executor on an "obligation owing to the testator should be invested in bonds of the United States, the interest of which should go to said life tenant, and such life tenant should likewise have the profits of the testator's estate not given to his wife." *Held* that, by the use of this language the testator did not change the life estate into a fee. University v. Tucker, 31 W. Va. 621, 8 S. E. Rep. 410.

II. CLASSES OF LEGACIES AND DEVISES AND INCIDENTS THEREOF.

A. GENERAL LEGACIES.—"General legacies (sometimes inaptly styled *pecuniary legacies*) are legacies of money, or of chattels which may be satisfied by the delivery of *anything of that kind*. Thus a legacy of 'my usual riding horse,' is specific, whilst one of 'a riding horse,' is general. A legacy of $1,000 is general, whilst one of $1,000 out of the money owing me by Z, is demonstrative." 3 Min. Inst. (2d Ed.) 590; Myers v. Myers, 88 Va. 131, 13 S. E. Rep. 346.

General legacies abate ratably amongst themselves for the payment of debts before either specific or demonstrative legacies, but they are not liable, like specific legacies, to be adeemed. 3 Min. Inst. (2d Ed.) 590; Myers v. Myers, 88 Va. 131, 13 S. E. Rep. 346.

"The advantage of a general legacy is that it is not liable to be lost by ademption (*i. e.*, to be sold by the testator, or lost or destroyed in his lifetime), as a specific legacy is; its disadvantage is that it is taken to pay the debts before the other legacies are touched." 2 Va. Law Reg. 869.

A testator by his will provided for the sale of certain land and of his personal property to pay debts, made a bequest of $700 to one of his seven children as his entire portion, and provided for his other six children by a demonstrative legacy. *Held*, that the $700 bequest was a general legacy and must abate to pay debts before the demonstrative legacy could be touched. Myers v. Myers, 88 Va. 131, 13 S. E. Rep. 346.

B. SPECIFIC LEGACIES.

Definition.—"Specific legacies are legacies of specific things which cannot be satisfied save by the delivery of that certain thing, and none other. A legacy of 'the diamond ring given me by the Empress of Brazil,' is specific whilst one of 'a diamond ring' is general." 3 Min. Inst. (2d Ed.) 589.

A specific legacy has been defined to be "the bequest of a particular thing or money, specified and distinguished from all others of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor." Morriss v. Garland, 78 Va. 215.

"A specific legacy is a bequest of a specified part of the testator's personal estate which is so distinguished. Thus, where a testator bequeathed 'such part of my stock of horses as A shall select'; and in another case, 'five hundred dollars in personal property to my wife, such as she may select'; and in another, 'my capital stock of £1000 in the India company's stock'; in these and other like cases, the legacies were held to be specific. So a bequest of certain stock, part of a larger amount owned by the testator, is specific, as has been repeatedly determined. A legacy is specific when the testator intends that the legatee shall have the very thing bequeathed and not merely an equivalent sum in money or other property." Hood v. Haden, 82 Va. 598.

Characteristics.—The principal characteristics of a specific legacy are that it is a part of the testator's property itself; that it is a severed or distinguished part of the whole of his property, and that it is liable to ademption. Morriss v. Garland, 78 Va. 215.

Specific legacies, though they constitute a preferred class and do not abate in common with general legacies, are liable to ademption. Indeed, liability to ademption is said to be the most distinctive feature of a specific legacy. Hence, if the identical thing bequeathed is not in existence, or has been disposed of, so that it does not form a part of the testator's estate, at the time of his death, the legacy is extinguished, and the legatee's rights are gone. Hood v. Haden, 82 Va. 598; Morriss v. Garland, 78 Va. 215; Skipwith v. Cabell, 19 Gratt. 795.

The general rule in regard to specific legacies is, that the claim of the legatee will be defeated, if the thing specifically bequeathed to him is not in existence at the time of the testator's death; in which case, the legacy is said to be adeemed. And it seems to be the better opinion, and is now the established rule in England, that ademption depends on a rule of law, and not upon the intention of the testator. Skipwith v. Cabell, 19 Gratt. 795.

"If the assets prove insufficient to pay the debts (which, of course, must be first discharged) and the legacies, too, the specific legacies are not encroached upon until the general legacies are exhausted, it being presumed reasonably, that the testator attached more emphasis and importance to the specific than to the general gift. The general legacies abate, therefore, for the payment of debts before the specific; and the specific abate only among themselves, and with the demonstrative. On the other hand, specific legacies are more liable than general legacies to be 'adeemed' by being lost, destroyed or sold by the testator in his lifetime, for if at the testator's death they no longer exist, or have ceased to be his property, the will cannot pass them." 3 Min. Inst. (2d Ed.) 589.

Construction of Legacies as Specific Not Favored.—It is a well-settled rule that the courts will incline against construing a legacy to be specific and that a legacy will not be held to be specific, unless there appears in the will a clear intention to make it so. Skipwith v. Cabell, 19 Gratt. 758; Morriss v. Garland, 78 Va. 215.

Instances of Specific Legacies.—A bequest of "five thousand dollars of my Virginia registered state bonds," is a specific legacy. Hood v. Haden, 82 Va. 588.

A bequest of a "carriage and horses belonging to it," was held to embrace only the two horses which were usually driven to the carriage, and not the four sometimes driven to it. Hearne v. Roane, Wythe 90; Hood v. Hayden, 82 Va. 588.

Where there was a specific bequest in satisfaction of a debt supposed by the testator to be due from him to the legatee, and the debt was in fact due from the testator to another person, it was held that the specific bequest was not charged with the payment of the debt, there being nothing from which to deduce the inference that the testator would not have made the bequest if he had known to whom the debt was really due. Harrison v. Haskins, 2 Pat. & H. 388.

C. DEMONSTRATIVE LEGACIES.

Definition.—A demonstrative legacy is a legacy of quantity, with a particular fund pointed out for its satisfaction; as, "I bequeath to A. $1000 to be paid out of the proceeds of my stock in the bank of R." 2 Va. Law Reg. 869; Morriss v. Garland, 78 Va. 215; My-

ers v. Myers, 88 Va. 131, 13 S. E. Rep. 348; 3 Min. Inst. (2d Ed.) 589.

Characteristics.—A demonstrative legacy so far resembles a general legacy as not to be liable to ademption; *i. e.*, if the fund for payment fails, the legacy is not lost, but the legatee will be permitted to receive the amount out of the general assets. On the other hand, it so far resembles a specific legacy that it is not liable to abate with the general legacies, on deficiency of assets. So it has the double advantage of escaping both ademption and abatement. 2 Va. Law Reg. 869; Morriss v. Garland, 78 Va. 215; Myers v. Myers, 88 Va. 131, 13 S. E. Rep. 346.

Demonstrative legacies, so far as the fund to which they are referred will suffice for payment, are preferred to general legacies, because it is to be inferred that by referring to specified parts of the estate for their payment, the testator intended them to be preferred to other legacies which he had not so secured. Myers v. Myers, 88 Va. 131, 13 S. E. Rep. 346.

"The pointing out of the fund is supposed to be suggestive of the peculiar solicitude on the part of the testator that his bounty should take effect, and therefore demonstrative legacies are endowed with all the privileges which appertain to specific legacies as to abating, in order to pay debts, and are not, on the other hand, liable to be adeemed by the loss of the fund or its collection by the decedent in his lifetime." 3 Min. Inst. (2d Ed.) 589.

"When the legacy is demonstrative, that is, when the legacy is given with a demonstration of the particular fund as the source or means of payment, it will not fail, even when the source out of which it is to be paid never had an existence. See Gallaher v. Gallaher, 6 Watts 473. It follows from these characteristics of a demonstrative legacy, that if it be not payable at a future time, like a general legacy it will bear interest from one year after the testator's death; for the demonstration, or pointing out, of a particular fund out of which it is to be paid still leaves it on the footing of a general legacy, with the advantage over such general legacy of having that particular fund especially devoted to its payment to the exclusion of general legacies, if necessary." Bradford v. McConihay, 15 W. Va. 732.

Instances of Demonstrative Legacies.—A bequest of "the sum of $1,080 per annum, payable semiannually, being the interest on the purchase money of the real estate on Main street, Richmond, sold by me to Charles J. Morris," is a demonstrative legacy. Corbin v. Mills, 19 Gratt. 438.

A bequest of $3,000 "to be paid out of the fund arising from the sale of the real estate hereinbefore directed to be sold," is a demonstrative legacy. Bradford v. McConihay, 15 W. Va. 732.

By the first clause of her will a testatrix bequeathed as follows: Of the $10,050 which I received from my uncle Fitzhugh Carter's estate, I give and bequeath $2,000 of it to Mrs. C.; $2,000 of it to Mrs. J.; $2,000 of it to my cousin Mrs. J.; $1,000 of it to my friend Miss L.; $1,000 of it to Mrs. B.; $1,050 of it to Mrs. F. of Philadelphia, and $1,000 to my cousin Miss R. I give the sums mentioned above to Gen'l Cocke, in trust for the sole and separate use of the ladies whose names are mentioned. These bequests were held to be demonstrative legacies. Skipwith v. Cabell, 19 Gratt. 758.

A legacy of "$50,000 worth, at par value, of my bank and other paying stocks, paying at least six per cent. per annum," to be selected by the executors, where the testator left fifteen different kinds of stocks and bonds, worth at least $350,000, was held to be clearly a demonstrative legacy. Morriss v. Garland, 78 Va. 215.

The direction in a will that the executor should take the "Home Place" at $40 an acre, or put it up to the highest bidder, and divide the proceeds thereof equally between the six children of the testator, is a demonstrative legacy. Myers v. Myers, 88 Va. 131, 13 S. E. Rep. 346.

A testator by the ninth clause of his will provided: "It is my wish that my executors hereinafter named shall have full power to sell and convey what land I own on Brushy creek, in Carroll county, Va., and the remainder of my Porter tract of land, near Ivanhoe furnace, and out of the proceeds of sale of same to pay over to my beloved wife the sum of $2,500, to be hers absolutely, to dispose of in such way as she may think proper; and to my children and grandchildren, in addition to what I have heretofore bequeathed to them, as follows: To my son Joseph Jackson, $200; to my son Geo. Tho. Jackson, $200; to my daughter, Mary A. Pugh, $200; to my granddaughter, Maggy Courtney, $100; to my granddaughter, Sallie Aker, $100." *Held*, that these legacies are demonstrative, and should have priority over all other pecuniary legacies in the fund arising from the sale of the Brushy creek and Porter lands, and the same should be first paid out of said fund, if sufficient, and, if not, that the demonstrative legacies must abate ratably, and after the payment of the demonstrative legacies named any balance of the proceeds of the sale of the said lands, together with all other funds in the hands of the executors, constitutes a fund to pay all general legacies *pro rata*. Dunford v. Jackson, 2 Va. Dec. 196.

D. RESIDUARY LEGACIES AND DEVISES.

Definition.—A residuary legacy or devise is a testamentary disposition of all the testator's personal property or real property respectively, not otherwise effectually disposed of by the will. 18 Am. & Eng. Enc. Law (2d Ed.) 723. See Gallagher v. Rowan, 86 Va. 823, 11 S. E. Rep. 121.

Partial Enumeration—Rule of Ejusdem Generis.—A bequest of "all my books, medicine and shop furniture, and all the estate not before devised including my gig and saddle horses," is not a general residuary bequest, but includes only property of the same kind as the articles enumerated. Minor v. Dabney, 3 Rand. 191. See also, Miars v. Bedgood, 9 Leigh 361.

What Passes by Residuary Bequest or Devise.—A residuary clause carries all the property of the testator which he has not attempted to dispose of, and also everything which turns out not to have been effectually disposed of, unless a contrary intention is clearly manifested in the will; for the fact of making a will raises a very strong presumption against any expectation or desire on the part of the testator of leaving any portion of his estate beyond the operation of his will. Gallagher v. Rowan, 86 Va. 823, 11 S. E. Rep. 121.

A will, after setting out four or five small bequests, contained the following residuary clause: "I do hereby appoint James Bedgood my executor to this my last will and testament, and that he shall receive the balance of my estate, if any." The testatrix, besides some furniture worth about $200, died possessed of $2978 in money. *Held*, that Bedgood was entitled to this money, as well as to any other balance of the estate. Miars v. Bedgood, 9 Leigh 361.

Same—Remainder after Life Estate.—A bequest of "all my lots or other ground not disposed of by will or deed," includes the reversion in a parcel of land, in which the testator had devised a life estate to another by the same will. Irwin v. Zane, 15 W. Va. 646.

A testator devised a house and lot to his wife for

life. He made other devises and bequests, and the residuary clause of his will was as follows: "All the rest and residue of my estate to be divided into two equal shares, and I give one-half to my two sons, James Henry Markell and Arthur Markell, and the other half to my nieces above named." *Held*, that the house and lot passed under the residuary clause of the will to the sons and nieces in equal shares. Markells v. Markells, 32 Gratt. 544.

A testator, after devising to his wife two negroes over and above her dower, devised all the rest and residue of his negroes to his children, equally to be divided between them; and then directed his executors to work all his negroes (except those particularly bequeathed) on his lands till his son W. should come of age. *Held*, that the dower slaves passed under the residuary clause, after the death of the widow. Cole v. Clayborn, 1 Wash. 262.

In Kennon v. McRoberts, 1 Wash. 96, 1 Am. Dec. 428, a general residuary clause was held not to embrace a reversionary interest in a tract of land (see also, Horde v. McRoberts, 1 Call 337). But, as stated in Minor v. Dabney, 3 Rand. 191, it was so decided "because it was evident, that the testator thought he had conveyed it otherwise in the body of his will, and could not therefore intend to make it a part of the residuum." See comment to same effect in Cole v. Clayborn, 1 Wash. 262; Philips v. Melson, 3 Munf. 76.

A testator devised land to his wife "during her widowhood, to raise his four youngest children on." He gave to his son, Levin, one large iron pot, his riding saddle, and a black heifer; to his wife and four youngest children, his two best feather beds and furniture; to his daughter, Nancy, one safe; to his daughter Bettie, one desk; and to his daughter Polly, one square walnut table. He desired the rest of his estate to be sold, and the money to be equally divided among his four smallest children. *Held*, that there were no words in the will conveying an intention in the testator to defeat the heir at law; that, as the testater devised his land to his wife for life, for her benefit and that of the younger children, it was to be fairly inferred, that he had given them all the interest in the land he intended; that the implication in the residuary clause was too weak to warrant the exclusion of the heir; and that, therefore, the reversion of all the real estate of the testator went to his heir at law. Philips v. Melson, 3 Munf. 76.

Same—Profits and Increase of Slaves.—Where slaves are specifically bequeathed to a child when he shall attain the age of twenty-one or shall marry, and no provision is made for maintenance in the meantime, their intermediate profits, if not otherwise disposed of, do not pass by a general residuary clause, but go to the legatee. Quarles v. Quarles, 2 Munf. 321.

If a testator bequeath a female slave to his wife for life, and then, absolutely, to one of his sons, saying nothing expressly or by evident implication of her increase, such increase, born after the death of the testator, and during the life of the widow, do not pass by a general residuary clause to all the children, but belong to the remainderman; such as are born before the testator's death, and are not otherwise disposed of by the will, do pass by such residuary clause. Ellison v. Woody, 6 Munf. 368.

Same—Legacies and Devises That Lapse or Otherwise Fail.—Where the will contains a residuary clause, void or lapsed legacies pass to the residuary legatees, and not to the next of kin. Elcan v. Lancasterian School, 2 Pat. & H. 53.

But at common law, although the will contains a residuary clause, lapsed or void devises will go to the heirs of the testator. Stonestreet v. Doyle, 75 Va. 356, 40 Am. Rep. 731. Under the statute, however, Va. Code 1887, § 2524, lapsed devises will pass to a general residuary devisee, unless the will shows a contrary intention on the part of the testator. Gallagher v. Rowan, 86 Va. 823, 11 S. E. Rep. 121.

"'It seems to be well settled,' says Redfield, 'that a residuary bequest as to personal estate carries not only everything not attempted to be disposed of, but everything which turns out not to have been effectually disposed of, as void legacies and lapsed legacies. A presumption arises in favor of the residuary legatee, as to personalty, against every other person except the particular legatee. The testator is supposed to give away from the residuary legatee, only for the sake of the particular legatee.' 'The courts,' he adds, 'have for a long time inclined very decidedly against adopting any construction of wills which would result in partial intestacy, unless absolutely forced upon them. This has been done partly as a rule of policy, perhaps, but mainly as one calculated to carry into effect the presumed intention of the testator. For the fact of making a will raises a very strong presumption against any expectation or desire on the part of the testator of leaving any portion of his estate beyond the operation of his will.' 2 Redf., Wills, 115. * * * And since the revisal of 1849 we have had a statute in Virginia, which puts devises of real estate on the same footing in this particular with legacies of personalty. Code, § 2524; 2 Lom. Ex'ors (2d Ed.) 307." Gallagher v. Rowan, 86 Va. 823, 11 S. E. Rep. 121. See *infra*. "Lapsed and Void Legacies and Devises."

With reference to what passes by a residuary bequest or devise, Mr. Minor says: "As the law was in Virginia prior to 1st January, 1787, a residuary devise, unlike a residuary legacy, did not include those devises which lapsed, nor probably those that were otherwise and originally void; but the same devolved upon the heir at law. The reason was, that whilst a will of personalty speaks at the time of the testator's death, and therefore a residuary legatee takes not only what is undisposed of by the expressions of the will, but also that which in the sequel turns out at the testator's death, not to have been effectually disposed of, the will of the lands was understood to speak only at the time of making it, and so the residuary devisee could take no more than what was at that time intended for him; and hence a devise that fails results to the heir. * * * When by statute in Virginia, taking effect 1st January, 1787, one was allowed to devise after-acquired lands, provided he plainly contemplated them (Turpin v. Turpin, 1 Wash. 75), it became needful to discriminate, in respect to the doctrine in question, between wills that did, and those that did not contemplate and dispose of such after-acquired lands. In the latter case, that is, wherever the will employed no expressions to the contrary, it was held to relate solely to the real estate which the devisor had at the time of making the will, and not to what he acquired subsequently. Harrison v. Allen, 3 Call 305; Raines v. Barker, 13 Gratt. 128; Gibson v. Carrell, 13 Gratt. 136; Smith v. Edrington, 8 Cr. 66; Warner v. Swearinger, 6 Dana (Ky.) 194. In this latter case, therefore, it is supposed that the heir, and not the residuary devisee, would take all devises that failed, for the same reason as before. But where the will did contemplate after-acquired lands, it would seem that the reason upon which the doctrine in question depends would no longer avail to exclude the residuary devisee; and that, by virtue of the residuary clause, he would take, in preference to the heir at law, all such devises as should lapse, or otherwise fail, just as a residuary legatee would, under corresponding circumstances, take lapsed and failing legacies,—unless, indeed, a contrary in-

tention was manifested in the will." 2 Min. Inst. (4th Ed.) 1009.

The distinction between a residuary bequest of personal estate and a residuary devise of real estate, as the law was prior to the statute of 1849-50, now Va. Code 1887, § 2524, placing devises on the same footing in this particular with bequests, is stated in Stonestreet v. Doyle, 75 Va. 356, as follows: "A will of personal estate refers to the state of the property at the testator's death; and therefore it is that a general residuary bequest of personalty comprehends everything which at the testator's death is not legally and effectually, as well as in express terms, disposed of. The rule is, however, very different with respect to a residuary devisee of realty. As to him the rule is(until changed by the statute of 1849 and 1850) the will speaks only at the time of making it, and he can take nothing but that which was intended for him. Jones v. Mitchell, 1 Sim. & Stu. 290. When, therefore, a specific devise of real estate is made, but which is void or ineffectual on account of the incapacity of the devisee to take, the estate is not included in the residuary devise, but passes to the heirs as a case of intestacy, and for the very obvious reason that the testator conceives himself to have disposed of the property, and therefore does not intend the residuary devisee shall take it. The specific devise, although inoperative for legal causes, as plainly indicates an intention to exclude the residuary devisee, as though the same estate had been given to some other person, who was at the time capable of taking, but by subsequent events was rendered incapable. The heir in such cases takes the estate, not on the ground of any supposed intention of the testator in his behalf, but because he is entitled to any part of it which is not effectually and legally given to some other person."

Though a provision that the executors shall invest a certain sum in land ordinarily would be a conversion of the amount into realty, yet where, by a breach of a condition precedent annexed to the devise, the devisee takes nothing, the conversion fails to that extent, and such portion of the money goes to the residuary legatee. Phillips v. Ferguson, 85 Va. 509, 8 S. E. Rep. 241.

Where a bequest in one clause of a will is void for uncertainty, the fund becomes a part of the residuary estate. Trustees of Emory & Henry College v. Shoemaker College, 92 Va. 320, 23 S. E. Rep. 765.

A will gave certain land to the testator's adopted daughter and "her heirs forever," and provided that, if she should die without issue, the land should be sold, and the proceeds applied to certain purposes, and, after making certain bequests, the will made the adopted daughter residuary legatee of all the testator's "remaining estate, real and personal." One of the purposes for which a part of the proceeds of the land was directed to be used was void. *Held*, that, that portion fell into the residue, and, on the death of the adopted daughter without issue passed into her sole distributee as personalty. Gallagher v. Rowan, 86 Va. 823, 11 S. E. Rep. 121.

A contingent remainder of personal estate which fails to take effect, falls into the residuum and passes to the residuary legatees. Shackelford v. Newbill, 2 Pat. & H. 232.

The rule that all legacies which fail by lapse or otherwise fall into the residuum and go to the residuary legatees, applies to specific or pecuniary legacies, but not to the subject of the residuary legacy itself. Frazier v. Frazier, 2 Leigh 649; Skipwith v. Cabell, 19 Gratt. 786.

A testator bequeathed the residuum of his estate to the four children of a deceased brother. Two of the legatees died before the testator, whereby the intended legacy of the moiety of the residuum to them lapsed. *Held*, that this moiety did not go to the residuary legatees who survived the testator, but was distributable among his next of kin, he being intestate as to it. Frazier v. Frazier, 2 Leigh 642.

"When a specific devise or bequest fails from any cause, the subject of it goes to the residuary devisee or legatee, as the case may be, unless a different intention appears in the will. But when a residuary devise or bequest fails from any cause, the subject of it, to the extent of such failure, goes to the heirs or distributees at law of the testator." Dictum by MONCURE, J., in Stone v. Nicholson, 27 Gratt. 8.

In 2 Min. Inst. (4th Ed.) 1010, Mr. Minor says: "JUDGE MONCURE'S dictum in Stone v. Nicholson, 27 Gratt. 8, doubtless relates to the present state of the law, as it is by the existing statute, taking effect 1st July, 1850 (V. C. 1873, ch. 118, sec. 14; V. C. 1887, ch. 112, sec. 2524). And yet the distinction which the observation supposes, between the destination of specific devises which fail (namely, that they are included in the residuary clause), and of part of the residuary devise itself (which is reckoned never to fall into the residuum), would seem to be hardly reconcilable with the terms of the statute. 'Such real estate * * * as shall be comprised in any devise * * * which shall fail or be void, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.' It was that very distinction (taken in Frazier v. Frazier, 2 Leigh 649) that the enactment was apparently designed to obviate, whilst at the same time it declared a conclusion to which, it is apprehended, the courts would have come at all events, as freely in devises as in wills of chattels, inasmuch as both by statute speak as at the testator's death."

Construction of Residuary Clause.—When a man makes a will the presumption is that he intends thereby to dispose of his whole estate, especially where the will contains a general residuary clause, and hence very strong and special words are required to show that the testator intended the residuary bequest to have a limited effect, and thus to rebut the presumption in favor of the residue. Smith v. Smith, 17 Gratt. 268; Gallagher v. Rowan, 86 Va. 823, 11 S. E. Rep. 121; Irwin v. Zane, 15 W. Va. 646.

General words in a residuary clause will carry every estate or interest of the testator, which is not expressly, or by necessary implication, excluded from its operation. Irwin v. Zane, 15 W. Va. 646.

But however general in point of form and expression a residuary clause may be, if it appear from other parts of the will that a particular estate or interest was not intended by the testator to fall into the residuum, it will not be embraced by the residuary clause, although no other disposition thereof may have been actually made by the will. Kennon v. McRoberts, 1 Wash. 96, 1 Am. Dec. 428; Minor v. Dabney, 3 Rand. 191.

If a testator give to one of his children a pecuniary legacy, expressly declaring that sum to be all he intends such legatee to receive of his estate, a general residuary bequest, to "all his children" (without mentioning names) must be construed as not meaning that child. Ellison v. Woody, 6 Munf. 368.

A bequest of "all the rest and residue of my estate which may at any time come to the hands of my executor, either from the lapsing of the aforesaid legacies or otherwise," was held, upon a consideration of the whole will and surrounding circumstances, to include the testator's real estate. Smith v. Smith, 17 Gratt. 268.

The residuary clause of a will was as follows:

"All the rest and residue of my estate, real, personal, and mixed, I desire shall go to, and be divided in equal parts, among those who would be my heirs at law, under the statute of descents and distributions in Virginia, in case I had died intestate." *Held*, that the heirs at law inherited under this clause *per capita*, and not *per stirpes*. Walker v. Webster, 95 Va. 377, 28 S. E. Rep. 570.

A devise to a wife of a residue of an estate, after paying debts and legacies, with a contingent limitation over to another "of whatever she may leave" at her death, vests in the wife an absolute estate in the residuum. Elcan v. Lancasterian School, 2 Pat. & H. 53.

The provision of a residuary clause that "the remainder of my estate, real and personal," shall be equally divided, etc., does not render the land subject to the payment of legacies, where by the prior clauses of the will only specific devises of land have been made, and no legacies have been given. Lee v. Lee, 88 Va. 805, 14 S. E. Rep. 534.

E. CUMULATIVE LEGACIES.—When two legacies are given by the same testator to the same person, if he takes both they are said to be cumulative as distinguished from such as are merely repeated or given in substitution. The testator's intention determines the construction, and although in general it must be gathered from the face of the will, parol testimony being for the most part inadmissible to show what it is, yet in case of cumulative bequests a much freer resort to it is tolerated. 3 Min. Inst. (2d Ed.) 597.

Mr. Minor lays down the following rules of interpretation where the intention of the testator does not appear from the face of the will:

"(1) If a specific thing is bequeathed twice by a testator, to the same person, he, of course, can have it but once, and thus no legacy of a specific chattel can ever be cumulative.

"(2) Where two legacies of equal amount are given to the same recipient by the same will, it is a mere repetition, and he is entitled to one legacy only; but if they be of unequal amount, the one last given is cumulative, and he is entitled to both. And parol evidence is admitted to repel the presumption in either case.

"(3) Where two legacies, whether of equal or unequal amount, are given to the same legatee, by different instruments, as by a will and a codicil, the last is cumulative, and he takes both. But here, also, parol evidence may be introduced to prove that the testator's intention was otherwise." 3 Min. Inst. (2d Ed.) 597.

Presumption Where One Legacy is Specific and the Other Residuary.—The presumption arising from the fact that the testator specifically devised certain lands to his two sons, and then directed the balance of his estate, "not hereinbefore partly disposed of," to be disposed of as the law directs, is that he thereby intended to equalize the two sons with his other children to whom he had made previous gifts and that he did not intend that the devise to them should operate by way of an advancement within the meaning of the Va. Code 1887, § 2561, which provides that advancements to a descendant, made by one who dies wholly or partially intestate, shall be brought into hotchpot with the whole estate before the person advanced shall be entitled to partition or distribution with the other heirs of the testator. Biedler v. Biedler, 87 Va. 300, 12 S. E. Rep. 753.

Legacies Given by Different Instruments Presumed to Be Cumulative.—A testator directed his property, except lands devised to his wife, to be equally divided among his children. He referred to a memorandum of advancements, which he wished to accompany his will "in order that an equal distribution of his estate might be made." After his wife's death, he added a codicil devising to a son certain land, and reciting that the death of his wife and other considerations had induced him to modify his will, and that his son had lived with him and been of great service and comfort to him, and that he had revoked so much of the will as was inconsistent with the codicil. The land was not valued in the codicil, nor was there any mention of it in the memorandum. *Held*, that the son took the land, in addition to his share under the original will, without having to account for it. Noel v. Noel, 86 Va. 109, 9 S. E. Rep. 584.

F. VESTED OR CONTINGENT LEGACIES.—A legacy not immediately payable is said to be vested when it is payable at a future time certain to arrive and is transmissible to the personal representatives of the legatee in case of his death before the time of payment. If the legacy is not thus transmissible, and is payable on an event which may never happen, it is said to be contingent. Whether a particular legacy is vested or contingent, is a question of testamentary construction to be determined by the terms of the will. See 18 Am. & Eng. Enc. Law (2d Ed.) 781. See also, 3 Min. Inst. (2d Ed.) 590. For a full discussion of what expressions will give vested, and what contingent, interests, see monographic *note* on "Wills."

G. LEGACIES AND DEVISES UPON CONDITION.

Definition—Classes of Condition.—A conditional legacy is a bequest to take effect, or to be defeated, upon the happening or not happening of some designated event. It is precedent, when the act to be done, or the event to happen is to precede the vesting of the legacy, and subsequent when the act to be done, or the event to happen is to follow the vesting. 3 Min. Inst. (2d Ed.) 594.

Condition Distinguished from Motive.—Where ambiguous words are used expressive of contingency, it may be a question whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative. In order to make the bequest conditional, it must be clear that the testator intended that it should operate only in a certain event. Hence, where a testatrix says: "In case of a sudden or unexpected death, I give the remainder of my property to be equally divided between my cousin, Dr. C., of Philadelphia, and my cousin, P. S., of New Orleans." no condition that the testatrix shall die suddenly and unexpectedly is contemplated, but the words express only that the possibility of such event was the reason or occasion for making the bequest. 3 Min. Inst. (2d Ed.) 595; Skipwith v. Cabell, 19 Gratt. 782.

A paper writing contained the following words: "Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeathe all my property, personal and real, to my beloved wife, Florence, witness my hand and seal, 7th of March, 1872. Wm. T. French." *Held*, that the provision, "If I get drowned this morning," was not a condition, but a narration of the facts which led the testator to make his will at that time. French v. French, 14 W. Va. 458.

A paper writing was in these words: "Lewinsville, August 19, 1862. Dear wife: I am going away; I may never return. I leave my property to Gaines and Dan; dispose of it as you see fit; don't forget sister Mary and Bridget. Pay William McCauley twenty dollars; Patrick Sullivan, twenty-five dollars. Edmund C. Conly." *Held*, in view of the circumstances surrounding the writer at the time, that this will was not conditional on his going away and not returning. Cody v. Conly, 27 Gratt. 313.

Construction of Conditions.—"While a person may

certainly make a conditional will, his intention to do so must appear very clearly on the face of the will; and if such an intention do not so appear, the will must be regarded as unconditional." Cody v. Conly, 27 Gratt. 313; French v. French, 14 W. Va. 458.

"Nothing is better settled than that in conditions subsequent, since they are in defeasance of interests already vested, courts of law and courts of equity are strict in requiring the very event, or the act to be done, with all its particulars, which is to defeat the interest previously vested." Lewis v. Henry, 28 Gratt. 192.

Party Accepting Legacy May Bind Himself to Perform Condition.—See *infra*, "Acceptance and Refusal of Legacies and Devises."

Rules to Determine Whether Condition is Precedent or Subsequent.—There are no technical words to distinguish between conditions precedent and conditions subsequent. The distinction is a matter of construction. The same words may indifferently make either, according to the intent of the person who creates the condition. If the language of the particular clause or of the whole will shows that the act on which the estate depends must be performed before the estate can vest, the condition is precedent, and unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole will, the condition is subsequent. Burdis v. Burdis, 96 Va. 81, 30 S. E. Rep. 462; Reuff v. Coleman, 30 W. Va. 171, 3 S. E. Rep. 597.

Impossible Conditions.—If a condition precedent or subsequent is annexed to a bequest of personal property, and its performance is or becomes impossible, the bequest does not fail, but the legatee takes the property by absolute title as if no condition had been annexed thereto. See 3 Min. Inst. (2d Ed.) 595.

If a condition precedent is annexed to a devise of real estate, and its performance is or becomes impossible, the devise fails, although the devisee is without fault; but if the condition be subsequent, and its performance becomes impossible without fault of the devisee, the estate is not defeated or forfeited, but the devisee holds the property by absolute title as if no condition had been annexed thereto. Burdis v. Burdis, 96 Va. 81, 30 S. E. Rep. 462.

A testator devised to his wife for life his homestead and five acres of land, with the express understanding that his son would support and take care of her, and at her death the homestead and land were to return to his son "as compensation therefor." The will also required the son to support and provide for his two sisters while they were single. The testator's wife died more than a year before the testator, and he made no change in his will. *Held*, that the condition on which the homestead and five acres vested in the son was a condition subsequent, and he acquired an absolute title. Burdis v. Burdis, 96 Va. 81, 30 S. E. Rep. 462.

Illegal Conditions.—"Where the illegal condition precedent is '*malum in se*,' as to kill a man, the legacy is void, whether it be charged on personalty or on lands, that is by the Roman, as well as by the common law; but where it is merely contrary to the policy of the law, as that a married woman shall live apart from her husband, if charged on the personalty the condition is void, and the legacy good, in pursuance of the principles of the Roman law; whilst, if it be charged on lands, the legacy and conditions are void, in conformity with the common law. Thus, where a testator bequeathed to his niece £5 a month, provided she lived apart from her husband, the bequest was held to be absolute and unconditional." 3 Min. Inst. (2d Ed.) 596.

Illegal conditions, if they be subsequent, are void as well by the common as by the Roman law, and the bequest is treated as if it were unconditional. 3 Min. Inst. (2d Ed.) 597.

For examples of illegal conditions, see *infra*, "Conditions in Restraint of Marriage"; "Conditions as to Religious Qualification."

Conditions in Restraint of Marriage—General Statement.—"If a condition in restraint of marriage is precedent and annexed to a gift of land (or of any interest arising out of land), it operates as at common law; when broken, it prevents the estate from vesting, whatever be its nature. When annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect; if partial and reasonable it is operative. When a condition is subsequent, and annexed to a gift of land (or of any interest arising out of land), if general, it is void, and although broken, the estate of the donee continues; if partial and reasonable, it is operative, and on its breach, the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases and the gift over takes effect; but if there is no gift over, then the condition is said to be *in terrorem* and is inoperative." 2 Pom. Eq. § 933, quoted with approval in Phillips v. Ferguson, 85 Va. 509, 8 S. E. Rep. 241. See *note* to Phillips v. Ferguson in 1 L. R. A. 837. See also, *note* in 1 Va. Law Reg. 550.

Limitation until Marriage Distinguished from Condition in Restraint of Marriage.—"It is well settled and very clear, that a testator can, by his will, give property to an unmarried female until her marriage, and then and in that event, to other persons. Such a bequest may, incidentally, operate as a restraint upon marriage. But such a possible, or even probable effect, will not invalidate the bequest. It is a bequest which every owner of property, in the exercise of his dominion over it, and his power of disposition of it, has a right to make; and it is a bequest which may be very reasonable and proper to be made, under the circumstances of the case. A head of a family would naturally wish to dispose of his property, or an adequate portion of it, in such a way as to supply the wants of the needy members of the family, at least so long as they might, or were likely to continue to be needy, and then to dispose of it as he might deem to be just and proper. He might, therefore, secure it to the use of a female member of the family until her marriage, and then in that event to other members of the family. He might well suppose that while the first object of his bounty would need it for her support so long as she remained unmarried and had no one to provide for her, she probably would not need it when she would have a husband to provide for her." Selden v. Keen, 27 Gratt. 576.

A testatrix bequeathed certain bank stock to a young lady, providing that if she should die under the age of twenty-one years or should marry, the bank stock should go to a trustee for the benefit of the young lady's mother, and of the great-nieces of the testatrix. *Held*, that the bequest over was a conditional limitation, and not a condition in restraint of the marriage. Selden v. Keen, 27 Gratt. 576.

Necessity for Gift Over.—A limitation over in the event of the marriage of the first taker is always an important, if not a conclusive, circumstance to show that a condition *in terrorem*, and in restraint of mar-

riage, is not intended. Selden v. Keen, 27 Gratt. 576.

Where there is no bequest over, and no specific direction that upon breach of the condition the legacy shall fall into the residuum of the estate, the condition is *in terrorem* merely, and does not avoid the bequest. Maddox v. Maddox, 11 Gratt. 804; Phillips v. Ferguson, 85 Va. 513, 8 S. E. Rep. 241; Fifield v. Van Wyck, 94 Va. 563, 27 S. E. Rep. 446.

The doctrine of *in terrorem*, that is, the rule that a gift over is necessary in order that a condition shall be valid, applies only to conditions in restraint of marriage and to conditions against contesting the will. Reuff v. Coleman, 30 W. Va. 171, 3 S. E. Rep. 597; Fifield v. Van Wyck, 94 Va. 563, 27 S. E. Rep. 446.

Sufficiency of Gift Over.—A provision in a will that the legacy to the contesting legatee shall revert to the estate of the testator is not a gift over within the meaning of the rule. Fifield v. Van Wyck, 94 Va. 557, 27 S. E. Rep. 446.

Conditions in General Restraint of Marriage.—A condition in a devise to the testator's sisters that they are to remain sole, and that in case of either marrying, the property shall thenceforth be enjoyed by the one remaining sole, is null and void as placing a restraint upon marriage. Smythe v. Smythe, 90 Va. 638, 19 S. E. Rep. 175.

A member of the Society of Friends, by his will, gave a legacy of a remainder after a life interest to his niece "during her single life, and forever, if her conduct should be orderly and she remain a member of the Society of Friends." When the niece arrived at a marriageable age, there were but five or six unmarried men of the society in the neighborhood in which she lived, and, during the life estate, she married a man not a member of the Society of Friends, and by that act ceased to be a member of the society. *Held*, that the condition was an unreasonable restraint upon marriage and therefore void. Maddox v. Maddox, 11 Gratt. 804.

A condition intended to be in general restraint of marriage is void. But where it appears that it was the intention of the testator to create springing and shifting uses for the benefit of different members of his family, according as their needs might seem to require, then the condition, or what is called a condition, is not against the policy of the law, but is valid. Selden v. Keen, 27 Gratt. 576.

Conditions in Partial Restraint of Marriage—Marriage before Majority Forbidden.—A bequest upon condition that the legatee shall remain unmarried until she becomes twenty-one years of age, is not such a restraint upon marriage as will make the condition void. Reuff v. Coleman, 30 W. Va. 171, 3 S. E. Rep. 597.

Conditions in Partial Restraint of Marriage—Marriage to Member of Particular Family Forbidden.—In Phillips v. Ferguson, 85 Va. 509, 8 S. E. Rep. 241, 1 L. R. A. 837, it was held that a condition by a father that his daughter should not marry into "T. W. Phillips' family" was reasonable and valid, and took effect on her marriage with a son of T. W. Phillips.

A condition annexed to a devise or bequest avoiding it if the beneficiary marry into the "family" of a person named, in the absence of anything in the context to the contrary, means one of the children of such person. Phillips v. Ferguson, 85 Va. 509, 8 S. E. Rep. 241, 1 L. R. A. 837.

Where a condition was annexed to a bequest, avoiding it if the beneficiary marry into the family of a person named, parol evidence is admissible to show that a person of the name mentioned lived in the vicinity, and that the testator was not on good terms with him, and shortly before making his will had refused his consent to the beneficiary's marriage with said person's son, who afterwards married her during the testator's life without his consent. Phillips v. Ferguson, 85 Va. 509, 8 S. E. Rep. 241, 1 L. R. A. 837.

Condition as to Religious Qualification.—A precedent condition requiring a religious qualification, as continued membership in a religious sect, if annexed to a legacy charged only on personal estate is void as against the policy of the law, and the gift is absolute. Maddox v. Maddox, 11 Gratt. 804.

Conditions Precedent Requiring Good Conduct on Part of Legatee.—A testator provided in his will that if a girl, eighteen years of age, who was at the time, and had been for several years, living in his family, should remain with his family until she should attain twenty-one years of age, and continue to conduct herself as she had theretofore done, then his executor should pay her $300 when she became of age. Two years before she became twenty-one years of age she had an illegitimate child, and, at the request of the testator's widow, left the family soon after she had the child. *Held*, that the legatee was not entitled to be paid the legacy. Reuff v. Coleman, 30 W. Va. 171, 3 S. E. Rep. 597.

Conditions Repugnant to the Nature of the Estate.—A condition subsequent which is repugnant to the nature of the estate devised or bequeathed is void, and the devisee or legatee will take free from the condition; for a man cannot give property absolutely and at the same time provide that it shall not be disposed of according to law.

This rule is well illustrated by that numerous class of cases in which an absolute interest in land or personal property is given, with a provision that "what remains" shall go to others upon the death of the primary devisee. See Hall v. Palmer, 87 Va. 354, 12 S. E. Rep. 618, 11 L. R. A. 610, and cases there cited: Elcan v. Lancasterian School, 2 Pat. & H. 53, and *foot-note*. See also, monographic *note* on "Wills."

Where freedom was devised to a slave, while slavery was a legally authorized institution in Virginia, with a condition that she should leave the state in six months, it was held that the condition was void and the gift of freedom absolute. Forward v. Thamer, 9 Gratt. 537. In this case, the court said: "It was within the power of the testator either to keep his slaves in a state of slavery or to emancipate them. If he had bequeathed them as slaves, he could annex no valid condition subsequent, which would be repugnant to the state of slavery. Peggy and Mary v. Legg, 6 Munf. 229; Rucker v. Gilbert, 3 Leigh 8; Wynn v. Carrell, 2 Gratt. 227. So if he emancipated them, he could annex no condition subsequent, repugnant to the freedom conferred. Parks v. Hewlett, 9 Leigh 511; JUDGE GREEN'S opinion in Isaac v. West, 6 Rand. 652; Fulton v. Shaw, 4 Rand. 597; Com. v. Fowler, 4 Call 35."

Where the will actually emancipates a slave so that his status is changed from that of a slave to a freedman of color, all provisions imposing conditions to take effect after that change of condition are void. Forward v. Thamer, 9 Gratt. 537; Osborne v. Taylor, 12 Gratt. 117, and *foot-note*. See Williamson v. Coalter, 14 Gratt. 403.

Where a female slave is emancipated with a reservation that her future increase shall be slaves, such reservation is void, and the woman and her increase are absolutely free. Fulton v. Shaw, 4 Rand. 597.

A testator bequeathed certain slaves to trustees for the use of J. for her life, and directed that at the death of J. they be emancipated. But should they or any of them prefer to remain in the state, they could do so by choosing masters to serve during the life of the person chosen, and then they should have the option of freedom or slavery by making a second choice. *Held*, that the condition

was repugnant and void. Osborne v. Taylor, 12 Gratt. 117. As to the effect of a provision in a will making the emancipation of a slave dependent on his own election, see Bailey v. Poindexter, 14 Gratt. 189, and *foot-note*. See also, Jones v. Jones, 92 Va. 590, 24 S. E. Rep. 255.

Conditions That Legatee Attain Certain Age—Whether Legacy Vested or Contingent.—Where a future time is fixed by the will for its payment, a legacy is vested or contingent, according as, upon a just construction, the testator appears to have meant to annex the time to the payment or to the gift. On this point Mr. Minor lays down the two following rules of construction, which however must vary according to the circumstances of the case showing an intention on the part of the testator that the estate shall or shall not vest: (1) A bequest expressed "to be payable," or "to be paid," at the age of twenty-one, or any other certain date in the future, is understood to annex the time to the payment, and confers an interest which vests immediately on the testator's death; and (2) If the words "payable" or "to be paid" be omitted, and the legacy be given "at twenty-one," or "if," or "in case," or "when," or "provided the legatee attains the age of twenty-one," or any other certain and definite period, these expressions are interpreted to annex the time to the gift itself, and to make the legatee's right to it depend on his being alive at the time fixed for its payment, so that, if he dies before that period arrives, his personal representative does not succeed to the legacy, that is, it is contingent. 3 Min. Inst. (2d Ed.) 592.

A will contained the following clause: "I give and bequeath my estate, except what I hereinafter name both real and personal, to my brother Benjamin B. Heath's children; providing either of them shall live to the age of twenty-one. If neither of them live to be twenty-one it is my desire that my sister Lilly Raney and my sister Barbara B. Lee's children to have it equally between them." *Held*, that the legacy to the children of Benjamin B. Heath vested at the death of the testator subject to be divested on the death of all of them under the age of twenty-one, and that the same rule applied to both real and personal estate. Raney v. Heath, 2 Pat. & H. 206.

Testator gave his wife all his property, both real and personal, "until" their youngest child should reach the age of seventeen years, his wife to board, clothe and educate all the children until that time; and further provided that, "when the younger child becomes seventeen years of age, I will and bequeath to my wife the one-third of my estate, both real and personal; the remainder to my children equally." *Held*, that each child took a vested interest, which, on his death before the youngest child reached the age of seventeen, passed to his personal representatives. Sellers v. Reed, 88 Va. 377, 13 S. E. Rep. 754.

Conditions against Contesting the Will.—A condition in a will that any legatee who attempts to set aside the will shall forfeit his legacy, is merely *in terrorem*, and inoperative, when it is annexed to a gift of personalty, and there is no gift over to some one else in case of forfeiture; and a residuary clause is not a sufficient gift over. Fifield v. Van Wyck, 94 Va. 557, 27 S. E. Rep. 446.

The doctrine of *in terrorem*, that is, the rule that a gift over is necessary in order that a condition shall be valid, applies only to conditions in restraint of marriage and to conditions against contesting the will. Reuff v. Coleman, 30 W. Va. 171, 3 S. E. Rep. 597. See *supra*, "Conditions in Restraint of Marriage."

Condition Requiring Legatee to Pay Debt Due Testator.—A will provided that a daughter should take no part of the testator's estate, unless her husband should account for and pay over to the estate certain money. On demurrer to an action brought by the executor to collect the money, it was held that the defendant had the choice of paying the money, or treating it as an advancement, and that the action could not be maintained. Darne v. Lloyd, 82 Va. 859, 5 S. E. Rep. 87.

Condition That Testator's Estate Be Not Required to Pay Claims in Pending Lawsuit.—A testator by his will devised a certain part of his estate to his daughter. By a codicil, executed six months afterwards, he declared "If my estate have to pay the debt, or any part thereof, in the lawsuit brought by M.'s administrator against L.'s estate I hereby will and direct that my daughter M. is to forfeit all interest in my estate, and is to inherit nothing more under this my will." The testator was the surety of L., who had been the husband of M., and was not sued, but settled the debt and took an assignment of it. After his death in a suit by his executors, his daughter brought the money into court and tendered it. *Held*, that the condition created by the codicil was a condition subsequent, and the estate not having paid the debt, but M. tendering the money to pay it, her interest in her father's estate was not forfeited. Lewis v. Henry, 28 Gratt. 192.

Conditions as to Birth of Issue.—A condition dependent on the birth of issue is valid if not in violation of the rule against perpetuities. Such condition is not held to be broken until it has become impossible of taking effect by the termination of the time prescribed or the death of the person named in the condition as the parent of the prospective issue. The fact that the birth of issue is improbable, or indeed impossible, as where the woman who is indicated as the mother of the issue is past the age of childbearing, does not amount to a breach of the condition. Page on Wills, § 677; Carney v. Kain, 40 W. Va. 758, 23 S. E. Rep. 650.

Conditions as to Support or Services.—In Crawford v. Patterson, 11 Gratt. 364, it was held that a bequest to the testator's wife adding "it is understood that my wife is to keep my children, and raise them, and give them sufficient schooling," makes a condition, and the wife is bound to provide for the support and education of the children in a manner suited to her circumstances as long as they remain with her, but that she is not liable for their expenses if they go to live with other relatives, she being willing to take care of them properly. See 3 Min. Inst. (2d Ed.) 594.

Where a testator devised land to his grandsons, they to take care of their mother while she resided with them, as long as one of the grandsons was ready to take care of her, he could not be compelled to contribute to her support elsewhere. Isner v. Kelley, 51 W. Va. 82, 41 S. E. Rep. 158.

Testator bequeathed a life estate in all his property to his wife, with remainder to his brother, and directed his executor to support B., a minor, so long as she should remain a member of testator's family, or until she should become twenty-one years of age. At the time of the drawing of the will, testator's family consisted of himself, his wife, the brother, and B. *Held*, that B., not having left the home, was entitled to support until she was twenty-one, although the wife had died, and the brother had come into possession of the estate. Miller v. Miller, 99 Va. 662, 39 S. E. Rep. 597.

Where a devise is upon condition that the devisee shall support a person named, the gift is not avoided because the support is not given by reason of the fact that the person to be supported dies before the

testator. Burdis v. Burdis, 96 Va. 81, 30 S. E. Rep. 462.

Provisions in a will that the executors shall manage a certain farm, and apply the "revenues" arising therefrom to the support of an infant, the residue to be paid to the testator's daughter, do not vest the personal property on such farm in either of the beneficiaries. Beirne v. Von Ahlefeldt, 33 W. Va. 663, 11 S. E. Rep. 46.

Conditions Exempting Beneficiary in Will from Liability for Debts—Spendthrift Trusts.—A testator may by his will create a valid trust for the support of a beneficiary, which will be free from his debts and liabilities. Page on Wills, § 685; Underhill on Wills, § 527; Garland v. Garland, 87 Va. 758, 13 S. E. Rep. 478, 24 Am. St. Rep. 682. See also, Markham v. Guerrant, 4 Leigh 279; Nickell v. Handly, 10 Gratt. 336; Johnston v. Zane, 11 Gratt. 570.

A testator devised property in trust, so that "the profit is set apart for his brother's use under his superintendence; but neither the property nor profit shall be bound for his past debts, or for his future debts or liabilities, other than decent or comfortable support; at his death all said property is to pass to a trustee in trust for certain other persons." *Held*, that the brother took no absolute estate, but only a qualified right to support from the profits, subject to no liabilities except for supplies for support, and the unexpended profits at his death passed to the remaindermen. Garland v. Garland, 87 Va. 758, 13 S. E. Rep. 478, 24 Am. St. Rep. 682.

III. WHO MAY DEVISE OR BEQUEATH.

Any person of sound mind, who is not under the age of twenty-one years or a married woman, may make a bequest or devise. A minor eighteen years of age or upwards may by will dispose of personal estate, and a married woman may make a will for the disposition of her separate estate or in the exercise of a power of appointment. Va. Code 1887, §§ 2511, 2512. On the subject of testamentary capacity, see generally, monographic *note* on "Wills."

IV. WHAT PROPERTY MAY BE DEVISED OR BEQUEATHED.

A competent testator may by his will dispose of any estate to which he may be entitled at his death, and which, if not so disposed of, would devolve upon his heirs, personal representatives, or next of kin. This power, under the present statute in Virginia and West Virginia, extends to any estate, right or interest, to which the testator may be entitled at his death, notwithstanding he may become so entitled subsequently to the execution of the will. Va. Code 1887, § 2512; W. Va. Code 1899, ch. 771, § 1, p. 705; 2 Min. Inst. (4th Ed.) 1001. For a full discussion of this subject, see monographic *note* on "Wills."

V. WHO MAY BE DEVISEES OR LEGATEES.

It appears that property may be devised to any person who is definitely ascertained. But where the devisee is an alien enemy, or a corporation not empowered by its charter to acquire and hold lands, the lands are liable to be forfeited to the commonwealth, the devisee not being able to hold, although capable to take; and in the case of a devise to one laboring under a disability, as of infancy, insanity or coverture, the devisee may disclaim, after the removal of the disability. 2 Min. Inst. (4th Ed.) 1001. See Bryan v. Hyre, 1 Rob. 102.

To the validity of every disposition as well of personal as of real estate, it is requisite that there be a definite object, and uncertainty in this particular is fatal. Pack v. Shanklin, 43 W. Va. 304, 27 S. E. Rep. 389.

Aliens.—It is provided by statute in Virginia and West Virginia that "any alien, not an enemy, may acquire by purchase or descent and hold real estate in this state; and the same shall be transmitted in the same manner as real estate held by citizens." Va. Code 1887, § 43; W. Va. Code 1899, ch. 70, § 1, p. 679.

An alien, whether friend or enemy, may, at common law, take land by grant or devise, which, however, is liable to escheat to the commonwealth upon office found; yet he may convey it, if done before office found. Marshall v. Conrad, 5 Call 364.

An alien enemy, as well as an alien friend, is capable of taking lands by devise; and an alien subject of Great Britain to whom a devise of lands was made in 1781, could, by the treaty of 1794, between the United States and Great Britain, hold and alien the lands so devised to him. Stephen v. Swann, 9 Leigh 404.

A testator by his will gave to his brothers, who were aliens, "to be equally divided between them, the money arising from the sale of the land and other property and from the debts due to me at the time of my death; and as they reside in Great Britain, it is my will that my executors make remittance to them in bills of exchange or in any other mode, as soon as they can." *Held*, that this was a good devise, that the sale and conveyance by the executors was valid, and that the land did not escheat to the commonwealth in consequence of the testator's dying without heirs. Com. v. Selden, 5 Munf. 160.

A testator devised his real estate to his executors to be sold by them, and gave the proceeds of such sale, and the rents and profits of the land which might accrue before the sale, to his sisters, who were aliens, subject to the payment of his just debts and of certain legacies to his executors. *Held*, that the title of the alien sisters was good against the commonwealth, claiming the money for which the lands were sold, the testator having died without lawful heirs and his personal estate being sufficient to pay his debts. Com. v. Martin, 5 Munf. 117.

Attesting Witnesses.—Under 1 Rev. Code, ch. 104, § 11, p. 377, a devise or bequest, whether of real or personal estate, to an attesting witness to a will, without whose testimony the will may not be otherwise proved, is void. Croft v. Croft, 4 Gratt. 103. But if such witness would be entitled to any share of the estate of the testator, in case the will were not established, so much of his share shall be saved to him as shall not exceed the value of what is so devised or bequeathed. Va. Code 1887, § 2529; W. Va. Code 1899, ch. 77, § 18, p. 707.

If a will can be proved independently of the testimony of an attesting witness, beneficially interested therein, a devise or bequest to such witness or her husband is not void. Davis v. Davis, 43 W. Va. 300, 27 S. E. Rep. 323. See editorial in 4 Va. Law Reg. 327. See also, monographic *note* on "Wills."

Draftsman as Beneficiary.—The fact that the draftsman of a will takes a benefit under it, while it imposes upon the court the duty of careful scrutiny, does not invalidate the will. Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650; Riddell v. Johnson, 26 Gratt. 152.

Devise to Heir of Testator.—Where a testator devises property to his heir to take effect in the same manner as he would take as heir, the heir is regarded as taking by descent and not by purchase. Biedler v. Biedler, 87 Va. 300, 12 S. E. Rep. 753. See monographic *note* on "Wills."

Corporations.—Corporations have the legal capacity to take charitable bequests, when, and to the extent, authorized by their charters. Wilson v. Perry, 29 W. Va. 169, 1 S. E. Rep. 302; University v. Tucker, 31 W. Va. 621, 8 S. E. Rep. 410; Roy v. Rowzie, 25 Gratt. 599. See monographic *notes* on "Corpora-

tions" appended to Slaughter v. Com., 13 Gratt. 767; "Charities" appended to Kelly v. Love, 20 Gratt. 124.

A bequest to a corporation of its own stock is valid, whether such stock is declared by its charter to be realty or personalty. Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19.

Where a foreign corporation is improperly described in the will, the bequest will not fail, if it be clearly shown by proper proof what corporation was meant by the description. University v. Tucker, 31 W. Va. 621, 8 S. E. Rep. 410.

Gifts to Churches and for Charitable Purposes.—See monographic *notes* on "Charities" appended to Kelly v. Love, 20 Gratt. 124, and "Church Property" appended to Brooke v. Shacklett, 13 Gratt. 301.

VI. ACCEPTANCE AND REFUSAL OF LEGACIES AND DEVISES.

A. IN GENERAL—PRESUMPTION OF ACCEPTANCE.—Title to personal property bequeathed does not vest in the legatee until he has accepted the legacy. But acts clearly showing an assent to a legacy are a sufficient acceptance of it without a verbal assent, and acceptance may be presumed where the legacy is beneficial to the legatee. 18 Am. & Eng. Enc. Law (2d Ed.) 745. See Kenny v. Kenny, 25 Gratt. 293.

The acceptance of a devise is necessary to vest title in the devisee. But since a gift implies a benefit, such acceptance will be presumed. The presumption of acceptance, however, may be overcome by the disclaimer or renunciation of the devisee, which may be by matter of record or by deed. It seems that a mere verbal disclaimer is not sufficient. Bryan v. Hyre, 1 Rob. 94; Corbett v. Nutt, 18 Gratt. 647; Suttle v. Richmond, etc., R. Co., 76 Va. 286; Fisher v. Camp, 26 W. Va. 580.

B. OBLIGATIONS ARISING FROM ACCEPTANCE.—A person who accepts a benefit under a will is bound to conform to all its provisions and renounce every right inconsistent therewith. 18 Am. & Eng. Enc. Law (2d Ed.) 746; Bolling v. Bolling, 5 Munf. 334. See *infra*, "Doctrine of Equitable Election."

Where legatees in Virginia have received their legacies according to the laws of a foreign state, they are bound to contribute to the debts of the estate, in the proportion required by those laws. De Ende v. Wilkinson, 2 Pat. & H. 663.

Acceptance of Legacy Coupled with Condition—Effect.—A party accepting a legacy coupled with a condition, may bind himself for the performance of the condition, although the burden may exceed the benefit. But to bind a party in such case, it must appear that he elected to accept the legacy and perform the condition with full knowledge of all the facts and circumstances necessary to enable him to make a judicious choice. To make an election conclusive, the party must be informed as to the relative values of the things between which he elects. And where the choice has been made without such knowledge, he will be relieved upon restoring the legacy. Hill v. Huston, 15 Gratt. 350; Taliaferro v. Day, 82 Va. 79. See *infra*, "Doctrine of Equitable Election."

Same—Where Condition is the Payment of Debts.—A bequest of the testator's entire property to a legatee, in consideration of which the legatee was to pay the testator's debts, though accepted, was held not to bind the legatee to pay the debts beyond the value of the legacy. Hill v. Huston, 15 Gratt. 350. See Harvey v. Steptoe, 17 Gratt. 289. See also, Darne v. Lloyd, 82 Va. 859, 5 S. E. Rep. 87.

Where a testator by his will gave large estates to his three sons directing that one of his sons should pay one-half of his debts and that the other two sons should each pay one-fourth, it was held that by accepting the devises the devisees became personally liable in respect to the subject devised to them respectively, each for his share of the debts; and that the creditors were under no obligation to look to the general estate of the testator before asserting their claims against the devisees and the subject devised. Baylor v. Dejarnette, 13 Gratt. 152.

C. ESTOPPEL RESULTING FROM ACCEPTANCE OR REFUSAL OF LEGACIES AND DEVISES.—See generally, monographic *note* on "Estoppel" appended to Bower v. McCormick, 23 Gratt. 310.

A legatee who is also an heir of the testator is not estopped by accepting payment of the legacy from attacking the validity of the residuary clause of the will, when the provisions of the will are not such as to require an election on his part or to amount to a condition annexed to the legacy. Fifield v. Van Wyck, 94 Va. 557, 27 S. E. Rep. 446.

Where a married woman assigns a judgment as a part of her separate estate, and dies solvent, leaving her husband the sole devisee and executor of her estate, and he thereafter ratifies the assignment, and dies pending a settlement of his wife's estate, leaving to beneficiaries a solvent estate consisting largely of the property acquired under the will of his wife, the beneficiaries are estopped from questioning the validity of the assignment. Hughes v. Wilson, 2 Va. Dec. 315.

Where a devisee waives the execution of a trust in her behalf by accepting from the executor money equal in value to such trust, she is estopped from requiring the execution thereof. Dearing v. Selvey, 50 W. Va. 4, 40 S. E. Rep. 478.

Where a testator devises land belonging to another person, and gives a legacy to that person, he cannot claim the benefit of the legacy, after asserting his right to the land and recovering it from the devisee. Kinnaird v. Williams, 8 Leigh 400.

About a year before his death, a father put each of his four children into possession of a tract of land, but did not convey it. By his will he gave each of the children the property in his or her possession. In a codicil to his will he stated that he was the guardian of his children and required that each of them should execute a receipt for all claims against him as guardian before they should be entitled to receive their portion under the will. The children continued in possession of said property for a number of years, but did not give the required receipt. *Held*, that they were estopped to demand a settlement of their guardian's accounts. Lewis v. Overby, 31 Gratt. 601.

A father bequeathed a slave to his daughter, but the name of the slave was altered after it was first written, and it was doubtful whether the bequest was of Harriet or Helen. The executors, thinking Harriet to have been the slave intended, delivered her to the daughter. She was of equal value with Helen and indeed preferred by the daughter, who, though not of age, accepted her and hired her out until Harriet died. Helen was delivered to another legatee, and sold by him. After about twenty years from the time that the slaves were delivered to the legatees respectively, and more than five years from the time that the daughter attained full age, a bill in equity was brought by the husband and herself to recover Helen and her children. *Held*, that the length of time and the acquiescence of the daughter in the manner of executing the will were sufficient grounds for dismissing the bill. Parsons v. McCracken, 9 Leigh 495.

D. DOCTRINE OF EQUITABLE ELECTION.

Definition and General Doctrine of Election.—Election is a choice which a person must make between

the acceptance of a benefit under an instrument, and the retention of some property already his own which the same instrument purports to dispose of to another. The doctrine of election as applied to wills is stated to be, that he who accepts a benefit under a will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he chooses to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights. And it is immaterial whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds upon the erroneous supposition that he is exercising a power which belongs to him; in either case, whoever claims in opposition to the will must relinquish what the will gives him. Beach on the Law of Wills, § 154; Jarman on Wills, 384 (marg.); Gregory v. Gate, 30 Gratt. 83; Moore v. Harper, 27 W. Va. 362. See also, Upshaw v. Upshaw, 2 Hen. & M. 381; 2 Min. Inst. (4th Ed.) 1004.

The Foundation of the Doctrine of Election.—The doctrine of election is said to rest upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect, as far as he can, to that instrument. Or, as it is sometimes expressed, he who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conforming to all its provisions and relinquishing every right inconsistent with it. Penn v. Guggenheimer, 76 Va. 846. See Upshaw v. Upshaw, 2 Hen. & M. 381; Kinnaird v. Williams, 8 Leigh 400, 31 Am. Dec. 658; Craig v. Walthall, 14 Gratt. 518; Dixon v. McCue, 14 Gratt. 540; 2 Min. Inst. (4th Ed.) 1002.

"For it is a conclusion in equity, that wherever any person, having a claim upon a man's estate, independent of him, and also a claim thereupon under his will, which claims are repugnant to each other, pursues the former, the latter is thereby waived or abandoned; for it being against the intention of the will, that the devisee should have both, equity therefore considers such devise to be upon an implied condition, that the devisee shall abandon his original title, or shall waive his title by devise." Blunt v. Gee, 5 Call 481.

"In the terse language of Lord Rosslyn, in Wilson v. Lord Townsend, 2 Vesey Ju. 697, 'You cannot act; you cannot come forth to a court of justice claiming in repugnant rights. When you claim under a deed, you must claim under the whole deed together; you cannot take one clause and advise the court to shut their eyes against the rest. Suppose in a will a legacy is given to you by one clause; by another, an estate of which you are in the possession is given to another. While you hold that, you shall not claim the legacy.' Pomeroy's E. Jur. §§ 465, 466; Leading Cases in Equity, vol. 1, part 1, 541, 547, 548; Kinnaird, Ex'or, v. Williams, 8 Leigh 400; Craig's Heirs v. Walthall, 14 Gratt. 518; Dixon v. McCue, 14 Gratt. 540." Penn v. Guggenheimer, 76 Va. 846. The language above is also quoted with approval in Dickinson v. Dickinson, 2 Gratt. 493.

Doctrine of Election Based on Compensation, Not Forfeiture.—The principle upon which the doctrine of election is founded is not, that by taking against the will the legatee thereby forfeits all right to participate in its benefits; but it is on the principle of compensation to the other legatee who has been disappointed of his bequest by the action of the party electing against the will; and accordingly when the former has been compensated out of the legacy to the latter, any surplus that may remain does not devolve as an undisposed of residue, but belongs to the electing donee. Beach on the Law of Wills, § 154; 2 Min. Inst. (4th Ed.) 1003; Higginbotham v. Cornwell, 8 Gratt. 83, 56 Am. Dec. 130; Gregory v. Gate, 30 Gratt. 90.

Presumption against Necessity for Election—Testator Must Intend to Dispose of the Property of Another.—In order to raise a case of election, it is well settled that the intention on the part of the testator to give that which is not his own must be clear and unmistakable. It must appear from language which is unequivocal, which leaves no room for doubt as to the testator's design. The necessity for an election can never arise from an uncertain or dubious interpretation of the clause of donation. 2 Min. Inst. (4th Ed.) 1004; Penn v. Guggenheimer, 76 Va. 839; Gregory v. Gate, 30 Gratt. 83; Moore v. Harper, 27 W. Va. 362.

In order to put a devisee to the alternative of either waiving his own interest under a will, or foregoing his claim to some interest disposed of therein, to which he is previously entitled independent of the will, it must be clearly evinced that the devisee's taking both will defeat the general intent of the devisor. Upshaw v. Upshaw, 2 Hen. & M. 381.

The difficulty of ascertaining the testator's intent, it is said, is always much greater where he has a partial interest in the estate devised than where he undertakes to dispose of an estate in which he has no interest. In the former case, the presumption is that he intended to dispose of that which he might properly dispose of, and nothing more; and this presumption will always prevail, unless the intention is clearly manifested by demonstration plain, or necessary implication on the part of the testator to dispose of the whole estate, including the interest of third parties. Generally when the testator has an undivided interest in certain property, and he employs general words in disposing of it, as "all my lands," or "all my estate," no case of election arises from it; for it does not plainly appear that he meant to dispose of anything but what was strictly his own. Penn v. Guggenheimer, 76 Va. 839. See Gregory v. Gate, 30 Gratt. 83.

A case of election does arise, however, when the testator, having an undivided or partial interest in an estate, devises it specifically, thus indicating a purpose to bestow it as an entirety. The rule on this subject is that where the testator proposes to give the whole thing itself, using language which, by reasonable intention, must necessarily describe and define the whole corpus of the thing in which his particular interest exists as a distinct and identified piece of property, then an intention to bestow the whole, and not merely the testator's individual share, must be inferred, and a case for an election arises. Penn v. Guggenheimer, 76 Va. 839.

It is not necessary, however, that this intention should be expressly declared. The dispositions of the instrument, fairly and reasonably interpreted, may of themselves show a clear design on the part of the testator to bestow upon the devisee property which in fact belongs to another. As in other cases, the intention may be gathered from the whole and every part of the instrument. Penn v. Guggenheimer, 76 Va. 839. See *infra*, "Manner in Which Election May Be Made."

Party Taking Title Indirectly Not Put to His Election by Gift under Will.—In order that a party to whom something is given by a will shall be put to an election, it is necessary that the testator shall give him a benefit by the will directly, and not derivatively or indirectly. Underhill on the Law of Wills, § 733; Bennett v. Harper, 36 W. Va. 546, 15 S. E. Rep. 143.

Whether Parol Evidence Is Admissible to Show Intention to Require Election.—According to the better opinion, the intention of the testator to dispose of what was not his own must be ascertained solely from the terms of the will, and is not to be proved by parol evidence. But the rule excluding parol evidence is applicable only to the declarations of the testator. It is always admissible to prove by parol the circumstances by which the testator was surrounded, the condition and character of all property disposed of in the will, its ownership, and the relations of the parties. Underhill on the Law of Wills, § 734; 2 Min. Inst. (4th Ed.) 1004; Tracey v. Shumate, 22 W. Va. 474; Atkinson v. Sutton, 23 W. Va. 197.

Manner in Which Election May Be Made.—The election may be made by the legatee impliedly as well as expressly, and whether there has been an acceptance may be determined by the circumstances of the case. Acts of ownership, lapse of time, ability to restore others to the same situation as if there had been no election, are some of the indicia of acceptance. Penn v. Guggenheimer, 76 Va. 839.

Election to take under a will may be presumed from laches. Beach on the Law of Wills, § 158; Cooper v. Cooper, 77 Va. 198; Blunt v. Gee, 5 Call 481.

Enjoying for a number of years the possession of property clearly intended to be in lieu of dower will bar the assertion of a claim thereto. Beach on the Law of Wills, § 158; Rutherford v. Mayo, 76 Va. 117; Penn v. Guggenheimer, 76 Va. 839.

It is well settled that an election may be by acts *in pais*. Craig v. Walthall, 14 Gratt. 518.

Where Several Have Option to Elect, All Must Concur.—A right of election which may be exercised by the option of certain persons cannot be exercised by the concurrence of any less than the number named. Thus, where the will provides for the conversion of certain real estate into money for the benefit of certain designated persons, the court will not allow any number less than all the persons named to take the property as real estate. Brown v. Miller, 45 W. Va. 211, 31 S. E. Rep. 956.

Election by Infants and Married Women.—When an infant is called upon to elect, the election has sometimes been postponed until he comes of age, but usually the court will refer it to a master to inquire what will be most beneficial to him, and upon the master's report, and whatever other trustworthy information can be obtained, the election will finally be determined by the court. 2 Min. Inst. (4th Ed.) 1007; Turner v. Street, 2 Rand. 404, 14 Am. Dec. 792.

Where land is devised to be sold, and the proceeds paid to an infant, the infant has an election to take the land or money: and if his guardian sells the land, and the sale does not appear to be advantageous to the infant, a court of equity can elect for him, and bind him by such election. Turner v. Street, 2 Rand. 404, 14 Am. Dec. 792.

With reference to the capacity of a married woman to elect, Mr. Minor says: "A married woman is certainly not competent, during coverture, to make an election, and it seems to be the better practice for the court to make it for her as will be most for her interest, upon the report of the master, and other evidence. In determining the election, the court would doubtless pay much regard to the opinion of the woman's husband if his interests were not adverse to hers. Indeed, in Shanks v. Edmondson, 28 Gratt. 812, it is said, perhaps with too little qualification as a general proposition, that the election may be made by the husband, if in making it he acts for himself, or for them both jointly." 2 Min. Inst. (4th Ed.) 1007. See also, Pratt v. Taliaferro, 3 Leigh 419; McClanachan v. Siter, Price & Co., 2 Gratt. 280. For a discussion on the capacity of a married woman to elect, see monographic *note* on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

The Choice Must Be Intelligently Made—Finality of Election.—It is well settled that no one can be constrained to make an election until the interests to which the election relates are clearly defined, and their relative values ascertained; and an election made before that is done, will, for the most part, be disregarded, at least if it be made under mistaken impressions as to the facts; but only upon the terms (supposing the election to have been unambiguously made) of restoring other persons, whose rights are affected by the party's act of election, to the same situation substantially as if that act had not taken place. Accordingly, one who is called upon to elect may file a bill in equity to have all needful accounts taken, and all proper inquiries made. 2 Min. Inst. (4th Ed.) 1006; Upshaw v. Upshaw, 2 Hen. & M. 381; Craig v. Walthall, 14 Gratt. 518; Hill v. Huston, 15 Gratt. 350.

A party cannot be required to make an election without such knowledge of the subjects submitted to his choice as will enable him to choose discreetly: nor can a party be held to have made an election without such knowledge, unless it manifestly appears that he intended to waive the benefit of accurate information and incur the risk of making a bad choice. Craig v. Walthall, 14 Gratt. 518; Upshaw v. Upshaw, 2 Hen. & M. 381.

Where a party has made an election without sufficient information, or under a mistake, he will be relieved against the consequences, upon the terms of restoring other persons, whose rights may be affected by his acts, to the same situation as if those acts had not been performed. Hill v. Huston, 15 Gratt. 350.

Where a widow, under a mistake as to her rights under the will of her husband, kept possession of the land for five years, cultivated it and took a legacy of $500 to aid her in managing the farm, it was held that she had not elected to take under the will but might still have her dower assigned to her. Dixon v. McCue, 14 Gratt. 540.

But where an election has been once made, expressly or impliedly, with a full knowledge of all the facts and circumstances necessary to an intelligent choice, it is irrevocable, and binds not only the legatees and devisees, but all persons claiming under them. Penn v. Guggenheimer, 76 Va. 839. See Cooper v. Cooper, 77 Va. 198.

Where a widow is informed that the provision in the will is in lieu of dower and advised to renounce it, but she declines to do so, and expresses herself satisfied with the provision, and takes possession of the property and holds it for four years, until she marries, she has elected to take under the will and cannot then claim her dower. Craig v. Walthall, 14 Gratt. 518.

A husband dying in the lifetime of his wife has no right to bequeath away slaves to which she is entitled in remainder or reversion, the particular estate not having expired; though he may in his lifetime sell his and her interest in them for a valuable consideration. In such case, however, if the husband does bequeath such slaves away from his wife, and devises other property to the wife for life with remainder over to other persons in fee simple, and she takes possession of the estate devised to her by him, holds it for many years.

and then disposes of part of it to those entitled to remainder, in consideration of their enlarging her interest in the residue to a fee simple, she thereby makes her election to accept the provision made for her in the will, and precludes herself from holding the slaves also; these circumstances taken together with her taking possession of the slaves being sufficient evidence of her having such knowledge of the two funds as is requisite to make the election obligatory. Upshaw v. Upshaw, 2 Hen. & M. 381.

When election has once been made, and thereby an estate vests in a debtor, the latter can no more defeat the right of his creditors to subject that estate to their claims, by a disclaimer of title, than by a voluntary deed of gift or assignment; and those creditors may resort to a court of equity for the purpose. Penn v. Guggenheimer, 76 Va. 839.

Doctrine of Election Applicable to Cases of Appointment under a Power.—"The doctrine of election is applicable as well to cases of appointment under a power, as to other dispositions in one's own right; so that, if one having such power gives benefits out of his own property to the objects of the power, and appoints the subject of the power to strangers, the former will be obliged to elect in favor of the latter. But when the appointment is made to the objects of the power absolutely, with a proviso or condition superadded in favor of strangers to the power, the proviso or condition is void, and no case of election arises." 2 Min. Inst. (4th Ed.) 1005.

Election to Take Legacy or Pay Debt Due Testator.—A will provided that a daughter should take no part of the testator's estate unless her husband should account for and pay over to the estate certain money. On demurrer to an action brought by the executor to collect the money, it was held that the defendant had the choice of paying the money, or treating it as an advancement, and that the action could not be maintained. Darne v. Lloyd, 82 Va. 859, 5 S. E. Rep. 87. See *supra*, "Obligations Arising from Acceptance."

Election in the Case of a Bequest or the Proceeds of an Insurance Policy.—A testator held four policies of life insurance, payable to one who had died, and the by-laws of three of the insurance companies provided that, if the beneficiary died before the insured, the proceeds should be paid to the relatives of the insured, and that the insured should not have the right to dispose of the proceeds by will. The testator devised one-third of his entire estate, consisting of all his life insurance, real estate, and personalty, to a certain person, and the remaining two-thirds to two nieces. *Held*, that the testator intended to devise the whole of the life insurance, and that, as the proceeds of three policies, under said by-laws, became the property of said nieces as his nearest relatives, and no interest therein passed to the other legatee, said nieces were put to their election to take under or against the will. Tompkins v. Griffin, 92 Va. 307, 23 S. E. Rep. 756.

The Doctrine of Election in Its Application to Dower.—The doctrine of election is founded on the same reasons and governed by the same rules when applied to a widow claiming dower as to any other case. One entitled to a benefit under an instrument must, if he claims that benefit, abandon every right which, if asserted, would defeat even partially the provisions of the instrument. If the widow's taking dower would interfere with any of the provisions of the will, she must elect. Dixon v. McCue, 14 Gratt. 540; Rutherford v. Mayo, 76 Va. 117. See monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

Same—Whether Devise or Bequest Presumed to Be in Addition to Dower or in Lieu Thereof.—Prior to the Act of 1866, the statute, Va. Code 1860, ch. 110, § 4, provided that "if any estate, real or personal, intended to be in lieu of dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate or the residue thereof." This statute was construed in Higginbotham v. Cornwell, 8 Gratt. 83, 56 Am. Dec. 130, where it was held that a provision for the wife, to bar her dower, must not only have been so intended, but that such intent must appear from the conveyance or devise, either by express words or by necessary implication. See Bolling v. Bolling, 88 Va. 526, 14 S. E. Rep. 67; Craig v. Walthall, 14 Gratt. 515; Dixon v. McCue, 14 Gratt. 540; Nelson v. Kownslar, 79 Va. 468; Douglas v. Feay, 1 W. Va. 26; Shuman v. Shuman, 9 W. Va. 50. See also, *foot-note* to Higginbotham v. Cornwell, 8 Gratt. 83.

In Douglass v. Feay, 1 W. Va. 34, it is said: "The case of Craig's Heirs v. Walthall and Wife, 14 Gratt. 578, cited and relied on by the counsel for the appellees, we are not to suppose, was intended to be in conflict with the case of Higginbotham v. Cornwell, and the doctrine therein declared, but in the opinion of the court it fell within the rule as settled in the latter case."

In Dixon v. McCue, 14 Gratt. 551, DANIEL, J., in delivering the opinion of the court, said: "In saying in the case of Higginbotham v. Cornwell, 8 Gratt. 83, that 'the conclusion against the claim of the widow ought to be as satisfactory as if it were expressed,' JUDGE BALDWIN has, as I humbly conceive, stated the doctrine somewhat too strongly. A rule thus rigid, whilst it formed no necessary foundation for the judgment of the court in that case, would, in my opinion, come in conflict with decisions in numerous cases which have been too long and too generally recognized as precedents, to allow of dissent or doubt in respect to their authority now. There are comparatively very few of the reported cases, wherein implications of the testator's intentions have prevailed in putting the widow to her election, in which it would be truly said that the conclusion against the claim of the widow was as satisfactory as if the testator, in the very terms of the devise, had expressed an intention to exclude it. And I think it fairly results from the authorities, that whenever the inference against the widow's right is clear beyond a reasonable doubt; whenever the implications against her are so strong, that, to defeat them, resort must be had to a forced, far-fetched or unreasonable construction of the will, a case is made which puts her to her election." See also, citing the principal case and *Dixon v. McCue*, as to this point, Gregory v. Gate, 30 Gratt. 91.

To change the rule of construction, as laid down in Higginbotham v. Cornwell, 8 Gratt. 83, 56 Am. Dec. 130, the act of 1866 was passed, which amended the statute of 1860 by adding thereto these words: "And every such provision, by deed or will, shall be taken to be in lieu of dower, unless the contrary intention plainly appears in such deed or will, or in some other writing signed by the party making the provision." Acts 1865-66, p. 160; Va. Code 1873, ch. 104, § 4; Va. Code 1887, § 2270; Bolling v. Bolling, 88 Va. 524, 14 S. E. Rep. 67; Nelson v. Kownslar, 79 Va. 468. See *foot-note* to Higginbotham v. Cornwell, 8 Gratt. 83, 56 Am. Dec. 130. See also, monographic *note* on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

Same—Same—Conflict of Laws.—The provisions of Va. Code 1887, § 2270, do not change the common-law rule that a will of personalty must be construed according to the *lex domicili* in which it was made; and where one domiciled in New York bequeathed personal property to his wife, but made no disposition of real estate in Virginia, and there was.

nothing in the will incompatible with her claim to dower, the testator's intent must be measured by the common-law rule in New York, to the effect that the provision would not be in lieu of dower unless a different intent was expressed in words, or clearly shown on the face of the will. Bolling v. Bolling, 88 Va. 524, 14 S. E. Rep. 67.

Same—When and How Widow Must Renounce—Effect of Renunciation.—When any provision for a wife is made in her husband's will, she may, within one year from the time of the admission of the will to probate, renounce such provision. Such renunciation shall be made either in person before the court in which the will is recorded, or by a writing recorded in such court, or the clerk's office thereof, upon such acknowledgment or proof as would authorize a writing to be admitted to record. If such renunciation be made, or if no provision be made for her in the will, she shall have such share of her husband's personal estate as she would have had if he had died intestate; otherwise, she shall have no more thereof than is given her by the will. Va. Code 1887, § 2559; W. Va. Code 1899, ch. 78, § 11, p. 713. See Noel v. Garnett, 4 Call 92; Blunt v. Gee, 5 Call 481; Taylor v. Browne, 2 Leigh 419; Dupree v. Cary, 6 Leigh 36; Kinnaird v. Williams, 8 Leigh 400, 31 Am. Dec. 658; Cocke v. Philips, 12 Leigh 248; Findley v. Findley, 11 Gratt. 434; Nelson v. Kownslar, 79 Va. 479; Douglas v. Feay, 1 W. Va. 26; Shuman v. Shuman, 9 W. Va. 50; Wallace v. Wallace, 15 W. Va. 722; McMechen v. McMechen, 17 W. Va. 683; Anderson v. Piercy, 20 W. Va. 282; Cunningham v. Cunningham, 30 W. Va. 599, 5 S. E. Rep. 139; McGlaughlin v. McGlaughlin, 43 W. Va. 226, 27 S. E. Rep. 378.

The renunciation of a will by the widow is equally as void when made in person in open court, and no record made thereof, as if made *in pais*, or by writing not recorded, or before any other court than that in which the will is recorded. Douglas v. Feay, 1 W. Va. 26.

The renunciation of a will by a widow will not be allowed to break in upon the arrangements of the will, and to disappoint the interests of others under her husband's will, further than is absolutely necessary. In all other respects, but as regards her, the will ought to be executed as nearly as possible according to the wishes and intention of the testator. Anderson v. Piercy, 20 W. Va. 282; Findley v. Findley, 11 Gratt. 434.

Same—Same—Appropriation of Property Given Up to Indemnify Legatees.—The widow cannot assert her paramount claim to distribution against the will, and also claim the provision, or any part of it, made for her by the will. If she elects to take the first, she must give up the last to indemnify the parties who are disappointed by his election. Findley v. Findley, 11 Gratt. 439; Mitchells v. Johnsons, 6 Leigh 461; Kinnaird v. Williams, 8 Leigh 400, 31 Am. Dec. 658; McReynolds v. Counts, 9 Gratt. 242; Morriss v. Garland, 78 Va. 226; Nelson v. Kownslar, 79 Va. 479.

Husband's Right to Elect as Respects His Curtesy.—Although it is provided by W. Va. Code 1887, ch. 78, § 11, that unless the husband shall renounce any provision made for him by the wife's will he shall have no other interest in her estate than is given him by the will, a failure on his part to renounce such provision will not deprive him of curtesy, unless he has agreed to accept the provision in lieu thereof, such agreement being the only mode by which curtesy can be barred under W. Va. Code 1887, ch. 65, § 16. Cunningham v. Cunningham, 30 W. Va. 599, 5 S. E. Rep. 139; Beirne v. Von Ahlefeldt, 33 W. Va. 663, 11 S. E. Rep. 46. See monographic *note* on "Curtesy" appended to Charles v. Charles, 8 Gratt. 486.

The husband by virtue of his marital right is entitled to curtesy in the real estate of which his wife died seized, notwithstanding he failed to renounce the provisions of the will made in his own favor according to the provisions of the statute; but, by reason of his failure to renounce the provisions of the will, his right to any distributive share of her personal estate is barred. Cunningham v. Cunningham, 30 W. Va. 599, 5 S. E. Rep. 139.

VII. CHARGING DEBTS AND LEGACIES.

For a discussion of this subject, see monographic *note* on "Marshaling Assets" appended to Carrington v. Didier, 8 Gratt. 260.

VIII. LAPSED AND VOID LEGACIES AND DEVISES.

"A lapsed legacy or devise is one which, though good and capable of taking effect at the time when the will was made, and never revoked by the testator, fails to take effect by reason of something which has occurred between the time of the making of the will and the time when the gift under the will would otherwise vest, as that the donee has ceased to exist, or to occupy the situation upon which the testator's bounty was predicated; or because of the nonperformance of some condition or the nonhappening of a contingency." 18 Am. & Eng. Enc. Law (2d Ed.) 747.

A void legacy or devise "is one which cannot take effect by reason of some matter inherent in the gift itself, as that the gift is prohibited by law, or that the beneficiaries are uncertain, or that there is no person who comes within the description of the beneficiary." 18 Am. & Eng. Enc. Law (2d Ed.) 747.

Lapsed Devises.—The law touching the lapse of devises is to be found in § 2523, Code 1887, and is as follows: "If a devisee or legatee die before a testator, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or the legatee would have done if he had survived the testator, unless different disposition thereof be made or required by the will;" but this statute is not applicable where, independently of it, no lapse would occur. Lockhart v. Vandyke, 97 Va. 356, 33 S. E. Rep. 613, 5 Va. Law Reg. 303.

Where a testator bequeathed money to a sister who had died before the execution of the will, leaving issue who survived the testator, the legacy did not lapse, but passed to such issue, under Va. Code 1887, § 2523, providing that if the legatee die before the testator, leaving issue who survive him, they shall take, unless a different disposition is required by the will, and § 2521, providing that a will shall be construed as if executed immediately before the testator's death, unless a contrary intention appears. Wildberger v. Cheek, 94 Va. 517, 27 S. E. Rep. 441.

Where a testator gives a legacy to his wife, but she dies before him, the legacy will not sink to the residuum of the estate, but will pass to her issue, under the statute. Va. Code 1860, ch. 122, § 13 (Va. Code 1887, § 2523). Wood v. Sampson, 35 Gratt. 845.

Where a testator directed a tract of land to be sold when the time was out for which it was leased and the money to be divided between certain children of his, to them and their heirs forever, the legacy did not lapse by the death of two of them, after that of the testator and before the expiration of the lease, but was a vested interest and belonged to their legal representatives. Selby v. Morgan, 6 Munf. 156.

In Virginia and West Virginia it has been held that the statute abolishing survivorship among joint tenants has no application where the estate in joint tenancy has not vested, and hence upon the death of one of two devisees in the lifetime of the

testator the whole estate passes to his survivor. Lockhart v. Vandyke, 97 Va. 356, 33 S. E. Rep. 613, 5 Va. Law Reg. 303; Hoke v. Hoke, 12 W. Va. 427. See monographic *note* on "Joint Tenants and Tenants in Common" appended to Ambler v. Wyld, Wythe 235.

Upon a devise to four children share and share alike, and in the event of the death of one or more of them, his or their share to go to the survivors, the event which is to fix the rights of the children is the death of the testator. If all survive the testator each takes his or her share of the estate devised free from any right of survivorship. Armistead v. Hartt, 97 Va. 316, 33 S. E. Rep. 616, 5 Va. Law Reg. 387.

In the absence of a positive and distinct indication of a contrary intention, only original, and not accrued shares survive in case of a gift over in event of death. Armistead v. Hartt, 97 Va. 316, 33 S. E. Rep. 616, 5 Va. Law Reg. 387.

When Contingent Executory Devise Deemed to Have Failed.—A contingent executory devise to take effect in a certain event, cannot be deemed to have failed, until it has become incapable of taking effect by the termination of the time or event prescribed. Carney v. Kain, 40 W. Va. 758, 23 S. E. Rep. 650.

Where an executory devise or bequest is made to the children or other descendants of the children of the testator who shall be living at the death of the last survivor of the testator's children, such devise or bequest cannot be deemed to have failed as to unborn children of the surviving child until her death, although she has passed the age of childbearing. For the possibility of issue is, in contemplation of law, only extinguished with life. Carney v. Kain, 40 W. Va. 758, 23 S. E. Rep. 650.

Judgments as Liens on Lapsed Devises.—The question whether a devise to one who dies in the lifetime of a testator, passing, under the Virginia statute, to the devisee's issue, is subject to debts of the deceased devisee, is discussed in an editorial in 5 Va. Law Reg. 321. After a full review of the authorities, the editor says: "We have little difficulty in concluding that under the present statute in Virginia the issue take directly from the testator, as statutory substitutes for their ancestors and consequently free from his debts and liabilities." See also, article by F. B. Kennedy, 4 Va. Law Reg. 790.

What Legacies or Devises Are Void.—For a discussion of legacies or devises which are void because the person or object referred to in the bequest or devise is uncertain or imperfectly described, see monographic *notes* on "Charities" appended to Kelly v. Love, 20 Gratt. 124, and "Church Property" appended to Brooke v. Shacklett, 13 Gratt. 301. As to legacies or devises which are void by reason of mistake, fraud, or undue influence, see monographic *note* on "Wills."

Devolution.—Where the will contains no residuary clause, a lapsed or void legacy or devise will go to the heirs or next of kin, as in cases of intestacy. 18 Am. & Eng. Enc. Law (2d Ed.) 760.

A testator by his will devised that "in case he should die before his brother R. A., all his estate both real and personal should descend to him and his heirs forever; but, in case his said brother should die without a lawful heir, it should then be equally divided between his brother W. A. and his nephew S. A., to them and their heirs forever." R. A. died without issue in the lifetime of the testator. *Held*, that the limitation over could not take effect, but the estate descended to the heirs of the testator. Allen v. Parham, 5 Munf. 457.

Where the will contains a residuary clause, void or lapsed legacies pass to the residuary legatees, and not to the next of kin. Elcan v. Lancasterian School, 2 Pat. & H. 53.

But at common law, although the will contains a residuary clause, lapsed or void devises will go to the heirs at law of the testator. Stonestreet v. Doyle, 75 Va. 356, 40 Am. Dec. 731.

Under the statute, however, Va. Code 1887, § 2524, lapsed devises will pass to a general residuary devisee, unless the will shows a contrary intention on the part of the testator. Gallagher v. Rowan, 86 Va. 823, 11 S. E. Rep. 121. See *supra*, "Classes of Legacies and Devises—Residuary Legacies and Devises."

IX. ABATEMENT OF LEGACIES.

"Abatement is the reduction of a legacy, general or specific, on account of the insufficiency of the estate of the testator to pay his debts and legacies. When the estate of a testator is insufficient to pay both debts and legacies, it is the rule that the general legacies must abate proportionately to an amount sufficient to pay the debts. If the general legacies are exhausted before the debts are paid, then, and not till then, the specific legacies abate, and proportionately." 1 Am. & Eng. Enc. Law (2d Ed.) 42.

Legacies bequeathed by codicils stand on the same footing as those of the same class bequeathed by the will. Gallego v. Attorney General, 3 Leigh 450, 24 Am. Dec. 650.

Residuary Legacies.—A residuary legatee, from the very nature of the bequest made to him, is postponed even to general legatees, and has no right to call upon them to abate their legacies along with him. He must be content with what is left after the payment of debts and other legacies. It seems, however, that the residuary legatee is entitled as a legatee taking the estate as at the decedent's death. Hence, if the estate becomes insufficient by the default of the executor, the wreck remaining is divisible among those entitled to that residuum, as well as other general legatees. 3 Min. Inst. (2d Ed.) 614. See *supra*, "Classes of Legacies, etc."

General Legacies.—As a general rule, where the assets are sufficient to pay the debts and specific legacies, but not the general legacies, and all the legatees are volunteers, the general legacies must abate proportionately *inter se*, in the absence of an intent on the part of the testator to prefer one general legatee to another. 1 Am. & Eng. Enc. Law (2d Ed.) 45; Jett v. Bernard, 3 Call 11.

Same—Legacy Given in Consideration of Relinquishment of Right by Legatee.—Where abatement of general legacies is necessary to pay debts and specific legacies, the rule is, that where all stand on the same footing the abatement must be on all *pro rata*. But if a legatee has relinquished any right in consideration of his or her legacy, such as dower, or distributive share, such legatee has preference over mere volunteers; and this is true although the value of the legacy exceeds the value of the right relinquished. Brown v. Brown, 79 Va. 648.

In Virginia it would seem to be clear that a wife cannot be held to be a volunteer as to a legacy left her by the will of her husband. If the husband is the best judge of the provision he is willing to make for her in lieu of her legal rights, it is her right to accept or renounce the provisions of the will as her views of her interest may suggest. If the provisions made for her by her husband's will are such as she is willing to accept as compensation for her dower and her distributive share of the personal estate, she is entitled to do so, and she takes the legacy as a purchaser and not as a volunteer, because the provisions made for her by the will may have restrained her from renouncing the will and receiving her

share as if her husband had died intestate. Brown v. Brown, 79 Va. 648.

In Jett v. Bernard, 3 Call 11, the court of chancery decided that the wife's legacy should abate in proportion with the other legacies, which decision was affirmed by the appellate court. But, as stated in Brown v. Brown, 79 Va. 648, "The report of the case shows that the appeal was upon other grounds than the abatement of the wife's legacy. * * * It appears * * * from the meagre report we have of the case, that the legacy was to the wife of forty thousand pounds of tobacco to buy her a carriage and supply her with such necessaries as she may be in want of, and the son was bequeathed twenty thousand pounds of tobacco to supply himself with necessaries. There is nothing in the case to show that the wife relinquished any right or interest to put her in the position of a purchaser."

Same—Intent of Testator to Prefer Legacy.—Although general or pecuniary legacies must always abate proportionately where there is nothing to indicate a contrary intention on the part of the testator, yet the testator "may arrange this matter otherwise at his pleasure; for *cujus est dare, ejus est disponere.* But the order in which legacies are given, affords no evidence of this intention: for even where the testator intends a perfect equality, some must be given first and some last. Hence the court has, generally, declined laying weight on particular words, as the saying, *imprimis*, or in the first place, or on a direction as to the time of payment. If it did not, there would be no end to claims of preference, considering the variety of expression, and the incorrectness with which wills are frequently drawn. * * * When, however, a testator creates two residuums of his estate, or in other words, residuum upon residuum; the first to be computed after taking out certain specified legacies; the other to be computed after taking out another set of legacies; the intention of the testator is very clearly shown to create different grades in his benefactions." Gallego v. Atty. Gen., 3 Leigh 450, 24 Am. Dec. 650.

A testator, having by his will bequeathed legacies to the amount of $69,600, directed that the whole residue of his estate real and personal should be sold by his executors, and out of the proceeds of such residue he bequeathed twenty-six pecuniary legacies to twenty-six legatees, amounting to $114,000; and he charged on the same funds such other legacies as he should bequeath by codicil; and gave the residue of the funds to residuary legatees; then, by codicils, he bequeathed other pecuniary legacies to the amount of $47,550. Owing to depreciation of the property, the fund proved inadequate to pay the amount of the legacies charged thereon. *Held*, that the legacies making up the sum of $79,600, were clearly to be preferred to the other pecuniary legacies bequeathed by the will, and to the various pecuniary legacies in the codicils; while all these in their turn should have preference to those who were to take the last residuum. Gallego v. Atty. Gen., 3 Leigh 450, 24 Am. Dec. 650.

After disposing of his whole estate by the first four clauses of his will, a testator in the fifth provided: "Independent of all the provisions heretofore made by me, I give * * * eight hundred dollars out of the money due my estate, to be applied to the education of my youngest daughter, Fannie Lee." *Held*, that this bequest was to be paid prior to all other legacies and devises, and that the legatee could recover it from the estate after attaining her majority. Lee v. Smith, 84 Va. 289, 4 S. E. Rep. 717.

Specific and Demonstrative Legacies and Devises.—After all the personal estate not specifically devised has been exhausted, specific legacies and devises abate proportionately. 1 Am. & Eng. Enc. Law (2d Ed.) 143. See Elliott v. Carter, 9 Gratt. 541. See *supra*, "Specific Legacies."

Specific legacies are to be preferred to general or pecuniary legacies. Gallego v. Attorney General, 3 Leigh 450, 24 Am. Dec. 650.

Where the fund out of which demonstrative legacies are payable is insufficient, the legacies must be reduced proportionately. Dunford v. Jackson, 2 Va. Dec. 196.

Demonstrative legacies, so far as the fund upon which they are charged will extend for their payment, abate ratably with specific legacies. 1 Am. & Eng. Enc. Law (2d Ed.) 145. See Gaw v. Huffman, 12 Gratt. 629. But in so far as it may be necessary to resort to the general estate by reason of the total or partial failure of the fund out of which demonstrative legacies are payable, they are to be regarded as general legacies, and contribute proportionately with the other general legacies. 1 Am. & Eng. Enc. Law (2d Ed.) 56; Bradford v. McConihay, 15 W. Va. 732. See also, Dunn v. Renick, 40 W. Va. 349, 22 S. E. Rep. 66.

A testator devised a tract of land to his son John R. Dunn, to whom he also bequeathed certain personal property. He directed that another tract be sold by his executors to pay, first a debt of $3,000 due by his son Henry Dunn, then a legacy of $7,000 to the wife of his son Henry Dunn, and he directed that the residue be applied to the payment of certain other bequests. The land remained unsold for nearly seven years, during which time a large amount of taxes accumulated, and then it only brought $10,000. The taxes and commissions on the sale amounted to $1,699.15. BRANNON, J., delivering the opinion of the court, said: "It cannot be thought for a moment that John R. Dunn is to be charged because he was devisee of another tract of land and legatee of certain personal property, because that devise and that legacy are specific in character. A specific legacy is liable to ademption, but not to abatement. The legacy payable to Mrs. Dunn out of the * * * land is a demonstrative legacy, and subject to abatement: and surely Mrs. Dunn cannot, as owner of a demonstrative legacy, call on John R. Dunn, the owner of a specific legacy and devise, to relieve her legacy from abatement or loss from these taxes and commissions, but must suffer the abatement alone. John R. Dunn gets his specific legacy and devise without abatement, whether Mrs. Dunn gets her legacy or not. Morriss v. Garland, 78 Va. 215; Bradford v. McConihay, 15 W. Va. 732; 2 Lomax, Ex'rs, p. 69, ch. 1, § 3; 2 Redf., Wills, p. 456, ch. 13, § 7, subsecs. 1, 9." Dunn v. Renick, 40 W. Va. 349, 22 S. E. Rep. 66. The wide statement in this case that a demonstrative legacy is subject to abatement, is misleading and not supported by the authorities cited. It seems that what is really meant is that where the fund out of which a demonstrative legacy is to be paid is extinguished or becomes insufficient, the legacy will be regarded as a general legacy and subject to contribute *pro rata* with other general legacies. This view is supported by Bradford v. McConihay, 15 W. Va. 732, where it is said that if the funds out of which a legatee is to receive a demonstrative legacy "should for any reason prove unavailing, he is still on the footing of other legatees, and may claim his legacy out of the general personal estate in common with other legatees who are general." See also, 1 Am. & Eng. Enc. Law (2d Ed.) 56.

X. ADEMPTION OF LEGACIES.

By ademption of legacies is meant "the obliterа-

tion of testamentary bequests, either by the voluntary act of the testator or by the loss or destruction of the thing bequeathed, and without the consent of the legatee." 1 Am. & Eng. Enc. Law (2d Ed.) 611.

"The word ademption, as applied to specific legacies of stock, or of money, or of securities for money, must be considered as synonymous with extinction or annihilation. Where stock specifically bequeathed has been sold by the testator, or where a debt specifically bequeathed has been received by the testator, the subject of the bequest is extinguished or annihilated; nothing exists upon which the will can operate, and the legacy is adeemed and gone. But 'where the thing specifically given has been changed in name and form only, and is in existence, substantially the same, though in a different shape, at the time of the testator's death, it will not be considered as adeemed by such nominal change.'" Skipwith v. Cabell, 19 Gratt. 795.

The doctrine of ademption applies to bequests of real property as well as to bequests of personalty. Hansbrough v. Hooe, 12 Leigh 316, 37 Am. Dec. 659.

"The general rule in regard to specific legacies is, that the claim of the legatee will be defeated, if the thing specifically bequeathed to him is not in existence at the time of the testator's death; in that case, the legacy is said to be adeemed. And it seems to be the better opinion, and is now the established rule in England, that ademption depends on a rule of law, and not upon the intention of the testator." Skipwith v. Cabell, 19 Gratt. 795.

Ademption by Sale of Property Bequeathed.—A specific legacy is adeemed if the testator sells or disposes of the identical thing bequeathed so that it does not form a part of his estate at the time of his death. Hood v. Haden, 82 Va. 588, citing Morriss v. Garland, 78 Va. 215.

Ademption by Portions in the Nature of Advancements.—Where a legacy is given to a child, and afterwards an advancement is made to that child, such advancement will be persumed to be in satisfaction of the legacy, but this presumption may be rebutted by evidence. Jones v. Mason, 5 Rand. 577; Hansbrough v. Hooe, 12 Leigh 316, 37 Am. Dec. 659.

An advancement to a child made subsequent to a will, is to be taken as a satisfaction of a legacy to that child *pro toto* or *pro tanto*, according to its amount. Moore v. Hilton, 12 Leigh 1.

A devise of realty is adeemed when the testator afterwards on the marriage of the devisee advances her another equally large tract of land as a portion. Hansbrough v. Hooe, 12 Leigh 316, 37 Am. Dec. 659.

The doctrine of ademption by gifts in the nature of advances applies only to such as are given after the making of the will. Where the gift is given before the making of the will, and the will does not charge it as an advancement, the court cannot so charge it in settling the estate. Strother v. Mitchell, 80 Va. 149.

As a general rule in order for a gift to work an ademption of a prior legacy it must be of the same class of property, or *ejusdem generis* as it is called, with the legacy itself. Jones v. Mason, 5 Rand. 592, 16 Am. Dec. 761.

But the rule of *ejusdem generis* is merely resorted to for the purpose of discovering the intention of the testator where it has not been expressed, and the rule will yield to such intention where it can be inferred from the circumstances of the case. Jones v. Mason, 5 Rand. 592, 16 Am. Dec. 761.

XI. SATISFACTION.

"Satisfaction, so far as it relates to the law of legacies and devises, may be defined to be the donation (by will) of a thing with the intention that it should be taken either wholly or in part in the extinguishment of some prior claim of the donee." 18 Am. & Eng. Enc. Law (2d Ed.) 769.

Satisfaction of Claim by Legacy or Devise to Creditor.—It is a general rule that a legacy given by a debtor to his creditor, which is equal to or greater than the debt, is, in the absence of a contrary intention, deemed to be a satisfaction of the debt. Crouch v. Davis, 23 Gratt. 62; Stewart v. Conrad, 100 Va. —, 40 S. E. Rep. 624, 7 Va. Law Reg. 767.

But the courts manifest a strong disinclination to enforce this rule, and the tendency of the more recent decisions at least is to lay hold of any circumstances, however trifling, for the purpose of repelling the presumption that the legacy was intended as a satisfaction of the debt. Stewart v. Conrad, 100 Va. —, 40 S. E. Rep. 624, 7 Va. Law Reg. 767; Crouch v. Davis, 23 Gratt. 62, and *foot-note*.

The general rule that a legacy given by a debtor to his creditor, which is equal to or greater than the debt, is, in the absence of evidence to the contrary, deemed to be a satisfaction of the debt, does not apply where the legacy is contingent, as in case of residuary legatees, for it may turn out that the legacy may not be equal to the debt. Stewart v. Conrad, 100 Va. —, 40 S. E. Rep. 624, 7 Va. Law Reg. 767.

A testator by the first clause of his will gave to his three nieces $15,000, to be equally divided between them; and by a subsequent clause he gave to their brother $5,000. He was guardian of his nieces and was indebted to them as such at the time he made his will. There was a legacy of $20,000 to a servant and her children, which he directed his executors to invest in state bonds and hold for their benefit; and whatever balance he might be worth he gave to his sister and her children. He owned a considerable estate, real and personal. *Held*, that under the circumstances the legacy to the nieces was not in satisfaction of the debt due to them. Crouch v. Davis, 23 Gratt. 62.

Release of Debt by Legacy or Devise to Debtor.—A testator made various bequests, and directed that "all of the legacies be paid and delivered * * * without deductions of any kind * * * and that no charge be made against any of my legatees by reason of any money passing from me to them at any time prior to my death." Among the legatees was a brother-in-law of the testator, to whom he bequeathed a pair of rifles. The brother-in-law owed the testator $5,000 upon a promissory note past due before the will was drawn. An action was brought to enforce the payment of this debt. *Held*, that the debt was forgiven and cancelled by the will. Neville v. Dulaney, 89 Va. 847, 17 S. E. Rep. 475.

Where bonds of a legatee are given to him by the testator as a *donatio mortis causa*, with the intention that the legatee shall not account for them, they are not an advancement in satisfaction of his legacy. Lee v. Boak, 11 Gratt. 182.

A testator by his will directed that at the death of his wife his estate should be equally divided between his thirteen nephews and nieces, "it being understood that from A.'s children's share is to be deducted such debts as I hold against their father and mother, which debts I authorize and direct be cancelled," the testator's wife survived him for many years. *Held*, that the cancellation took effect as of the date of the testator's death, and that no interest on the debts was chargeable afterwards. Smith v. Yancey, 81 Va. 88.

Satisfaction by Gift Inter Vivos.—An advancement to a child made subsequent to a will, is to be taken as a satisfaction of a legacy to that child, *pro toto* or

pro tanto, according to its amount. Moore v. Hilton, 12 Leigh 1.

XII. PAYMENT.

A. IN GENERAL.—A title by devise vests in the devisee at common law, if he assents thereto, from the death of the testator, by the mere operation of law, and the devisee is entitled to the immediate possession. But a legatee derives his title immediately from the testator through the executor, upon whom the entire personal estate devolves, to be applied by him to the satisfaction of the debts without regard to the testator's having directed portions of it to be applied to other purposes. 18 Am. & Eng. Enc. Law (2d Ed.) 785. See *supra*, "Acceptance and Refusal."

B. LEGACIES SUBORDINATE TO DEBTS.—The debts of a testator must of course be paid in preference to legacies bequeathed by him, and the executors cannot safely pay over legacies of any description until he has settled or provided for the adjustment of all valid claims against the estate. See monographic *note* on "Debts of Decedents" appended to Shores v. Wares, 1 Rob. 1.

C. ASSENT OF PERSONAL REPRESENTATIVE.

Necessity of Assent.—Since the title to the testator's personal property vests in the executor, notwithstanding directions in the will that it be applied to other purposes, the executor's assent to the legacy is essential to a complete title on the part of the legatee; although before such assent he has an inchoate right to the legacy, which is transmissible to his representatives. 18 Am. & Eng. Enc. Law (2d Ed.) 785; Hairston v. Hall, 3 Call 218; Smith v. Townes, 4 Munf. 191.

A testatrix devised certain slaves to her son for life, and at his death to her grandchildren, with the provision that, if they should be taken in consequence of any debt due by the son, the slaves should be divided among the grandchildren, as soon as they were known to be out of the possession of the son, whom she appointed executor of her will. The slaves were taken and sold on an execution against the son. *Held*, that the legatees could not recover them without proving the assent of the executor to the legacy. Hairston v. Hall, 3 Call 218.

Where there is a bequest of slaves to certain legatees, with contingent remainder to others, the first takers will not be required to give security for the delivery of the slaves of the remaindermen on the happening of the contingency unless it be shown that there is danger that they may be lost to the remaindermen. Raney v. Heath, 2 Pat. & H. 206.

What Constitutes Assent.—"With respect to what shall constitute the assent of an executor to a legacy, the law has prescribed no specific form: a very slight assent is held sufficient; and it may be either express or implied, absolute or conditional. He may, not only in direct terms authorize the legatee to take possession, but his assent may be inferred, either from indirect expressions, or particular acts, and such constructive permission will be equally available. His assent may be implied: as, if the executor congratulate the legatee on his legacy; or, if a horse is bequeathed to A. and the executor requests him to dispose of it; or if B. propose to buy the horse of the executor, and he direct him to buy it of A. or if the executor himself purchase the horse of A. or merely offer him money for it, either of these amounts to an assent, by implication, to the legacy. The assent may be absolute or conditional; but if conditional, the condition must be precedent; as where an executor assents to the devise of a term, if the devisee will pay the rent in arrear at the testator's death; the condition must be performed, or there is no assent. But assent upon a subsequent condition, as, provided the legatee pay the executor a certain sum annually, is void as to the condition; for, though the state of the fund may authorize the executor to withhold the legacy, or to impose a condition precedent to his paying it, yet if he once part with it, he has no right to clog it with future stipulations, and thus make the legacy conditional, which the testator gave absolutely. Toler's Law of Ex'rs, Book 2, ch. 4, § 2, p. 306-312 and the authorities there cited." Lynch v. Thomas, 3 Leigh 686.

The delivery of a specific legacy to the legatee is equivalent to an assent. Lynch v. Thomas, 3 Leigh 682; Frazer v. Bevill, 11 Gratt. 9.

A testator bequeathed a slave to an infant son, providing that his wife should hold the slave until the son should attain full age. The executor delivered the slave to the wife and never resumed possession. *Held*, that this was an assent of the executor to the legacy to the son. Lynch v. Thomas, 3 Leigh 682.

Where executors or administrators with the will annexed who are legatees of slaves under the will, agree to a division of the slaves and each takes possession of those allotted to him, this is an assent to the legacies by the executors or administrators. Frazer v. Bevill, 11 Gratt. 9.

Allowing a legatee to retain possession of a legacy of which he had possession during the lifetime of the testator, is an implied assent to the legacy. Lowry v. Mountjoy, 6 Call 55.

Where a bequest is made to the executor, he may assent to it in express terms, or his assent may be implied from his language or conduct. 18 Am. & Eng. Enc. Law (2d Ed.) 787; Frazer v. Bevill, 11 Gratt. 9.

Right of Executor to Retract Assent.—"It seems to be true, that whilst as a general proposition an assent once given to a legacy can never afterwards be retracted, there are exceptions to the rule: As when the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and its recall is not attended with injury to a third person, as to a *bona fide* purchaser from a legatee on the faith of such assent, it is said, that it is only reasonable, that the executor under particular circumstances, should have the power of retracting it; as when he assents upon a reasonable ground for considering that the assets are sufficient to meet all demands, but unknown debts are unexpectedly claimed, which occasions a deficiency." Frazer v. Bevill, 11 Gratt. 17. See also, Nelson v. Cornwell, 11 Gratt. 724.

When Court of Equity May Compel Assent.—The assent of the executor to a legacy may be enforced by a court of equity when all the debts of the testator known to be in existence have been paid. Nelson v. Cornwell, 11 Gratt. 724.

How Assent Proved.—A legatee suing for a slave specifically bequeathed, may prove by the executor, if he has no objection to being examined, his assent to the legacy; but he cannot prove by him that the testator had title to the slave and could bequeath it. Smith v. Townes, 4 Munf. 191; Frazer v. Bevill, 11 Gratt. 9.

When Assent Presumed.—Where the plaintiff and defendant claim under the same executory bequest, and a case is agreed, submitting the right to be adjudged, according to the legal construction of the will, without saying anything about the executor's assent to the legacy, the court will assume such assent between the present parties. Royall v. Eppes, 2 Munf. 479.

Effect of Assent.—The assent of the executor vests the legal title to the property in the legatee, and a creditor obtaining a judgment against the executor cannot levy an execution upon the property in the

hands of the legatee. His only remedy is to proceed against the executor at law, or to follow the property in equity. Burnley v. Lambert, 1 Wash. 308; Scott v. Halliday, 5 Munf. 103; Sampson v. Bryce, 5 Munf. 175; Burchard v. Wright, 11 Leigh 463; Frazer v. Bevill, 11 Gratt. 9.

Where a specific thing is bequeathed, the assent of the executor vests the property in the legatee, and he may have an action at common law for the recovery of the legacy against a stranger or the executor as the case may be. Smith v. Townes, 4 Munf. 191.

Where personal property of a testator or intestate has been distributed to legatees or distributees of the decedent, with the assent of his executor or administrator, it is not competent to a creditor of the decedent to levy his execution on such property under a judgment obtained against the personal representative. Randolph v. Randolph, 6 Rand. 194.

It seems that the assent of the executor should be taken to be void and ineffectual as to purchasers, where there is no change of possession, and the executor continues to exercise acts of ownership and to dispose of the property without opposition. Burchard v. Wright, 11 Leigh 463.

Though an executor may have assented to a specific legacy, he does not thereby dispense with a refunding bond. Nelson v. Cornwell, 11 Gratt. 724.

Effect of Assent to First Taker on Remainderman.—Where slaves were bequeathed to a legatee for life, and if he should die without heirs, then over to a grandson of the testator, the assent to the legacy in favor of the first taker was an assent in favor of the contingent legatee over. Frazer v. Bevill, 11 Gratt. 9. See also, Kenny v. Kenny, 25 Gratt. 293.

A testator bequeathed a slave to an infant son, and provided that his wife should hold the slave for his son until he should attain full age. The executor delivered the slave to the wife. *Held*, that this was an assent by the executor to the legacy to the son. Lynch v. Thomas, 3 Leigh 682.

A testator bequeathed slaves to his son for life, remainder to his son's children. The executor, being apprehensive that the son would sell the slaves to persons who would carry them out of the state, applied to a court of chancery to restrain the son from so doing, and to compel him to give security that the property would be forthcoming at his death for the legatees in remainder, the executor alleging that he had never assented to the legacy, and the legatee for life alleging that he had assented thereto. *Held*, that if the executor had not assented to the legacy, he had a plain remedy at law to recover the subject; and if he had assented to it to the legatee for life, that assent enured to the benefit of the legatees in remainder, and though they might, the executor could not, ask the aid of the court to secure the subject to the legatees in remainder. Bishop v. Bishop, 2 Leigh 484.

D. TAKING SECURITY FROM LEGATEE.—For a discussion of the right of an executor or administrator to require security in the shape of a refunding bond before the payment or delivery of legacies, see monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

E. TO WHOM PAYMENT MAY BE MADE.—See treatment of this subject in monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

F. TIME FOR MAKING PAYMENT.—See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

G. MODE AND SUFFICIENCY OF PAYMENT.—For a discussion of this subject, see monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

Retainer of Debt Due from Legatee.—A debt due to the executor individually may be insisted on as part payment of the legatee's legacy. Hooper v. Hooper, 32 W. Va. 526, 9 S. E. Rep. 937.

Where, under a mutual mistake as to the proportion of the debts of the testator which a legatee was bound to pay to the executor, the legatee assigned the legacy to the executor for the payment of the amount for which she was supposed to be liable, it was held that the assignment should only be allowed to stand as a security for the true amount for which the legatee was liable. Gaw v. Huffman, 12 Gratt. 628.

The debt of a guardian of a distributee to an administrator individually cannot be set off against the share of the distributee which has been decreed to be paid by the administrator to the guardian. Shriver v. Garrison, 30 W. Va. 456, 4 S. E. Rep. 660.

Executors Cannot Prefer Particular Legatees.—Executors are not authorized to prefer particular legatees, by a direction in the will to pay a legacy as soon as possible, because the legatee is in need; nor by a direction to pay a legatee, if possible, as soon as it may be convenient for him to receive it, nor by a general direction to pay such legatee as, in their judgment, are most in need. Gallego v. Attorney General, 3 Leigh 450, 24 Am. Dec. 650.

H. OVERPAYMENT—LIABILITY OF LEGATEE TO REFUND.

Liability to Refund at Suit of Executor.—See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

Where, without fraud or collusion, a decree is rendered by a court of competent jurisdiction against an executor, he may bring his suit in equity against the legatees for contribution to satisfy such decree, without first paying the money himself or appealing from the decree against him, though requested and advised to do so. Bower v. Glendening, 4 Munf. 219.

Liability to Refund at Suit of Co-legatee.—"It is well settled, that a legatee who has been paid cannot be required to refund at the suit of a co-legatee in case of a devastavit by the executor. The reason is, that the assets being sufficient for the payment of all the legatees, the one who is paid has received only what he was justly entitled to, and he cannot be deprived of the fruits of his superior diligence." Leake v. Leake, 75 Va. 792.

In 1862 an executor sold real estate at a public auction for confederate money, and the sale was sustained as proper. Some of the legatees who were to receive the money lived in the state and others in Missouri; and the executor paid to the resident legatees their shares of the estate sold. *Held*, that these were rightful and proper payments, and could not be recalled at the suit of the nonresident legatees. Staples v. Staples, 24 Gratt. 225.

Where the executors innocently but imprudently pay to some legatees the full amount of their legacies and the fund owing to depreciation of the property proves insufficient to pay all the legatees, the unpaid legatees have a right to look to the executors for their ratable proportion of the fund, and are not bound to have recourse against the overpaid legatees to compel them to refund, if the executors are solvent. Gallego v. Attorney General, 3 Leigh 450, 24 Am. Dec. 650.

I. INTEREST.—See generally, monographic *note* on "Executors and Administrators "appended to Rosser v. Depriest, 5 Gratt. 6.

Legacies ought to be paid with interest, though the fund out of which they are to be paid does not bear interest. Anderson v. Burwell, 6 Gratt. 405.

An executor, who is the residuary legatee, is bound to pay interest on legacies left by his testator,

though no demand has been made for them for fourteen years, though during all that time the legatees have been dead, and there has been no administration on their estates, and though the executor did not know, and had no means of knowing, whether they were alive or dead, or where they resided in their lifetime. Bourne v. Mechan, 1 Gratt. 292.

Where a testator, in his will, makes advancements to his children, and directs that they shall be charged interest thereon, it is proper to charge such interest in making distribution of his estate. Hays v. Freshwater, 47 W. Va. 217, 34 S. E. Rep. 831.

A testator directed his executors to set apart so much of his property, not specifically bequeathed, as they might think sufficient to produce an annual income, by rent or interest, of $2,000, which amount he desired them to pay in the following manner, namely, the sum of $500 annually to his sisters and niece, to be paid to each of them for life. The executors failed to set aside the property as directed, and died wholly insolvent and largely indebted to the estate. In a suit by one of the annuitants against the administrator *de bonis non*, she claimed not only the principal, which the executors failed to pay her, but interest thereon. *Held*, that to decree for such interest against the administrator *de bonis non*, thereby diminishing the estate of the residuary devisees and legatees, was erroneous. Adams v. Adams, 10 Leigh 527.

Where slaves are specifically bequeathed to a child, when he or she shall attain the age of twenty-one years or shall marry, and no provision is made expressly for maintenance in the meantime, their intermediate profits, if not otherwise disposed of, do not pass by a general residuary clause, but go to the legatee. In such case, the legatee is also entitled to interest on the profits from the time of the receipt thereof by the executor, no good reason appearing for his failure to apply the principal to the use of the legatee. Quarles v. Quarles, 2 Munf. 321.

Where there is no hand to receive a legacy, the executor should invest it in an interest-bearing fund, or bring it into court to be so invested. Lyon v. Magagnos, 7 Gratt. 377.

Time from Which Legacies Bear Interest.—As a general rule a legacy bears interest from the time it is payable or demandable. Bradford v. McConihay, 15 W. Va. 732.

Since a legacy is not payable under the statute, Va. Code 1887, § 2706, until one year from the appointment of the executor, it will not, as a general rule, commence to bear interest until the end of such year. This rule, however, is varied if there be a future day named for the payment of the legacy, or some other period be fixed by the will when the interest is to begin. Moorman v. Crockett, 90 Va. 185, 17 S. E. Rep. 875.

Prior to statutory enactment (see Va. Code 1887, § 2706), interest was allowed on a legacy, where no certain time for payment was specified, from the end of one year from the testator's death, instead of from one year from the appointment of the executor. Shobe v. Carr, 3 Munf. 10.

A testator bequeathed a certain sum to each of his two infant daughters, to be paid at age or marriage; but, upon the death of either, her legacy to go to her sister. One of the daughters died during infancy. *Held*, that the legacy thus accruing was due immediately and bore interest from one year after her death. Cary v. Macon, 4 Call 605.

A bequest of $3,000 "to be paid out of the fund arising from the sale of the real estate hereinafter directed to be sold," where there is no time fixed in the will for its payment, bears interest from one year after the death of the testator, and not from the time when the land, out of the proceeds of which it is to be paid, is actually sold. Bradford v. McConihay, 15 W. Va. 732.

Devisees cannot be charged interest upon an advancement before final distribution. Davies v. Hughes, 86 Va. 909, 11 S. E. Rep. 488.

A lease from a testator to his devisee is merged by the taking effect of the devise, and a charge on the premises created by the devise will bear interest from such taking effect, and not from the designated expiration of the lease. Couch v. Eastham, 29 W. Va. 784, 3 S. E. Rep. 23.

If the testator "desire that no interest shall be demanded on a legacy, but that the executor will pay it off as soon as money can be raised by selling certain property," no interest is to be demanded until a reasonable time for raising the money shall have elapsed; after which, the executor, if he improperly withholds payment, is chargeable with interest. Patton v. Williams, 3 Munf. 59.

A testator left property to the plaintiff and defendant, and provided that when the plaintiff, who was then a child two years old, "is old, enough to be sent to school, I wish (defendant) to take and give her $5,000 as her portion." The defendant accepted the bequest, but did nothing to fulfill the charge until the plaintiff was ten years old, when, by her next friend she sued for a construction of the will, and payment of what she was entitled to. *Held*, that the $5,000 became payable and interest bearing from her fifth year, the scholastic period fixed by the general free school system of Virginia being from five to eighteen; and that annual allowance should be made for her education. Taliaferro v. Day, 82 Va. 79.

An executor is not chargeable with interest on a legacy payable to an infant, until a guardian has been appointed, and he has received notice of such appointment. Cavendish v. Fleming, 3 Munf. 198.

Where a legacy is left in trust and the trustee refuses to act, the executor is not bound to pay the legacy until a new trustee is appointed by the court of chancery, and he is not chargeable with interest, until after the decree. Johnson v. Mitchell, 1 Rand. 209.

Same—Where Legacy Charged on Land, etc.—It is an undisputable general rule that although a legacy vests, where no special intention to the contrary appears, at the death of the testator, it does not begin to carry interest until a year afterwards. But where the legacy is charged solely on land, or given to a child, and directed to be paid by a devisee of land, in order to make the portion of such child equal to that of the devisee of the land, it should bear interest from the date of the death of the testator. Couch v. Eastham, 29 W. Va. 784, 3 S. E. Rep. 23.

A legacy to a daughter of the testator was charged on land devised to a son and also made a personal demand against the son, in order that the daughter's portion might be equal to his. *Held*, that the daughter was entitled to interest on her legacy from the death of the testator, the time when the son came into the enjoyment of the land devised to him. Couch v. Eastham, 29 W. Va. 784, 3 S. E. Rep. 23.

A legacy given to a trustee for the support of the family of one of the testator's children, payable out of the proceeds of the sale of real estate bears interest from the death of testator. Dunn v. Renick, 33 W. Va. 476, 10 S. E. Rep. 810.

A testator left seventeen children. For four of them, as he stated in will, he had made ample provisions. To each of his remaining children he bequeathed a legacy of $1,000. There was no other provision for these children. *Held*, that interest

should be allowed on these legacies from the time of the testator's death. Hite v. Hite, 2 Rand. 409.

Same—Where Time of Payment is Fixed by the Will.—Where a general legacy is by the terms of the will made payable at a fixed time, or on the happening of some event, it is a general rule that interest will begin to run from the time designated, or from the happening of the event, and this is true whether the legacy is vested or contingent. 18 Am. & Eng. Enc. Law (2d Ed.) 795; Taliaferro v. Day, 82 Va. 79.

Where a testatrix gives a legacy, directing that it shall be paid within a year from her death, the legacy bears interest from the end of the year, although there is no hand to receive it for thirteen years. Lyon v. Magagnos, 7 Gratt. 377. See also, Bourne v. Mechan, 1 Gratt. 292; Granberry v. Granberry, 1 Wash. 246, 1 Am. Dec. 455.

Suspension of Interest.—Where the husband of a legatee declined, during the Revolutionary War, to take her legacy when offered by the executor, partly in certificates and partly in money, saying that he had rather it should remain in the hands of the executor until the surviving son of the testator came of age, interest was thereby suspended; and the surviving son will be allowed a year after coming of age to look into his affairs, before the legacy begins to bear interest again. Cary v. Macon, 4 Call 605.

Compound Interest Not Allowable.—Interest upon interest on a legacy will not be allowed, unless the testator plainly requires it. Calloway v. Langhorne, 4 Rand. 181.

Rate and Computation.—For a discussion of the rate and computation of interest, see monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6. See also, monographic *note* on "Interest" appended to Fred v. Dixon, 27 Gratt 541.

XIII. ACTIONS.

A. ACTIONS BY LEGATEES TO RECOVER ASSETS.—As a general rule a legatee cannot, either at law or in equity, sue to recover the personal assets of the testator. The right to maintain such suit is in the personal representative alone. 18 Am. & Eng. Enc. Law (2d Ed.) 800. See Graveley v. Graveley, 84 Va. 145, 4 S. E. Rep. 218.

While it is a general rule that a legatee or creditor of a decedent's estate cannot maintain a suit against the personal representative of the decedent and another who is debtor to the estate, yet there are special circumstances under which such suit may be brought. "The circumstances usually relied on, and which have been held sufficient to authorize such joinder, are the insolvency of the personal representative; collusion between him and the debtor; the fact that the debtor was a partner of the decedent; or a trustee holding property for, or an agent of, the decedent." Beaty v. Downing, 96 Va. 451, 31 S. E. Rep. 612; Dulany v. Smith, 97 Va. 130, 33 S. E. Rep. 532. See also, Wilson v. Wilson, 93 Va. 546, 25 S. E. Rep. 596.

In Beaty v. Downing, 96 Va. 451, 31 S. E. Rep. 612, it was said that among the circumstances usually relied on to take a case out of the general rule, that a distributee, legatee or creditor cannot sue the debtor of the decedent along with his personal representative, was the fact that the debtor was a partner of the decedent. But that statement was unnecessary to the decision of the case, as the debtor sued was not a partner. The better rule seems to be that some special circumstances are necessary to justify such a course. "The special circumstances which have been held sufficient," says BUCHANAN, J., quoting from MR. JUSTICE LINDLEY in his work on Partnership, side page 1068, "are collusion between the executors and the surviving partners; refusal by the former to compel the latter to come to an account; dealings which may have precluded the executors from themselves obtaining any account; the fact that the executors are themselves partners and liable therefor to account to themselves as executors; and generally where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the persons interested in the estate of the deceased against the surviving partners, then, it has been said, an action may be instituted by those persons against the executors and the surviving partners." Conrad v. Fuller, 98 Va. 16, 34 S. E. Rep. 893, 5 Va. Law Reg. 686, and *note*, p. 690.

Equity has jurisdiction of a bill by a remainderman to recover assets held by the personal representatives of the life tenant. Wilson v. Straight, 46 W. Va. 651, 33 S. E. Rep. 758.

A bill by residuary distributees against the executor, the widow, and a third person, which alleges that the executor is unfaithful to his trust, and that he is controlled by a desire to unfairly protect and promote the interests of the other defendants, to the injury of the plaintiffs, and that his relations with the plaintiffs are such that they dare not confer with him, lest any information they might impart would be used to their disadvantage, and that, controlled by these influences, he will make no effort to require the other defendants to account for money possessed by the decedent at his death, and which it is distinctly charged they took and appropriated to their own use, states a case for equitable relief, notwithstanding interrogatories were propounded which the defendants were justified in declining to answer as incriminating. Dulany v. Smith, 97 Va. 130, 33 S. E. Rep. 532.

The dismissal of a suit in chancery brought by a legatee of a decedent against his personal representative and a debtor of the estate for the purpose of holding the debtor to account, while a separate suit is pending against the personal representative for the settlement of his account, should be without prejudice to the right of the legatee to have the personal representative charged in the other suit with any sum which it was his duty to collect, but which he had failed to collect of the debtor. Beaty v. Downing, 96 Va. 451, 31 S. E. Rep. 612.

B. ACTIONS BY LEGATEES TO ENFORCE PAYMENT OF LEGACIES.—"In this state, suits for legacies are brought in courts of equity only; except in the few cases in which a court of common law has jurisdiction. No suit will lie at common law to recover a legacy, unless the executor has assented thereto. If no such assent has been given, the remedy is exclusively in the courts of equity. 1 Story's Equ. Jur. § 591. Since the decision of Deeks v. Strutt, 5 T. R. 690, it has been considered as the settled doctrine in England, that no action at law will lie to recover a general legacy; even though there be assets, and the executor expressly promised to pay it. 2 Roper on Legacies 1798; 1 Story's Equ. Jur. §§ 591, 592. This doctrine, however, has not been recognized in any case decided by this court; and TUCKER, P., in Kayser's Ex'or v. Disher, 9 Leigh 357, seemed to be unwilling to admit it in its whole extent. It is well settled in England, that an action at law is maintainable against an executor for a specific legacy, after assent given, and that would no doubt be regarded as sound doctrine in this state; at least, where the executor waives his right to require a refunding bond. But it is laid down in 1 Story's Equ. Jur. § 593, as very certain, that courts of equity now exercise jurisdiction in cases of legacies, whether the executor has assented

thereto or not. 'The grounds of this jurisdiction (he says) are various. In the first place, the executor is treated as a trustee for the benefit of the legatees; and therefore, as a matter of trust, legacies are within the cognizance of courts of equity, whether the executor has assented thereto or not. This seems a universal ground for the jurisdiction. In the next place, the jurisdiction is maintainable in all cases where an account or discovery or distribution of the assets is sought, upon general principles.' And, 'in the next place, there is in many cases, the want of any adequate or complete remedy in any other court.' I have seen no case in which it was decided that a court of equity has not jurisdiction in a suit for a legacy, brought by the legatee against the executor. The assent of the executor to the legacy may give a right of action at law, but will not take away the right of suit in equity. Until the legacy is paid or delivered by the executor to the legatee, the former's trust is executory, and may be enforced in a court of equity. The executor may retract his assent, if given upon a reasonable ground for considering the assets as sufficient for all demands, but which prove deficient in consequence of unknown debts unexpectedly claimed. 2 Lomax on Ex'ors 132. The legatee cannot be expected to know the state of the assets, and the executor cannot complain that the suit against him is brought in a court in which an account can be taken of the assets; and if found deficient, the legacy may be applied to make up the deficiency. These observations apply with increased force in this state, in which an executor, before he can be compelled to pay or deliver a legacy, has a right to require a refunding bond for his indemnity; unless the legatee pursue the course prescribed by the Code, p. 554, § 32." Nelson v. Cornwell, 11 Gratt. 724.

For a discussion of the necessity of the assent of the executor to perfect the title of a legatee to the property bequeathed him, see *supra*, "Payment." See also, monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

It is well settled that no action can be maintained at law for a legacy against the executor without an express promise to pay. No admission of assets or mere acknowledgment will be sufficient; for without such promise the executor has a right to require a refunding bond, which a court of law cannot compel the creditor to give or the executor to receive. Kayser v. Disher, 9 Leigh 357; Whitehead v. Coleman, 31 Gratt. 789.

Where an executor has assented to a specific legacy and waived a refunding bond, the legatee may maintain an action at common law against the executor for its recovery. But the intention to waive the refunding bond must be very clear. Such intention will not be inferred from a mere assent to the legacy, because the executor may be willing to assent to a legacy, and even to hold it for the benefit of the legatee, and still not willing to part with the possession of it without a refunding bond. Nelson v. Cornwell, 11 Gratt. 724; Whitehead v. Coleman, 31 Gratt. 789.

An action at law by a legatee against an executor for a legacy, on the executor's promise to pay it, must be brought against the executor in his individual, not in his representative character; and the judgment in such case must be *de bonis propriis*. Kayser v. Disher, 9 Leigh 357.

Where a legacy is made payable on the legatee's attaining the age of eighteen or marrying, the legatee cannot maintain a suit to recover it before the happening of one or the other of these events. Swope v. Chambers, 2 Gratt. 319. See Rowland v. Rowland, 11 W. Va. 271.

Suit for Recovery of "Special Legacy."—After disposing of his whole estate by the first four clauses of his will, a devisor provided in the fifth: "Independent of all the provisions heretofore made by me, I give * * * eight hundred dollars out of money due my estate to be applied to the education of my youngest daughter, Fannie Lee." *Held*, that this was a gift to be paid prior to all other legacies and devises, and as it had never been paid for the purpose specified the beneficiary could recover it from the estate by suit for that purpose. Lee v. Smith, 84 Va. 289, 4 S. E. Rep. 717.

Parties.—A legatee whose legacy has been assented to by the executor may sue the executor for it at law without joining the other legatees. Rexroad v. McQuain, 24 W. Va. 32.

Where there are assets enough to pay all the legatees, one entitled to a legacy of an amount certain may maintain a suit therefor without making the other legatees parties. It is otherwise in case of residuary legatees, unless it appears that all prior legacies have been satisfied. Sharpe v. Rockwood, 78 Va. 24.

But where a suit is brought by one legatee against the administrator to have his legacy paid, when the fund out of which it is to be paid is not definitely ascertained, all the parties having an interest in such fund must be made parties to the suit. Rexroad v. McQuain, 24 W. Va. 32.

All the residuary legatees or distributees, together with the executors or administrators of such as have died since the testator or intestate, ought to be parties to a suit for the division of a residuum. Sheppard v. Starke, 3 Munf. 29; Purcell v. Maddox, 3 Munf. 79; Richardson v. Hunt, 2 Munf. 148.

"The distinction, as to parties, seems to be that a specified legatee may sue the executor without making the other legatees parties; because * * * it is presumed that the executor has assets to pay legacies, unless he makes the objection that he has not: but, in a suit by a residuary legatee, all the co-legatees must be parties, to make an end of the subject, and prevent multiplicity of suits." Note to Richardson v. Hunt, 2 Munf. 148.

In a suit by residuary legatees against the executors for the distribution of the estate, the specific legatees should be parties, unless it satisfactorily appears that their legacies have been satisfied. Nelson v. Page, 7 Gratt. 160.

S. conveyed to W. a tract of land on condition that he should pay certain parties, who subsequently became the heirs and legatees of S., certain sums of money to become due and payable annually after his death. After the death of S., one of the legatees, and her assignee of a part of the sum bequeathed to her, brought a bill to subject the land to the payment of such legacy, making only the administrator with the will annexed, and W., parties defendant. *Held*, that the remaining legatees who were entitled to the residuum of the proceeds of the sale and the judgment creditors of S. were necessary parties. Snyder v. Brown, 3 W. Va. 143.

A bill in equity in behalf of persons, suing as children of a deceased residuary legatee for his share of the residuum, cannot be sustained; it should appear that the plaintiffs are the administrators or other legal representatives of such legatee. Hays v. Hays, 5 Munf. 418.

T. bequeathed the sum of $1,000 to be held in trust for the sole and separate use and benefit of the testator's niece, a married woman, "and her children, so that the same shall not be in any way liable for any debt, contract, or engagement of her husband." After the testator's death, the son of his niece in his own behalf, and as administrator of his deceased

sister, filed a bill against the trustee's executor to recover the amount of the trust fund which had been invested in worthless confederate bonds. *Held*, that during the mother's life the children had no interest in the fund, and that the bill should be dismissed. Waller v. Catlett, 83 Va. 200, 2 S. E. Rep. 280.

A testator directed land to be sold and the proceeds divided in different proportions among several legatees. Both of the executors named in the will united in the sale of the property. One of the legatees assigned his interest in the legacy to a third person, and the assignee brought a suit in equity against one of the executors only. *Held*, that the other executor should have been made a party, as he was a party to the sale. Findlay v. Sheffey, 1 Rand. 73.

A sole legatee and devisee cannot join as defendants the administrator and an alleged debtor of the estate, on the ground of collusion between them, in a suit to compel a discovery of assets claimed to be held by the debtor in the shape of insurance on the decedent's life, where the bill does not allege that the administrator knew that the debtor had the policy, or that the complainant had ever mentioned it to him or asked him to ascertain under what circumstances the debtor held it, or that, having knowledge of it, he refused to inquire into the matter, or to sue to recover it, or such part of it as the estate might be entitled to. Beaty v. Downing, 96 Va. 451, 31 S. E. Rep. 612. See *supra*, "Actions by Legatees to Recover Assets."

Pleading.—See generally, monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

A bill to enforce the payment of a legacy payable "when legatee marries or attains the age of twenty-one," cannot be maintained without an averment in the will, that the legatee has married or attained the age of twenty-one. Swope v. Chambers, 2 Gratt. 319. See Rowland v. Rowland, 11 W. Va. 271.

A bill by residuary distributees against the executor, the widow and a third person, which alleges that the executor is unfaithful to his trust, that he is controlled by a desire to unfairly protect and promote the interests of the other defendants, to the injury of the plaintiffs, and that his relations with the plaintiffs are such that they dare not confer with him, lest any information they might impart would be used to their disadvantage, and that, controlled by these influences, he will make no effort to require the other defendants to account for money possessed by the decedent at his death, and which it is distinctly charged they took and appropriated to their own use, states a case for equitable relief, notwithstanding interrogatories were propounded which the defendants were justified in declining to answer as incriminating. Dulany v. Smith, 97 Va. 130, 33 S. E. Rep. 532.

Limitations and Laches.—See generally, monographic *notes* on "Limitation of Actions" appended to Herrington v. Harkins, 1 Rob. 591; "Laches" appended to Peers v. Barnett, 12 Gratt. 410; "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

The personal representative of a decedent is deemed a trustee exercising a continuing trust as to legatees, and though he may rely on the staleness of the demand of a legatee, or upon any presumption of payment or satisfaction arising from lapse of time, yet the statute of limitations has no application to a suit by the legatee to recover his legacy. Jones v. Jones, 92 Va. 590, 24 S. E. Rep. 255.

The statute of limitations cannot bar the claim of a legatee to his specific legacy, while it is held as such by the executor, although a long time has elapsed since the assent of the executor to the legacy. Nelson v. Cornwell, 11 Gratt. 724.

A legatee died shortly after the testatrix and before a qualification upon her estate, and there was no administration on the estate of the legatee for twelve years. *Held*, that the act of limitations of 1826 did not bar the claim for the legacy. Lyon v. Magagnos, 7 Gratt. 377.

Since the personal representative of a decedent is a trustee of a continuing trust as to legatees or distributees, the statute of limitations does not apply to a claim against the estate in favor of a negro for an annuity given him, in 1856, in a will which at the same time made him free. Jones v. Jones, 92 Va. 590, 24 S. E. Rep. 255.

Where a legacy is limited upon a future event, the statute of limitations cannot begin to run against the right to claim it until the happening of such event. Effinger v. Hall, 81 Va. 94.

A testator bequeathed a slave to an infant son, providing that his wife should take charge of the slave until his son should become of age. *Held*, that the statute of limitations could not run against the claim of the son to the slave until he became of age. Lynch v. Thomas, 3 Leigh 682.

Where a man who is executor of his deceased wife remains in possession of her land after her death, the statute of limitations will bar her devisees from recovering from him for the use of the land for the period ending five years before suit, since his liability for such use is a personal one, and not as executor. Baker v. Baker, 87 Va. 180, 12 S. E. Rep. 346.

Stale demands by legatees are discountenanced by courts of equity, and executors will be protected against them. And no relief was given to a legatee after a lapse of thirty-eight years from the time when he could have brought suit, and of thirty-six years from the date of the decree affirming the validity of the bequest to another legatee. Elcan v. Lancasterian School, 2 Pat. & H. 53.

A delay of seventeen years by a specific legatee to sue for his legacy was excused where he left the state two years before he arrived at age, was not heard of for eleven years, and has ever since been a nonresident. Nelson v. Cornwell, 11 Gratt. 724.

Laches cannot be imputed to a legatee for failure to sue for a legacy, which is limited upon a future event, until the happening of such future event. Effinger v. Hall, 81 Va. 94.

In 1854 a testator made his will bequeathing all his personal property except $2,500 to his wife. The $2,500 he directed "to be put on interest on landed security by his executor, and the interest paid annually to the trustees, and their successors, of the Lutheran Church in Martinsburg, for the use and benefit of said church." The will also made the testator's wife the residuary legatee. The will was admitted to probate in 1855. In 1856, the executor in his first settlement credited himself with "$2,500 put out on interest for the benefit of the Lutheran congregation of Martinsburg;" and the widow, the residuary legatee, frequently declared that "it was the church's money," and laid no claim to it, and the interest was annually paid to the trustees with her knowledge; and more than twenty years after the probate of the will she died, after having executed her will giving "all money due her or her estate, from all sources whatsoever," to certain legatees, who in 1880 instituted a suit to have said clause, giving $2,500 to the trustees for the benefit of said church, declared void, and the money paid to them. The trustees relied on lapse of time and the acquiescence of the widow. The executor of the executor brought $2,500 into court, and submitted that it should be

paid to those entitled to receive it, and the court decided in favor of the plaintiffs, and distributed the money to them under the provisions of the widow's will. It was held, on appeal, that lapse of time and acquiescence have no application in such a case. Mong v. Roush, 29 W. Va. 119, 11 S. E. Rep. 906.

A negro to whom freedom and an annuity were given by his master's will, probated in 1856, and who presented a claim against the estate for the annuity in 1878, having been wrongfully kept in slavery until 1865, was not guilty of laches. Jones v. Jones, 92 Va. 590, 24 S. E. Rep. 255.

It was uncertain in a will whether a slave bequeathed to a daughter was "Harriet" or "Helen," but the legatee accepted the former, and the latter was delivered to another legatee. About twenty years after the slaves were delivered and more than five years from the time when the daughter attained to full age, a bill in equity was brought by her husband and herself to recover "Helen." *Held*, that the length of time and the acquiescence of the daughter in the manner of executing the will were sufficient ground for dismissing the bill. Parsons v. McCracken, 9 Leigh 495.

Judgment or Decree.—For a discussion of judgments or decrees against executors, see monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

It seems that where a decree against executors for a legacy is made upon their confessing assets sufficient to satisfy the same, without specifying whether such assets consist of money or other property, such decree may with propriety direct that they pay the legacy and interest, with the costs of the suit, out of the said assets, if so much thereof they have; if not, out of their own estates. McRae v. Brooks, 6 Munf. 157.

In assumpsit by a legatee against an executor for a legacy, one count in the declaration alleged a promise made by the defendant, as executor, to pay the legacy. *Held*, that this was a count against the executor in his representative character, upon which the judgment could only be *de bonis testatoris*. Kayser v. Disher, 9 Leigh 357.

In a suit by a legatee against the executor, a decree by default for the legacy was rendered against the executor three years after the service of the subpœna on him. The executor thereupon filed a bill to enjoin the decree, as obtained by surprise, alleging that, at the time of the service of the subpœna on him in the original suit, he was a nonresident of the state; that he wrote to counsel practicing in the court in which the suit was pending to file his answer and attend to the suit; that such counsel neglected to answer, and died pending the suit; that the notifications in the case never came to his knowledge; and that he was in advance of the estate. *Held*, that the executor had been guilty of laches and was not entitled to relief. Callaway v. Alexander, 8 Leigh 114, 31 Am. Dec. 640.

C. ACTIONS AGAINST DEVISEES AND OTHER LEGATEES TO OBTAIN LEGACY.—See monographic *note* on "Marshalling Assets" appended to Carrington v. Didier, 8 Gratt. 260.

A legatee is not entitled to charge land devised to co-legatees for a deficiency in her share of the personal property paid to her by the executor, where it is shown he distributed the personal property to her co-legatees without reference to her right to a proportion thereof. Meade v. Campbell, 2 Va. Dec. 669.

D. REMEDIES OF CREDITORS.—See generally, monographic *notes* on "Creditors' Bills" appended to Suckley v. Rotchford, 12 Gratt. 60, "Debts of Decedents" appended to Shores v. Wares, 1 Rob. 1, and "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

A devisee may be sued in equity by any creditor to whom a claim is due for which the estate devised is liable, or for which the devisee is liable in respect to such estate; and such devisee is not liable to an action at law for any matter for which there may be redress by such suit in equity. Any judgment or decree for such claim against the personal representative of the decedent is *prima facie* evidence of the claim against the devisee in such suit in equity. Va. Code 1887, § 2668. See Leavell v. Smith, 99 Va. 374, 38 S. E. Rep. 202, 7 Va. Law Reg. 191; Daingerfield v. Smith, 83 Va. 81, 1 S. E. Rep. 599; Staples v. Staples, 85 Va. 76, 7 S. E. Rep. 199.

Under Va. Code 1887, § 2668, declaring that a devisee may be sued in equity by any creditor to whom a claim is due, for which the estate is liable, or for which the devisee is liable, in respect to the estate, an executor was entitled to maintain a bill against devisees in which it was alleged that on the settlement of his accounts a sum was found due him from the estate, and that no assets remained in his hands. Leavell v. Smith, 99 Va. 374, 38 S. E. Rep. 202.

Actions against Legatees.—As a general rule if an executor or administrator proves insolvent, creditors not guilty of laches may, by bill in equity, follow the assets in the hands of legatees or distributees, and compel them to refund even though the personal representative may have retained sufficient assets to pay the debt, and wasted them. 13 Enc. Pl. & Pr. 11; Leake v. Leake, 75 Va. 792. See also, Sampson v. Payne, 5 Munf. 176; Davis v. Newman, 2 Rob. 664, 40 Am. Dec. 764.

This rule "applies of course only in those cases where the executor and his sureties are insolvent. The recourse of the creditor is first upon them, in case of a devastavit, and the court will not generally pursue the assets in the hands of the legatee unless the action on the executorial bond should prove unavailable." Leake v. Leake, 75 Va. 808.

"It must also be understood that the creditor is not in every case entitled to go against the legatee, for he may lose his right of recourse by laches or other circumstances, which would make it grossly inequitable to follow the assets in the particular case." Leake v. Leake, 75 Va. 808.

A legatee is entitled to nothing until the debts of the testator are paid. He has no claim except upon the bounty of the testator. If he receives payment before the debts are paid, he takes, subject to the condition of making restitution, if it becomes necessary to satisfy creditors; and no dealing of the executor with him or advancement made to him can in any manner effect or modify the liability of the testator's estate to the payment of his debts. Leake v. Leake, 75 Va. 792.

"The assets are always bound to the creditor, and he may pursue them in the hands of the legatee even though the testator's effects would have been sufficient to pay both debts and legacies. * * * The legatee takes subject to the liability to refund at the suit of creditor." Davis v. Newman, 2 Rob. 664, 40 Am. Dec. 764; Leake v. Leake, 75 Va. 792.

Although the executor had in hand sufficient assets to pay both debts and legacies, and although a portion of the assets was actually paid to legatees and another portion set apart for a creditor, which was wasted by the executor, the creditor has nevertheless a right to demand restitution from the legatee. Leake v. Leake, 75 Va. 792.

Where personal property of a testator or intestate has been distributed to legatees or distributees of the decedent, with the assent of his executor or administrator, it is not competent to a creditor of the decedent to levy his execution on such property

under a judgment obtained against the personal representative. Randolph v. Randolph, 6 Rand. 194. See *supra*, "Payment—Assent of Personal Representative."

After the assent of the executor to a specific legacy, the property is changed, and a creditor obtaining a judgment against the executor cannot levy an execution upon the property in the hands of the legatee. He may pursue the executor at law, or follow the property in equity, making all the legatees parties. Burnley v. Lambert, 1 Wash. 308.

Parties.—In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees. Hooper v. Royster, 1 Munf. 119.

In Leake v. Leake, 75 Va. 792, a creditor, who had obtained a judgment against the executor, filed his bill in equity alleging a devastavit and made the executor and sureties as well as the legatees parties to the bill.

In a bill to foreclose a mortgage, the devisees of the land mortgaged ought to be parties, and not the executors of the mortgagee. Graham v. Carter, 2 Hen. & M. 6.

In a suit by creditors to subject the real estate of a decedent to the payment of his debts, where it appears that the decedent devised his real estate to his wife for life, with remainder in fee in equal parts to his two children, but, if either die without issue, remainder over to his sister, with power to the wife to sell and reinvest proceeds, if deemed advisable, the sister is not a necessary party. New v. Bass, 92 Va. 383, 23 S. E. Rep. 747.

An administrator conveyed property to a trustee to secure the sureties in his administration bond. After his death, the trustee sold the property and there was a surplus of the proceeds of the sale remaining in his hands after discharging the trust. The creditors of the administrator brought a bill to subject the surplus to the satisfaction of their debts. *Held*, that the legatees of the intestate were not necessary parties. Jones v. Lackland, 2 Gratt. 81. See Waddy v. Sturman, Jeff. 5.

Pleading.—Where a bill by an executor against devisees alleged that in the settlement of the executor's accounts a certain sum was found due the executor, and that there were no assets in his hands, wherefore he sought to charge the same to the devisees, a demurrer could not be sustained on the ground that the *ex parte* settlement before the commissioner was not *prima facie* evidence of the amount due, since there was nothing on the face of the bill showing that the executor intended to rely on such evidence. Leavell v. Smith, 99 Va. 374, 38 S. E. Rep. 202.

When Creditor May Sue Debtor of Decedent Along with Personal Representative.—As a general rule a creditor of a decedent's estate cannot maintain a suit against the personal representative of the decedent and a debtor to the estate. In order for a creditor to be able to maintain such suit, there must be some special circumstances which render it necessary to the protection of his rights, such as collusion between the personal representative and the debtor, refusal to sue, some impediment in the due prosecution of a suit by the personal representative, or the like. Conrad v. Fuller, 98 Va. 16, 34 S. E. Rep. 893; Beaty v. Downing, 96 Va. 451, 31 S. E. Rep. 612; Dulany v. Smith, 97 Va. 130, 33 S. E. Rep. 532. The mere fact that the debtor was a partner of the decedent does not authorize a creditor to maintain such suit. Conrad v. Fuller, 98 Va. 16, 34 S. E. Rep. 893.

Evidence.—There being no privity between the personal representative and the party to whom real estate has descended or been devised, a judgment against such personal representative is not even *prima facie* evidence against the heir or devisee. Laidley v. Kline, 8 W. Va. 218; Brewis v. Lawson, 76 Va. 40; Mason v. Peter, 1 Munf. 437; Foster v. Crenshaw, 3 Munf. 520; Chamberlayne v. Temple, 2 Rand. 384; Shields v. Anderson, 3 Leigh 729; Street v. Street, 11 Leigh 498; Robertson v. Wright, 17 Gratt. 534, and *foot-note*.

Decree.—The decree should require each of the legatees or distributees to pay in proportion to the value of the decedent's property which they respectively received. If some of them are insolvent the others will be required to make good the deficiency to the extent of what they have received. 13 Enc. Pl. & Pr. 14; Leake v. Leake, 75 Va. 792, citing Hopkirk v. Dennis, 2 Munf. 326; Chamberlayne v. Temple, 2 Rand. 400; Lewis v. Overby, 31 Gratt. 601; Ryan v. McLeod, 32 Gratt. 375.

Where legatees are called upon to refund at the suit of a creditor, the general principle is that all must be done before the court and the burden apportioned among them, if possible, without material delay or injury to the creditor. But if some of the legatees are insolvent, the others will be required to make the deficiency to the extent of what they have received. Leake v. Leake, 75 Va. 792.

A legatee may take a legacy and pay the testator's debts, or may decline the legacy and avoid the debts. A decree against the legatee must be in the alternative, and not personal against him for the debts. Brown v. Brown, 79 Va. 648.

In a suit to subject land in the hands of devisees to the payment of judgments obtained against a third person as principal and the decedent as surety, it appeared that the principal was not able to pay the judgments; that the personalty left by the decedent to pay debts was insufficient; that efforts to realize from the lands directed by the will to be sold to pay debts had proved unavailing; and that fifteen years had elapsed since the testator's death. *Held*, that it was proper to decree that the devisees should contribute their ratable proportions to pay the debt, and on failure to do so the lands devised should be subjected to the payment of such proportions. Bell v. McConkey, 82 Va. 176.

A creditor of a testator filed a bill against the executor alone to subject the testator's land to the payment of his debt; and a decree was made appointing commissioners to sell and convey the land and out of the proceeds to pay the debt, and to pay the surplus to the executor. The commissioners acted as directed, and their report was confirmed. *Held*, that the devisees were not bound by the decree; and that the sale and confirmation thereof, and the deed of the commissioners to the purchaser, did not operate to pass the legal title. Hudgin v. Hudgin, 6 Gratt. 320.

On a bill by a creditor against the devisees or heirs at law of a decedent, the court should first make a decree for renting the land, and, if the rent should prove insufficient to satisfy the debts, a report should be made to the court for further proceedings to be had before a decree can be made ordering a sale. An alternative decree for the sale of land, if the rent offered be insufficient, is erroneous. Daingerfield v. Smith, 83 Va. 81, 1 S. E. Rep. 599.

Attachment by Creditors.—Equity has jurisdiction over an attachment to subject a legacy in the hands of an executor as garnishee, to the payment of the

plaintiff's debt, for the proceeding involves the settlement of accounts which could not be done at law. Whitehead v. Coleman, 81 Gratt. 784.

A wife's interest as legatee in her father's estate, in the hands of the executor, may be subjected by the creditor of her husband in a proceeding for foreign attachment when the husband resides out of the state. Vance v. McLaughlin, 8 Gratt. 289.

Though the service of the process upon the executor in a proceeding by foreign attachment creates a lien upon the wife's interest as legatee in the father's estate in favor of the creditor, yet if the husband dies pending the proceedings, leaving the wife surviving him, the lien of the creditor is defeated and the property belongs to his wife. Vance v. McLaughlin, 8 Gratt. 289.

A contingent remainder which is a mere possibility is not within Va. Code 1873, ch. 148, § 1, allowing an attachment against "estate or debts" in certain cases. Young v. Young, 89 Va. 675, 17 S. E. Rep. 470. See extensive *note* appended to this case in 23 L. R. A. 642.

A creditor, at whose suit process of foreign attachment against an absent debtor is served on one of two executors, is entitled to priority of satisfaction, out of a legacy to the absent debtor, over an assignee of the legacy who claims under an assignment dated the day after the service of the attachment on the executor. Sandidge v. Graves, 1 Pat. & H. 101.

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127 ***Kownslar v. Ward.**

October, 1820.

Milldams*—Application to Raise—Necessity for an Inquest.—It is as necessary, that an inquest should be had as to injuring the health of neighbours, obstructing navigation &c. on an application to raise a mill dam already erected: as to construct it originally.

Same—Same—Imperfect Verdict.—The verdict in such case responding only to the damage done a contiguous owner, by flooding his land; and not to the health of neighbours &c. is imperfect; and the inquest will be quashed.

Kownslar owned the land on both sides of Mill Creek in Berkeley; he had a mill on it already, and wishing to raise the dam, (which had been erected according to law,) obtained a writ of ad quod damnum, which was issued in the usual form, requiring the sheriff to summon a jury to inquire of damages; whether the health of the neighbours would be injured &c. The sheriff returned, that a jury being summoned and charged as aforesaid, upon their oaths said, that Kownslar should be at liberty to keep his dam at the present height, and that the damages to Ward will be $300, by backing the water; and nothing was said in the inquest, as to any other requisitions of the writ. It was not found, whether navigation would be injured; the passage of fish obstructed, the health of neighbors injured &c. on the return of the inquest, Ward appeared as defendant in the county court, which on hearing the evidence granted Kownslar leave, to continue his dam, on paying Ward the $300 awarded him. Ward appealed to the Superior court: there Ward objected to the judgment, because the damages were inadequate: the jury not considering the injury done to a mill seat he had above Kownslar's; he offered evidence
128 to support this objection. *Kownslar objected to the evidence being heard; because it ought to have been introduced in the county court, on a motion to quash the inquest. The evidence was admitted, to which Kownslar excepted.

The Superior court reversed the judgment, for inadequate damages; and remanded the cause to the county court, with directions to set aside the inquest, and to award a new writ. Kownslar appealed.

Leigh for the appellant. The county court is properly the police of the vicinage, and having better knowledge of the facts, their judgment should not be disturbed on matter of evidence, without strong and manifest cause.

The Act of Assembly prescribing the mode of raising dams, directs an inquest to be had of the damages only, and not of the health of neighbours &c.(a) The words of the statute shew, that the order will be made, unless the jury find, that the health of neighbours will be injured, or that some one of the evils to be avoided will ensue.

Eppes v. Cralle,(b) if a conclusive authority, is certainly against the appellant: but is it conclusive?

Wickham, contra. If damages only, were to be inquired of, in any subsequent inquest, the statute would be evaded, by raising the dam a given height at first, and then adding to it at pleasure.

Judge Pendleton said in Home v. Richards (c) that the court before which witnesses appear, is the best judge of weight of evidence, but surely, that was not to grow into an abstract rule of law, to disqualify the judgments of intermediate courts.
129 *The statute requires, that the inquest should respond to the whole writ, and this answering only to part, must be quashed.

ROANE, Judge.* The court is of opinion that according to the true construction of the 8th Sec. of the act concerning mills &c., (d) it is as necessary on an application to raise a mill-dam previously erected, that the inquisition should respond to the requisitions of the law, in relation to the health of the neighbourhood, the overflowing of mansion-houses, orchards &c., and the obstruction of the passage of fish, and ordinary navigation, as it is in the case of an original application: and this not being done in the case before us, (which in event, might have deprived the County court of the power of going into the investigation of the merits,) the court is of opinion, that the said inquisition is defective, and the judgment founded thereupon, erroneous. On this ground, and not on that taken by the Superior court, on which we give no opinion, the judgment of that court quashing the inquisition, and reversing the proceedings up to the petition is affirmed.

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*Milldams.—See monographic *note* on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

The principal case is cited with approval in C. & O. Canal Co. v. Hoye, 2 Gratt. 524, and distinguished in Mitchell v. Thorne, 21 Gratt. 174.

(a) 2 Rev. Code, 228, and 2 Rev. 227, § 5.
(b) 1 Munf. 258.
(c) 2 Call, 507.
(d) 2 Rev. Code, p. 228.
*CABELL absent.

130 *Lane v. Tidball.

November, 1820.

Sale by Trustees—Injunction—Cloud on Title.*—A court of equity should injoin a sale by trustees, where the title to the property is disputed, and full value could not probably be had for it; even if that fact was known to all the parties to the deed, when executed.

Lane and Brome merchants, filed a bill in the Chancery court of Winchester, stating, that Bull some years before, being indebted to one Turnbull, had given a mortgage on certain lands, to secure the payment; a suit had been brought to foreclose the equity of redemption; and a decree had been made for a sale, which decree was executed, so far, as to put the purchaser in possession. The decree however was reversed on appeal; and the Chancellor directed Bull to be reinstated in his possession: from which decree, an appeal was taken, which appeal was pending, when this bill was filed. In this state, and while the widow of the purchaser, under the decree of foreclosure, was in possession, Bull executed a deed of trust on the same lands, to secure a debt due to one Morris; the interest in which deed, Morris assigned to Tidball and M'Cormick and for their benefit, the trustee was about to sell the land under the deed of trust. The interference of a court of equity was asked, to prevent a sale, because the land would not sell for its value, while a suit pended, affecting its title.

The Chancellor refused the injunction, because all parties to the deed had contracted with full knowledge of the facts; and the short time fixed for the sale by the deed, excluded the idea, that any one thought the doubts as to the title were to be cleared up, before the sale. The injunction however was granted by a Judge of the court of appeals.

131 *The injunction was dissolved, on replication to the answers of Tidball and M'Cormick; and they appealed.

ROANE, Judge. This is a bill brought by the appellants, against the appellees, and their trustees, constituted by deed of trust, under which they claim, of 9th March 1819. Its object is, to restrain the latter from selling the land conveyed in trust, until, by the aid of a court of equity, the title to the said land should be clearly settled, so that a fair sale of it may take place for an adequate price. That this could not probably be the case at present, is manifest, not only from what appears of record in the cause, but also from the admissions of the appellees themselves. They have urged in their answer as a reason, for a speedy sale of the premises, that if that sale should be delayed, their lien upon the land might in event be lost. Other purchasers (reasoning as they do,) would therefore give but a very inadequate price for the land, pending the suits which affect the title; and the interest of all parties might be materially injured, by proceeding to sell under the present circumstances.

It is urged as a reason why the court should not interfere, that the grantor, Bull, was fully apprised of these suits, and doubts about the title, when he made the deed; that he authorised a sale by the trustee in so short a time, that he could not have contemplated a previous settlement of the title, by a court of equity; and, that he had power to direct a sale by his trustee, of his interest in the land, notwithstanding the existence of the doubts aforesaid. If the words of the deed were so clear and explicit to this last point, as to admit of no doubt that such was his intention; if no persons but Bull himself were claimants before the court; and if on the other hand, the appellees were under no necessity to ask the assistance of a court of equity in relation to their right, we will not say (for we mean not to decide the question,)

132 *how far the declared will of the grantor, in such circumstances, should

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***Trust Deeds—Cloud on Title—Duty of Trustee—Rights of Interested Parties—Injunction to Sale.**—A trustee in a deed of trust is the agent of both parties and must consult impartially the interests of each; and where a sale of the trust subject becomes necessary, it is his duty to use every reasonable effort to sell the property to the best advantage possible. Thus, where there is a cloud resting upon the title to the property, or there is any doubt or uncertainty as to the debts secured or the amounts thereof, or a dispute or conflict among the creditors as to their respective claims, or where there is any other impediment to a fair sale of the property, which cannot be otherwise removed, it is his duty to apply to a court of equity, which is always open to him, to remove the impediment; and, if he fails in that duty, any party injured thereby has an unquestionable right to make such application. It is improper and illegal for the trustee to sell the property while such impediments are resting on it, and if he attempts it, a court of equity, on a bill filed by the debtor, secured creditor, subsequent incumbrancer, or any other person having an interest, will restrain the trustee until these impediments to a fair sale have by its aid been removed as far as it is practicable. These principles seem well established by a long line of Virginia and West Virginia cases. See, citing the principal case as authority on this subject, Chowning v. Cox, 1 Rand. 311; Rogers v. Marshall, 4 Leigh 435; Gibson v. Jones, 5 Leigh 374; King v. Ashley, 5 Leigh 413; Miller v. Argyle, 5 Leigh 467, 470; Beale v. Seiveley, 8 Leigh 675; Wilkins v. Gordon, 11 Leigh 556; Bank v. Hupp, 10 Gratt. 53, 58; *foot-note* to Miller v. Trevilian, 2 Rob. 1; Peers v. Barnett, 12 Gratt. 416; Faulkner v. Davis, 18 Gratt. 651, 662, and *foot-note*; *foot-note* to Hogan v. Duke, 20 Gratt. 244; *foot-note* to Shurtz v. Johnson, 28 Gratt. 659; Horton v. Bond, 28 Gratt. 825; Schultz v. Hansbrough, 33 Gratt. 576; Muller v. Stone, 84 Va. 837, 6 S. E. Rep. 223; Alexander v. Howe, 85 Va. 202, 7 S. E. Rep. 248; Keagy v. Trout, 85 Va. 399, 7 S. E. Rep. 329; Morriss v. Virginia State Ins. Co., 90 Va. 373, 18 S. E. Rep. 843; Spencer v. Lee, 19 W. Va. 188, 194; Kinports v. Rawson, 29 W. Va. 497, 2 S.E. Rep. 90; Hartman v. Evans, 38 W. Va. 679, 18 S. E. Rep. 814. The principal case was distinguished in Thompson v. Jackson, 3 Rand. 509. Further, if a sale be made by the trustee while such impediments are resting on the property, any one having a substantial interest, when not in default himself, may apply to a court of equity to have the sale set aside. Spencer v. Lee, 19 W. Va. 188, citing principal case; Rossett v. Fisher, 11 Gratt. 492; Wilkins v. Gordon, 11 Leigh 547; Miller v. Argyle, 5 Leigh 460; Quarles v. Lacy, 4 Munf. 251; Gay v. Hancock, 1 Rand. 72; Chowning v. Cox, 1 Rand. 306; s. c., 3 Leigh 654; Gibson v. Jones, 5 Leigh 370; Norman v. Hill, 2 Pat. & H. 676.

See further, on this subject, Gay v. Hancock, 1 Rand. 72; Gibson v. Jones, 5 Leigh 370, and *foot-note*; Bryan v. Stump, 8 Gratt. 241, and *foot-note*; Rossett v. Fisher, 11 Gratt. 492, and *foot-note*; monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518; monographic *note* on "Deeds of Trust" appended to Cadwallader v. Mason, Wythe 188.

Chancery Practice—Decree for Sale—Cloud on Title.—*A fortiori*, a court, having full possession of the subject in a pending suit should not decree sale until every impediment to a fair sale by its aid is removed as far as practicable. See Horton v. Bond, 28 Gratt. 825; Peers v. Barnett, 12 Gratt. 416; White v. Mech., etc., Ass'n, 22 Gratt. 248; King v. Ashley, 5 Leigh 413; Alexander v. Howe, 85 Va. 202, 7 S. E. Rep. 248, citing the principal case.

See further, *foot-note* to Rossett v. Fisher, 11 Gratt. 492, and monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

be allowed to prevail. Such however is not the case before us. The terms of the deed as to the first point are not so clear and imperious, as to exclude the interference of a court of equity: the general words therein, which on this point are relied upon, on the part of the appellees, are to be found in most deeds. The appellees, themselves, not having the legal title to the lands in question, are as to it, in the situation of subsequent mortgagees, and under the circumstances of this case, a court of equity ought not to permit a sale until the other claims are adjusted: and the appellants are not only, also bona fide creditors of Bull, but have an interest under his will, in causing the premises in question to sell for their full value; by augmenting the surplus arising from this sale for the payment of the debts due to Nourse, under the terms of the will: they proportionably increase that residuary interest, which the will has subjected to the payment of their claim. It is only necessary for the court to decide the case which is actually before it. It is not necessary to decide upon the stronger case to which we have just alluded. We have no hesitation, however, in repeating the sentiments which have fallen from this bench; that a trustee, in a deed of trust, is to be considered the agent of both parties; that he ought to act impartially between them; that he ought to disregard the suggestions of either party inconsistent with that duty; and has in general, no greater powers, touching his trust, than a commissioner of a court of equity. We will add, that he may, of his own motion, apply to a court of equity to remove impediments to a fair execution of his trust: as also, if necessary, to adjust the actual sum, which ought to be raised by the sale. If he should fail however to do this, the party injured by his default, has an unquestionable right to do it. These principles apply with peculiar force to the actual case before us. The party, in this case, has enacted no imperious
133 law (if *we may so express ourselves,) ousting the jurisdiction of a court of equity. That jurisdiction, therefore, exists in full force, on its ordinary principles, in relation to it. It is not the grantor himself who is to be affected, but a meritorious creditor; one equally entitled to the aid of a court of equity, with the appellees themselves. That court delights to pay all creditors, and will not reject the just claims of any. Those claims cannot be paid, unless the fund in question, should be made to sell for its full value; and that cannot be done without the interposition, that is now prayed.

The analogy between this case, and the ordinary one of a subsequent mortgagee or incumbrancer, coming into a court of equity to secure his debt, is apt and clear: and it will lose none of its force, when the application is made to a summary tribunal created by the mere act of the parties.

In the ordinary case, the party coming into equity, must convene all the necessary parties, for the purpose of ascertaining the amount of the previous incumbrances, and is entitled to make the most of the fund for his and their benefit, by removing all the impediments to a fair sale of the premises. Compared to these objects, a little delay is deemed of no account in a court of equity. Under the influence of these principles, the court is of opinion, that the decree of the court of Chancery dissolving the injunction is erroneous. It is therefore to be reversed with costs, the injunction reinstated, and the cause remanded to be finally proceeded in, pursuant to the principles of this decree.

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134 *Cole v. Fenwick.*

November, 1820.

Forthcoming Bonds—Judgment on—Equitable Relief.†—Judgment on a forthcoming bond, ought not to be relieved against, in equity, because the bond was forfeited, by a slave having run away, who by the condition, was to be forthcoming.

Cole stated, in a bill filed in the Chancery court of Richmond, that he as surety for one Buck, together with Buck, entered into a forthcoming bond to Fenwick, (who sued for the benefit of Williams,) with condition, to deliver ten negro men mentioned in the condition, to the sheriff of Chesterfield: an execution by Buck for Williams, had been previously levied on these slaves. The slaves were delivered according to the condition, except one, who had run away, and could not therefore be had. When the slaves present were about to be sold, Mills exhibited a deed of trust from Buck to Taylor, prior to the commencement of Fenwick's action, including all the slaves on which execution had been levied. Mills forbad the sale of the property present, and of the absent slave: and no one indemnifying the sheriff, although the plaintiff's attorney had notice of the time and place of sale, and was requested by the sheriff to attend, the property was restored. The forthcoming bond was returned forfeited as to Peter, the negro who had run away; Cole tendered another slave in his place, alleged to be of greater value. Judgment however was rendered on the forthcoming

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*This case being argued before the appointment of a Reporter, no arguments of counsel can be given. —Edition 1821.

†**Forthcoming Bonds—Judgment on—Equitable Relief.**—See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107; monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

Same—Sheriff's Return—Conclusiveness of.—In Adler v. Green, 18 W. Va. 206, it is said: "The uniform practice in Virginia has been to contradict the sheriff's return of 'forfeited' upon forthcoming bonds, as illustrated in a number of cases in the Virginia reports, without even a suggestion being made in any of those cases, that the sheriff's return was conclusive of the forfeiture. McKinster v. Garrott, 3 Rand. 554; Bernard v. Scott's Adm'r, 3 Rand. 522; Pleasants v. Lewis, 1 Wash. 273; Nicolas v. Fletcher, 1 Wash. 330; Burke v. Levy's Ex'or, 1 Rand. 1; Jones v. Raine, 4 Rand. 386; *Cole v. Fenwick, Gilm.* 134. I am of opinion therefore, that a sheriff's return upon a forthcoming bond is not conclusive, but only *prima facie.*"

See further, on this subject, cases collected in monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Indemnifying Bonds—Failure of Officer to Require—Effect.—The indemnifying bond law was made for the ease of the officer, and exonerates him, to a certain extent, from his common-law liability in case of illegal seizures, and from the measures previously necessary to be resorted to, to ascertain the title to the property. But if the bond be not duly required by him, his common-law liability is supposed to continue. Davis v. Com., 13 Gratt. 143, citing the principal case, and Stone v. Pointer, 5 Munf. 290. See principal case also cited in Adler v. Green, 18 W. Va. 212.

bond, and in that state, Cole obtained his injunction. Fenwick and Williams answered, but set forth nothing varying
135 the equity of the case: on *a hearing, the Chancellor dissolved the injunction: and Cole appealed.

COALTER, Judge. I am of opinion, that after the various decisions in this court on that subject, it no longer remains a question, but that a failure to deliver any part of the property mentioned in a forthcoming bond, is a forfeiture of the bond; unless indeed, such failure shall be occasioned by the act of God, or destruction of the property by inevitable accident, concerning which, I at present, give no opinion.

On the other hand, it is well established I think in the case of Pleasants v. Lewis, 1 Wash. 273, that where a part of the property is delivered, the sheriff is bound to receive the same, and to proceed therewith, in the same manner, as if the whole had been delivered; and that the avails thereof, on a sale made by him, shall be applied, in whole or in part discharge of the execution, as the case may be: and if the latter, that the award of execution in the bond, should be limited to the balance then appearing due on the execution.

I am further of opinion, that had the appellee Fenwick been present on the day of sale, he would not have been bound to increase those avails, and to put himself in jeopardy, by giving an indemnifying bond against the deed of trust, which was exhibited to prevent the sale, even if it had been stated by his debtor or the security in the delivery bond, that the deed was fraudulent or that the debt had been paid: he had a right, even in that case, to stand on the forfeiture of the bond, leaving it to the sheriff and the surety to take such steps as behooved them, in relation to the property thus under execution. Should he interfere, and by giving bond, procure a sale of the property as if unincumbered, and be afterwards cast in a suit by the trustees, he might ultimately lose his debt. Whereas, had all the property been delivered, he might have elected to indemnify or
136 not, or to sell, subject *to the deed, and in either event, be intitled to his second execution, when the proceedings on the first were at an end. The forfeiture of the bond though, discharges the first judgment, and were he to be obliged to indemnify, and afterwards be cast by the trustees, so as, in effect, to receive but little, or perhaps no part of his debt, he could not re-issue his execution, either on the original judgment, or on the delivery bond; and if he could, other creditors may, during this delay, have swept off the property of his debtor.

All this mischief, would result not by reason of any default in him, but by the fault or misfortune of the other party in forfeiting his bond. If then, he would not be bound to indemnify, in the case supposed, a fortiori he would not, if the deed of trust was bona fide, and the debts thereby secured really due, which seems to be the case admitted by the bill: in fact, it seems there was no dispute about the right of property. It was Buck's, subject to a deed to secure debts, about which there appears no dispute. Why the property was not sold subject to the incumbrance, if that could be done, if undisputed, or if disputed why the sheriff did not at the instance of the surety, file a bill to have this matter determined, and a fair sale of the property, does not appear. It may have been because the appellant was satisfied, that nothing could be made out of that property towards satisfying the appellee's debt; or he and the sheriff may have thought, although no notice was given, or bond demanded, that the property might be restored in this case, in the same manner, as if it had all been delivered, notice given, and bond required, and that thereby, the loss if any, would fall on the appellee.

If the sheriff was in fault in restoring the property, in relation to which however the bill imputes no blame to him; and if the appellant has been injured thereby, it is so far from being an injury arising from the fault of the appellee, that it seems to be one which took place, if not
137 *by the connivance, at least by the tacit assent of the appellant himself. But whether the sheriff has subjected himself to his action or not, is not now to be settled. Suffice it, that be that as it may, the appellee cannot, on this ground, be delayed in recovering his just debt, and enforcing his legal remedy. But it is said, that the bond has been forfeited in consequence of inevitable accident, and consequently this court must relieve. But how can this court save the forfeiture, if the court where the bond was to become a judgment, in discharge too of a precedent judgment, could not? Say that it was an accident without the control of the party, and that the appellant and appellee are both innocent; but if a loss is to accrue, who ought to bear it? He who encountered the risk of taking the property from the custody of the law, or he who had no agency in producing the accident? And if either party is obliged to look to the ability of Buck to do justice, who ought that to be? he who trusted most, or he who trusted not? But if they stood equal, then he who has the law on his side, and especially if he is defendant, must prevail. I think, therefore, the decree must be affirmed.

ROANE, Judge. This is a bill brought by the appellant against the appellee, and William C. Williams, for whose benefit the appellee obtained a judgment upon the forthcoming bond in the proceedings mentioned. It is brought by the appellant as the surety thereto; and to be relieved against the effect of the said judgment; and it is brought only against the creditors, omitting the sheriff, by whose acts, taken in conjunction with the default of the appellant himself, the injury complained of was produced. It is brought against a creditor who is entirely free from any kind of misconduct; who remained quiet during the whole progress of the execution,
138 and *in whose favour the judgment now complained of, followed, as the regular consequence of the default of the appellant. The particular ground of relief set up by the appellant is, that the slave Peter, who was not produced on the day appointed for the sale, was absent through.

no default of the appellants, and, if produced, was not as is alleged, liable to the execution, and could not consequently, as is further alleged, have been sold to satisfy it.

The variety of these allegations will be inquired into; but I will first take a brief view, on general principles, of the liabilities of the respective parties.

As to the creditor, I take it to be clear law, that he is not bound to do any thing but sue out his execution; unless indeed he is duly required to give the indemnity bond provided by our statute, which he may give or not, at his election. He is, with this exception, at liberty to remain neutral; and the sheriff is to take his own measures in relation to any difficulties which may arise, respecting the title of the goods taken in execution. This doctrine, to be found every where, is strongly admitted by this court in the case of Baird v. Rice.(a) In that case, the creditor was made liable, because and only because he volunteered himself into the business, and in effect released the property which had been taken in execution. The exception admitted in that case proves the general doctrine to be, as I have stated; as also does the general tenor of the terms of the decision itself.

With respect to the parties to the forthcoming bond, the property is at their risk, and they undertake, that it shall be delivered. In case of a non-delivery of any part of such property, the bond is considered forfeited; it is to have the force of a judgment by the terms of the act, and an execution is to go for the whole. It is true
139 indeed, *that the sheriff may sell the part delivered, and credit the amount thereof on the execution.(b) But subject to that exception, the parties to the bond are to submit to the judgment, unless there be some particular circumstances in their case, to be relied on, for their relief, other than that of the mere non-delivery of the property. To go into the circumstances, which prevented the delivery of the property, would throw upon the creditor an enquiry to which he is an utter stranger, and repeal that provision of the act which says the property restored under the forthcoming bond is to be at the risk of the seller.

As to the responsibility of the sheriff, he acts at his peril, respecting the title of the goods seized; and it is said(c) that inconveniences would ensue, if this were not the case; and acting at his peril, the general principles of law afford him various means (d) of ascertaining in whom the title is. An act on the subject of indemnity bonds was made for the case of the sheriff, and exonerates him from his common law responsibility, in all cases, in which the bonds required by the act is given; but where that is not required by him, the common law responsibility is supposed to continue. (e) It is however unimportant in this case, whether that common law responsibility continues or not. The sheriff omitted to take any measures respecting the sale of the slaves in question. There is no pretence to say, that this inquiry should not be made by him, in relation to property delivered up, under a forthcoming bond. The sheriff's lien on it is not lost by the temporary delivery to the owner(f) which is only considered an exception out of it; he may as in other cases, return the
140 property until *the question of the title is fully settled; and in case of a dispute, is, at his own peril to do it.

It is readily admitted, that though our act gives to a forfeited forthcoming bond the force of a judgment, that judgment may, under some circumstances, be relieved against. In the case of Lusk v. Ramsay (g) the property was in effect delivered up, by being already in the hands of the sheriff, or if not so considered, the non-delivery was entirely owing to the officer. It would have been outrageous not to have relieved in that case. In that case, the surety stood contrasted with the present appellant in this strong circumstance, that he had committed no default whatever. I lay down the broad proposition, however, that such judgment is not to be relieved against on the single ground, that it flowed from a non-delivery of a part only of the property, however minute. In that case, the judgment (under an act,) is to be considered as analogous to a covenant, secured by a sum agreed on, as stipulated damages, against which, equity will not relieve, on general principles.(h) Nor ought such a judgment to be relieved against, in prejudice of an innocent creditor, on the ground that a due degree of diligence on the part of the officer, might have prevented a rendition: in that case the creditor who has the law on his side will hold it, and the obligor or his surety, have his redress over, against the defaulting officer.

In the case before us, while the appellant is in default in not having complied with the condition of his bond, the appellee's conduct is entirely faultless. It is entirely unimportant, whether he knew of the alleged incumbrance or not. Knowing it or not knowing it, he had a right to lay by and permit the sheriff to struggle with the difficulty. It was no concern of his, unless he was duly notified of the claim, and duly required to give an indemnity bond under our act. No such notice was
141 *given nor requisition made. It is true the sheriff states, that his attorney was notified of the time and place of sale; but that falls far short of imposing on him an obligation, to give the bond, or take any measures whatever in relation to the subject. On the other hand the appellee swears, that he had no knowledge that the deed of trust embraced the property in question, or the amount of debts it was intended to secure. That deed is not in this record nor is shewn to have been recorded: there was then no means whereby the appellee (even had it been his property) could have informed himself as to the existence of this fact. He is therefore perfectly free from blame in this business, and besides

(a) 1 Call, p. 19.
(b) 1 Wash. 274, Pleasants v. Lewis.
(c) 1 Burr 33, Cooper, &c. v. Chitty.
(d) Ibid.
(e) 5 M. 290, Stone v. Pointer.

(f) 3 Munf. 417, Lusk v. Ramsey.
(g) 4 Munf. 417.
(h) 1 Fonbl. 149.

stands bottomed upon a regular and legal judgment.

The counsel for the appellant have taken the bold ground, that this property if it had been delivered up, could not have been sold by the sheriff. Were this fact so, it might possibly have made a difference: but in this, I think, he is clearly mistaken. Had the sheriff done his duty, the deed of trust might have proved to have been fraudulent. It might have been merely to secure a trivial, or satisfied debt. It might by due diligence have been cast aside, and the property left free, to satisfy the execution; or if the debt secured thereby was small, the negroes might perhaps have been sold, subject to that incumbrance. None of these things, were done by the sheriff, and it may be by his misconduct, that the judgment in question has been rendered. He undertook to do that, which he was not authorised to do under the existing circumstances. His conduct therefore, may have been entirely illegal; and if any injury has been done to the appellant, that sheriff who acts at his peril, and has the means of acting rightly, ought to compensate it. As however, the sheriff is not made a party to this suit, the appellee should not be detained in court a moment on his account. He is entirely distinct from the sheriff in this business; and his case entitles him to a decree
142 *of dismissal: and the opinion of the court is, that the decree dismissing the bill should be affirmed.

Hallam v. Jones.

December, 1820.

Attachments—Statute—Application.*—The 12th section, ch. 123, 1 Rev. Code, allowing any person to interplead in attachments, without bail, applies, only to attachments for debts, and not for rent.

Edward Hallam procured a warrant of attachment, against certain goods of John M'Pherson, for rent. The defendant not appearing to replevy the goods, Hallam moved the Hustings court of Richmond (to which the warrant was returnable) for judgment. The court gave judgment, and gave a day to Jones and Winston (with whom the officer stored the goods, and who claimed title to them) to interplead. M'Pherson at another day, moved the court, to set aside the judgment; which motion was overruled and the cause continued, on the motion of Jones and Winston; who at the next term filed a special plea, which was afterwards withdrawn: the defendant allowed to plead any matter he legally might; and the cause continued. At the next term, Jones and Winston moved for leave to interplead, which was refused; the plaintiff had judgment, and the effects attached were ordered to be sold. Jones and Winston excepted to the opinion of the Hustings court, refusing permission to plead that the property was theirs: and appealed to the Superior court of law for Henrico county. That court reversed the judgment of the court of Hustings, on the exception; and Hallam appealed.

143 *ROANE, Judge.* The court is of opinion, that notwithstanding the generality of the expression "all attachments," (a) these terms do not extend to attachments for rent, like the one before us. This is evident not only from a recurrence to the several acts from which that act is complied, and which make that construction inadmissible, but also from the 13th section immediately following. In that section, the phrase is limited by the expression "such attachment," therein used, to attachments for debt only; as is evident from the general provisions to the section aforesaid; which provisions apply, only to attachments of the latter character.

On these grounds, the court reverses the judgment of the Superior court with costs; and affirms that of the court of Hustings.

Griffith v. Fanny.†

December, 1820.

Right to Freedom—Law Governing—Case at Bar.—A negro held in servitude in Ohio, under a deed executed in Virginia to a citizen of Virginia, is entitled to freedom by the Constitution of Ohio.

Fanny sued Griffith, in forma pauperis, for her freedom, in the Superior court of law for Wood county. The defendant pleaded "not guilty," and specially, that Fanny was his slave.

At the trial, the Jury found by a special verdict, that Fanny was the slave of one Kincheloe, until a short time before the 23d August 1816. Sometimes in that month, he sold her to William Skinner, a
144 citizen, resident in the *state of Ohio. In conformity with the sale, Kincheloe delivered possession to Skinner at Marietta in Ohio, and received the purchase money. Griffith was present at this sale; and on the 23d August 1816, Kincheloe executed a bill of sale for Fanny, to Griffith, which bill was delivered to Skinner. This bill was an absolute sale of Fanny from Kincheloe to Griffith, who was at the time, and continued to be, a citizen of Virginia. The agreement to have a bill of sale executed to Griffith, was between him and Skinner, for Kincheloe was no party to their contract, though he executed the deed. At the time of its execution, Skinner stated to Kincheloe, that he wished the bill of sale to be to Griffith, because by the laws of Ohio, he could not hold a slave in his own right. Fanny was at different times seen at Skinner's residence in Ohio. She was last seen there, in the spring of 1818. About the 1st October 1818, she returned to Virginia, where she was taken into the possession of Griffith, who claimed her under the bill of sale. The section of the Constitution of Ohio, prohibiting involuntary servitude was inserted into the verdict. And upon these facts, the law of the case was sub-

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*Attachments—Statute—Application.—It has been decided in *Hallam v. Jones, Gilm.* 142, that the general laws relating to attachments against absconding debtors, do not extend to attachments for rent, notwithstanding the generality of the words "all attachments." Redford v. Winston, 8 Rand. 156.

See generally, on the subject of attachments, monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

*CABELL absent.

(a) Chap. 123, § 12, 1 Rev. Code.

†The principal case was cited with approval in Hunter v. Fulcher, 1 Leigh 181; Foster v. Fosters, 10 Gratt. 492.

mitted to the court: which gave judgment for the pauper, and Griffith appealed.

Hay for the appellant, insisted, that the Constitution and law of Ohio, were not set forth with sufficient certainty to warrant the judgment; and that there should be a venire de novo. That it did not appear Fanny made any thing more, than a sojournment in Ohio, which did not entitle her to freedom; the Constitution of the U. States prevented that effect. In a special verdict nothing can be supplied by intendment.

Forbes contra. The whole transaction is, on its face, a fraud, intended to evade the laws of Ohio. They are found in the words in which they are enacted, and are wholly repugnant to every claim of
145 Griffith. The residence *of Fanny in Ohio, by the consent and connivance of Griffith, dissolved the connection of master and slave, and Fanny is free.

By the Court.* The Judgment is affirmed.

Carter v. Carr.

December, 1820.

Writ of Right—Abatement.†—The death of one of the demandants in a writ of right before trial, abates the whole writ.

This was a writ of right brought by a great number of demandants, consisting of all the children of John Carter of Sudley, among whom were Elizabeth Tidball; all the children of Robert Carter who was a son of John; and the children of Edward, and the grantees and devisees of Landon Carter, against Joseph Carr the tenant.

The mise was joined on the mere right: and a Jury was sworn in conformity with the statute to try the mise.

The tenant's counsel moved the court to instruct the Jury, that the demandants could not in law recover on the title produced. And the court did instruct the Jury, that the evidence of the demandants, if it proved any title, proved it belonged to some of them as tenants in common with others of the demandants, and that they could not recover in this joint action.

The Jury under the instruction of
146 the court found that *the tenant had more mere right to hold, than the demandant to demand, &c.

The court gave judgment that the tenant hold the tenement to him and his heirs, free, quit and discharged of the said demandants and their heirs, forever.

On the day after judgment was given, but before signing the order, the death of Elizabeth Tidball one of the demandants was suggested to have happened before the commencement of the term. The fact being admitted, the demandants' counsel insisted the whole writ should abate. The court decided the writ should abate as to the deceased demandant only, and judgment was entered against the survivors and their heirs, but not against Elizabeth Tidball. The demandants' counsel excepted and appealed.

The cause was argued by Stanard, Tucker and Gilmer for the appellants, and by Wickham for the appellee.

For the appellants it was contended,

That tenancy in common, at common law was pleadable only in abatement, and could not be pleaded in bar or given in evidence on the general issue. For whatever defeats the particular action but does not conclude the party for ever, should be pleaded in abatement.(a) Some things are pleadable in bar or abatement, as in replevin "property in a stranger" or in any action "outlawry for felony" or "alien enemy." But it is a rule without exception, that nothing can be pleaded in bar which goes to the capacity in which plaintiffs sue, when the defect pleaded is remediable by another writ.

Tenancy in common has every badge of a plea in abatement: it does not deny the plaintiff's cause of action but objects to the form of it: it does not negative his right, but asserts it: it is a defect remediable by another writ. The law therefore com-
147 pels the defendant to plead *it in abatement, and if he go to trial without doing so, he waives the objection.(b)

The writ of right forms no exception to these principles. The dictum in Brook's abridgment, 48, that nothing can be specially pleaded in writs of right, but collateral warranty, means nothing, in bar.

The evil to be remedied by the statute(c) was, that the tenant by views, vouchers, essoins, and imparlances, protracted the cause. The act took away all these, and allowed no excuse to the tenant but non summons: and enacted, that if the tenant after one imparlance did not plead nontenure, or in abatement, and then if the plea was overruled, the mise should be joined on the mere right. He is then, to plead matter of abatement, in abatement. But the construction contended for on the other side dispenses with the plea altogether: if it be evidence on the mise, why require it to be pleaded? If evidence without being pleaded, why not after it is pleaded and overruled? Besides, a plea in abatement must be sworn to; here there is no oath, no notice, and that on a trial of

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*CABELL absent.

†**Writ of Right—Abatement.**—The death of one of the demandants in a writ of right before trial and judgment abates the whole writ; and it is of no importance whether the deceased demandant left a child or not. Drago v. Stead, 2 Rand. 454, on the authority of the principal case.

In Garrard v. Henry, 6 Rand. 112, it is said: "Matter in abatement is either intrinsic, appearing in the writ, declaration, replication, or some pleading of the plaintiff: or it is extrinsic. For intrinsic matter, the court will, *ex officio*, abate the suit. Extrinsic matter is such as either *de facto* abates the suit, or such as renders it abatable. Of the first sort, is the death of the demandant, or one of the several demandants in a writ of right, pending the action; and at whatever stage of the suit, this fact comes to the knowledge of the court, they will abate the suit. *Carter v. Carr*, and Drago v. Stead, in our books are cases of this kind. But, the death of a party before the commencement of a suit, is a fact which does not, of itself, abate the writ, but only falsifies and renders it abatable by plea, put in, in due time, and proper form. If the defendant, passing by the fact of such death, pleads generally, or as here, joins the mise on the mere right, he thereby acknowledges that the party is in life, and forever precludes himself from taking advantage of his death, in any manner or form."

(a) Ba. ab. "Abatement" (N.) 4 T. Rep. 227; 1 Chit. Pl. 434.

(b) 1 Ba. ab. 19.

(c) 1 Rev. 496.

the mere right, without regard to technical formalities.

Next it was enacted, that any thing may be given in evidence on the mise joined upon the mere right, which might have been specially pleaded. The object of the statute was the simplification of the remedy, and it is imperative that all matters of defence shall be given in evidence and not pleaded: but it means as Brook meant, matter in bar; and matter in abatement is not available at all after the mise is joined.

Green v. Liter(d) was decided on this ground. And Hyers v. Green(e) so confidently relied on by the other side, is not in conflict with this doctrine. That was nontenure of the whole, which was always a good plea in bar(f) but tenancy in common never was a plea in bar.

148 *Again, in Hyers v. Green, the verdict negatived the plea of nontenure, here the verdict affirms the tenancy in common.

But supposing the statute allow matter of abatement to be given in evidence on the mise joined upon the right, it surely does not require the judgment to be in bar. This verdict is found under instruction of the court, and is no more than a special verdict finding the fact, that the defendants are tenants in common. The judgment therefore that the tenants hold &c. is erroneous, for it should be that the writ be quashed.(g)

But Mrs. Tidball's death abated the whole writ. This is clear.(h) So in real actions.(i)

It is said there is no reason for abating the whole writ, because survivors can at least defend themselves. That is not the criterion. Can possession be given according to the writ? Where several persons sue jointly for divisible property, they must recover all, or none, or some part. If they recover none, the death of one of the plaintiffs makes no difference; but if the survivors recover all, what becomes of the part of the deceased? if they recover part, what part? for the separate parts of each can be assigned only by partition. But the case is too clear, on the death of one of the demandants to be pressed.

ROANE, Judge.* The court is of opinion the judgment of the Superior court is erroneous, in this, that it only abates the suit as to Elizabeth Tidball one of the demandants, when in consequence of her death before the trial, it ought to

149 have been abated as to them all. *The judgment is therefore reversed with costs, and the court is of opinion that the writ aforesaid should be abated.

Hill v. Bull.

December, 1820.

Principal and Surety—Extension of Time—Discharge of Surety.†—Giving farther time for payment, to the principal, without the consent of the surety, discharges the surety from all liability.

Hill exhibited his bill in the Superior court of Chancery of Winchester, setting forth, that having become surety for Hite to Bull for 196l., Bull many years afterwards, and after Hite had become insolvent, applied to Hill for payment, and Hill gave Bull a deed of trust on his own property to secure the debt; that Hill made an arrangement with Hite (who was clerk of Jefferson County court) that he should appropriate a sufficient amount of clerk's tickets to meet the payment of the debt to Bull; that Hite did appropriate his clerk's tickets accordingly; that after the fees were collected, Hite wrote to Bull, informing him that the fees had been at Hill's instance appropriated to the payment of this debt, and requesting that Bull would be content to receive out of them 100l., and permit Hite to use the rest of the money, and give him another year's indulgence for the balance of the debt; that Bull assented, and gave the indulgence, without Hill's knowledge, or consent; that Hill afterwards induced Hite to deliver other clerk's tickets equal to the balance due Bull, to North (Bull's acknowledged agent for the collection of the debt) to be applied by North, when collected, to the payment

150 of the balance; *and that North again permitted Hite to draw the money from North himself (who was sheriff) and apply it to his own use. Bull, Hite, and North, are made defendants, and the bill prays, that Hite may be decreed to carry his agreement to appropriate his clerk's fees to the payment of the debt due Bull, into specific execution; that Hite and Bull may discover the contents of the letters which passed between them on the subject; that Bull may be decreed to release his lien on Hill's property, and enjoined from claiming the debt of Hill, and that North might be compelled to settle it.

North answered, that he was once agent for Bull for the collection of the debt, that he was requested by Hill not to sue for it, till he heard farther from him, but Hill never spoke of it more; that Hite once placed in his hands, clerk's fees, nominally, equal to the debt, but the fees were principally due from insolvent debtors; what he collected he paid to Bull; that while he was

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(d) 8 Cran. 228.
(e) 2 Call 555.
(f) 1 Ba. ab. 21.
(g) Co. Lit. 363, a; Shaw v. Clements; Hyers v. Wood.
(h) 2 Saund. 72, i; 1 Chit. 55.
(i) 1 Reeves, 462, 3.
*CABELL absent.
†**Principal and Surety—Extension of Time—Discharge of Surety.**—The rule seems well settled that a creditor, who, without the consent of the surety, enters into a binding contract, upon a sufficient consideration, to indulge the principal debtor so as to tie his hands from proceeding to collect his debt for any time, however short, by such contract, releases the surety from liability for the debt. The principal case is cited as authorizing this proposition in Norris v. Crummey, 2 Rand. 337; Chichester v. Mason, 7 Leigh 262; Glenn v. Morgan, 23 W. Va. 469; Bank v. Lee, 2 Fed. Cas. 702, Cas. No. 921; *note* to Hopkirk v. McConico, 12 Fed. Cas. 503, Cas. No. 6,696.

For further authority in point, see Bennett v. Maule, Gilm. 328; Croughton v. Duval, 3 Call 72, 73; Ward v. Johnson, 6 Munf. 6; Hunter v. Jett, 4 Rand. 104; *foot-note* to Devers v. Ross, 10 Gratt. 252; Adams v. Logan, 27 Gratt. 201, and *foot-note*; Shannon v. McMullin, 25 Gratt. 211, and *foot-note*; Dey v. Martin, 78 Va. 1; Christian v. Keen, 80 Va. 369; Burson v. Andes, 83 Va. 445, 8 S. E. Rep. 249; Stuart v. Lancaster, 84 Va. 772, 6 S. E. Rep. 139; Wells v. Hughes, 89 Va. 543, 16 S. E. Rep. 689; Exchange Building, etc., Co. v. Bayless, 91 Va. 134, 21 S. E. Rep. 279; State Savings Bank v. Baker, 93 Va. 510, 25 S. E. Rep. 550; Bacon v. Bacon, 94 Va. 686, 27 S. E. Rep. 576; Wright v. Independence Nat. Bank, 96 Va. 728, 32 S. E. Rep. 459; Tate v. Bank, 96 Va. 765, 32 S. E. Rep. 476; Shields v. Reynolds, 9 W. Va. 485 *et seq.*

See also, *foot-note* to Wright v. Stockton, 5 Leigh 153.

sheriff, Hite put other clerk's tickets into his hands for collection, but without any appropriation of them to Bull's debt, the proceeds of the collection were paid to Hite.

Bull, in his answer, acknowledges, that at Hite's request, he had given him farther indulgence for the debt, but without knowing at the time, or having any reason to believe, that any specific fund had been appropriated to the payment of it, much less that Hite had made such appropriation, in consequence of an agreement with Hill, as stated in the bill. The indulgence he gave, was intended as an indulgence not only to Hite, but to Hill, whose property was pledged for the debt.

The deposition of Hite, a defendant, was taken in the cause, which was objected to as inadmissible.

Tucker and Bouldin for the appellant. Hite is a competent witness. It is clear where the interest is equal either way, the testimony is admissible. Bull had an existing judgment against him; and
151 Hill had his right *to a decree in equity; if the interest be not equal, it is strongest against the party calling him; in that case also, he is competent.(a) As to the objection of costs, it applies with equal force in any possible event of the suit. Costs in equity are discretionary, and Hite should pay them, for withdrawing the funds appropriated for the payment of the debt.

But Hill was discharged by the new contract, entered into between Bull and Hite; by which, Bull gave farther time. For this, Rees v. Berrington,(b) is a clear authority.

Leigh, contra. Hite is an incompetent witness; for he is liable for costs, being a party to the suit on the record.

Nor was Hill discharged from liability, by the indulgence given Hite. The doctrine on this subject is stated with too much latitude by the other side. It is true, a principal shall never give up a lien, and hold the surety bound afterwards. This is the rule laid down in Croughton v. Duval.(c) But Bull gave up no lien.

Besides, Hill is not a mere surety. There was a consideration personal to Hill: it was a longer forbearance, which induced him to execute the deed of trust. He assumed the debt by this act, on himself. He cannot now be suffered to remit himself back, to the original bond.

ROANE, Judge. Without deciding upon the admissibility of Geo. Hite's deposition, so far as it is affected by his alleged liability for costs, in the case before us; and there being other abundant testimony, the court is of opinion, that the appellee Bull, having agreed to wait with the said Hite, the principal debtor, one whole year, for a moiety of his debt, without the knowledge or consent of the appellant; thereby making a new contract with the principal, without the assent of the surety,
152 *which not only varied materially the situation of the parties, but suspended his resort to a bill of quia timet; this case is brought within the established principle of equity, which was admitted by this court, in the case of Croughton and Duval, and the appellant is absolutely discharged thereby, from his liability to pay the debt in question.

The decree is, therefore, to be reversed with costs, and the appellee decreed to release the deed of trust in the proceedings contained; and be also perpetually injoined from demanding the debt aforesaid from the appellant.

(a) 2 Salk. 691.
(b) 2 Ves. jr. 243.
(c) 2 Call 69.

Goode v. Galt.*

December, 1820.

Bail Bond—Failure to Sign—Effect.—The name of a person is in the body of a bail bond, but the bond is not signed by him; it is error to take judgment against him.

Same—Return.—The sheriff may amend the return.

Galt and Johnson, partners in trade, obtained a writ in debt, against Ellis Puryear, from the Superior court of law for Goochland county. The sheriff returned, that the writ was executed on Ellis Puryear, who was "bailed by William Goode." The bail bond is part of the record, and though the name of William Goode is inserted in the bond, it is signed only by Ellis Puryear, and Richard Redford; Redford's name is not in the body of the bond. The defendant never appeared to plead, and an office judgment was confirmed against Ellis Puryear, and William Goode. Goode appealed.
153 *ROANE, Judge.† The judgment is to be reversed to the writ, and the cause sent back; with liberty to the sheriff to amend his return, if he think proper: and for farther proceedings to be had.

SHERIFFS AND CONSTABLES.

I. Scope of Title.
II. Appointment and Term.
III. Disqualification.
IV. Rights, Duties and Powers.
V. Return.
VI. Levy.
VII. Liability.
1. In General.
2. For Assessments.
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VIII. Actions by Sheriff.
IX. Actions against Sheriff.
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X. Deputy.
1. Authority and Term.
2. Duties and Powers.
3. Compensation.
4. Liability.
a. To Third Persons.
b. To Sheriff.
XI. Constable.

*The principal case is cited in Baker v. Preston, 1 Gilm. 301.

†CABELL absent.

Cross References to Monographic Notes.

Elections, appended to West v. Ferguson, 16 Gratt. 270.

Executions, appended to Paine v. Tutwiler, 27 Gratt. 440.

Executors and Administrators, appended to Rosser v. Depriest, 5 Gratt. 6.

Official Bonds, appended to Sangster v. Com., 17 Gratt. 124.

I. SCOPE OF TITLE.

All cases involving the law as applicable to sheriffs, deputy sheriffs and constables have been included in this article, except those involving the necessity and validity of the bonds required of these officers, their liability therein, and the proceedings to enforce such liability. These cases will be found in the monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

II. APPOINTMENT AND TERM.

Nomination by Justices.—In nominating three persons to the executive for the office of sheriff, the justices are not subject to control of superior courts in the exercise of the discretion placed in them by law. Frisbie v. Justices, 2 Va. Cas. 92.

Extension of Term Constitutional.—Section 2, ch. 8, Acts 1855-56, extending the term of sheriff from July 1, 1856, to July 1, 1857, is constitutional. Com. v. Drewry, 15 Gratt. 1.

Holding Over—"De Facto."—A sheriff was duly commissioned for the term of one year, but received no commission for the succeeding year, yet continued to act as sheriff for that year, and an estate was committed to him for administration. Until his successor was appointed, he was sheriff, although not regularly commissioned, and was responsible for the proper administration of the estate. Douglass v. Stumps, 5 Leigh 392.

Must Complete Duties after End of Term.—Where an estate has been committed to a sheriff for administration, and there is no statutory provision for transferring it to his successor in office, it is well settled that he must complete the administration, whether his official term has ended or not, and for an abuse of the trust, he is liable together with his sureties. Tunstall v. Withers, 86 Va. 892, 11 S. E. Rep. 565, *citing* Dabney v. Smith, 5 Leigh 13; Tyler v. Nelson, 14 Gratt. 214.

III. DISQUALIFICATION.

Holding Incompatible Office.—The acceptance of an incompatible office *ipso facto* vacates the office of sheriff, and his resignation of the second office subsequently, cannot restore him to the first. Shell v. Cousins, 77 Va. 328.

Same—Sampler of Tobacco—Construction of Constitution.—By sec. 6, art. 7 of the Constitution, it is provided that "sheriff shall hold no other office." This was construed to make the holding of *any* other office incompatible with that of sheriff. Hence where the sheriff of Dinwiddie county accepted the office of sampler of tobacco, in the city of Petersburg, he thereby forfeited the former office. Shell v. Cousins, 77 Va. 328.

Same—Deputy Inspector and Collector of Customs—Construction of Statute.—Section 2, ch. 11, Va. Code 1873, provides that "no person shall be capable of holding" any part of profit, trust or emolument, civil or military, legislative, executive or judicial, under the government of the commonwealth, who holds a similar post under the federal government, or who receives from such government any "emolument" whatever. The office of sheriff is a post of profit, etc., under the state government, and the office of deputy inspector and collector of customs at Fortress Monroe is a similar post under the United States government, and the holding of the latter office disqualifies the holder from holding the former. Bunting v. Willis, 27 Gratt. 144.

IV. RIGHTS, DUTIES AND POWERS.

Commissions.—A sheriff is not entitled to commissions on a sale, unless the sale is actually made. Com. v. Brown, 5 Call 569.

Same—Ca. Sa.—Discharge.—A sheriff is entitled to commissions on a *ca. sa.* executed on the defendant, who, after taking the benefit of the prison bounds, pays the amount of execution to the plaintiff, by whom he is thereupon discharged from custody before the return day of the execution. Gardner v. Neal, 9 Gratt. 85.

Right to Subrogation.—A sheriff or other officer, who pays an execution in his hands for collection, without an assignment at the time of the judgment on which it is founded, or the debt is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having liens by judgment or otherwise. Clevinger v. Miller, 27 Gratt. 740; Feamster v. Withrow, 12 W. Va. 611. See further, monographic *note* on "Subrogation" appended to Janney v. Stephen, 2 Pat. & H. 11.

Right to Purchase Debt Held for Collection.—If he acts in good faith a sheriff may purchase a debt in his hands for collection by execution. Rhea v. Preston, 75 Va. 757; Clevinger v. Miller, 27 Gratt. 740.

Right to Indemnity.—If a sheriff, by his act or that of his deputy, in violation of his official duty, suffers property, liable to levy and which has been levied on by him or his deputy, to be converted by the debtor to his own use, he cannot be allowed, to the prejudice of creditors holding liens on the debtor's remaining property, to have indemnity thereout to the use of another by substitution, for what he has been compelled to pay on account of official delinquency or misconduct. Sherman v. Shaver, 75 Va. 1.

Collection of Taxes, Levies, etc., after Removal.—The statute, sec. 18, ch. 49, Code 1860, providing for the appointment of a collector of taxes, levies, etc., where there is a vacancy in the office of sheriff from other causes than death, is not mandatory, and if not acted on, a sheriff removed from office must collect them, and for his default his sureties are liable. Ballard v. Thomas, 19 Gratt. 14.

Sale under Levy after Removal.—A sheriff has authority to sell goods, which were levied on during his term, after his term has expired, and he may be compelled to do so. Tyree v. Wilson, 9 Gratt. 59.

Duty to Provide Jail.—The fact that the county court has not provided a jail in which a debtor taken in execution may be confined, does not authorize the sheriff who has taken a debtor on execution, to permit him to go at large. If no jail is provided, it is the duty of the sheriff to provide one, and to keep the debtor whom he has taken in execution, in custody. Stone v. Wilson, 10 Gratt. 529.

Supplies to Runaway.—A sheriff, as jailer, is bound to furnish a runaway committed to the jail, with such supplies as are necessary for the season of the year. Dabney v. Taliaferro, 4 Rand. 256.

Collection of Poor Rates.—It was held in Munford v. Overseers, 2 Rand. 313, that formerly the sheriff was bound to collect the poor rates if appointed by the overseers of the poor. As the law now stands it is his official duty to make these collections in all the cases.

Payment of Money of Board of Education on Order of President and Secretary.—In Board, etc., v. Parsons, 22 W. Va. 308, an ex-sheriff, who had money belonging to a board of education, on the demand of the board, signed by its president and secretary, requiring him to pay the money over to the present sheriff, the treasurer of the board, was held bound to

comply with the order, in the absence of legal grounds for refusing to pay.

Power to Collect Levy after Removal.—Before the expiration of six months after a county levy the sheriff is removed from office. He still has power to collect the levy, and his sureties are responsible for his failure to account. Ballard v. Thomas, 19 Gratt. 14.

Collectors of Taxes.—Sheriffs are *prima facie* collectors of the public taxes. Winston v. Overseers, 4 Call 357.

To Farm Office.—A sheriff farmed his office to a person, whom he appointed his deputy, for a sum in gross, the deputy contracting to discharge all the duties, and to take all the emoluments of the office. This contract was held not prohibited by the statute against buying and selling offices, and was lawful. Salling v. M'Kinney, 1 Leigh 42.

V. RETURN.

Invalid Return Not Evidence.—Where process is returnable process, if the officer make return of the performance of acts beyond his duty under such process, such return will be invalid as to such parts, and will not be evidence, though the addition of such parts will not render the whole return void, but it will be good to the extent he was authorized to make return. Shannon v. McMullin, 25 Gratt. 211.

Additional Return Not Prima Facie Evidence.—An addition to the return of the sheriff is outside of and beyond the sheriff's official duty, and is therefore not conclusive nor even *prima facie* evidence of the facts therein. Alexander v. Byrd, 85 Va. 690, 8 S. E. Rep. 577.

A sheriff makes return upon an execution that it was levied on certain personal property, which was named. Subsequently he endorsed on the execution that it was held up, and the property was not sold, by direction of the creditor. The additional return was held not to be even *prima facie* evidence of the facts stated therein. Shannon v. McMullin, 25 Gratt. 211.

Invalid Return Used as Admission.—Although the return of an officer may be invalid as to others as to parts which are beyond his duty under the process, still it may be used as an admission against the sheriff in a proper case. Shannon v. McMullin, 25 Gratt. 211.

Decree Nisi—Paper Not Directed in Official Capacity—Affidavit.—A sheriff's return of the service of a decree *nisi*, or of any paper not directed to him in his official capacity, ought to be authenticated by affidavit. Anonymous, 1 Hen. & M. 206. See secs. 3207, 3220, Code of 1887.

Contradiction—Competent Evidence—Judgment by Default—Objection in Appellate Court.—A sheriff's return may be contradicted by evidence *aliunde*, and the sheriff is a competent witness to prove its truth. But after judgment by default, a party cannot object in an appellate court, to the truth of the return. Cunningham v. Mitchell, 4 Rand. 189.

Execution against Former Sheriff—Insufficiency of Return for Judgment against Security.—If, to an execution against a former sheriff, the new sheriff returns that he has taken lands, which were claimed by another person; that he had summoned two juries on the title, who had disagreed, and, therefore, rendered no verdict; that he had proceeded no further, not having any direction from the agent; and that he could find no other property; this is not sufficient to prove the sheriff's inability, so as to ground a judgment against the old sheriff's security. Preston v. The Auditor of Public Accounts, 1 Call 471.

VI. LEVY.

See monographic *note* on "Executions" appended to Paine v. Tutwiler, 27 Gratt. 440.

Sheriff Interested Cannot Take.—A sheriff who is interested in an execution cannot lawfully levy it himself. Carter v. Harris, 4 Rand. 199.

How Made—In Sheriff's Power.—A writ of *fieri facias* may be levied, without touching or removing the property, provided it be in the immediate power of the sheriff, and admitted by him to have been taken to satisfy the debt. Bullitt v. Winstons, 1 Munf. 269.

Property Left with Party under Verbal Agreement to Produce on Day of Sale.—Where a sheriff permits property levied on to remain in possession of a third person, or of the defendant, under a verbal agreement to produce it on the day of the sale, this does not prevent the execution from being levied in contemplation of law, as the sheriff is responsible to the plaintiff in the event the property is not forthcoming. Bullitt v. Winstons, 1 Munf. 269.

VII. LIABILITY.

1. IN GENERAL.

As De Facto Officer.—Where a sheriff, who was regularly elected, failed to qualify by giving bond in the proper time, but entered regularly upon the duties of his office, he is a *de facto* officer, if not *de jure*, and as such is liable for his acts. Monteith v. Com., 15 Gratt. 172.

After End of Term—Money Due County Court.—A sheriff whose term of office has expired, having in his hands moneys belonging to the county court of his county, is not liable to be sued therefor, until such county court, by some order entered of record, or draft made in pursuance thereof, directing him to pay the same to his successor in office or to some other person, has been presented to him for payment, and it has been refused. State v. Hays, 30 W. Va. 107, 3 S. E. Rep. 177.

For Taking Insufficient Bail—No Objection by Plaintiff.—On a *capias ad respondendum*, on which appearance bail is required, the sheriff takes insufficient bail, but the plaintiff proceeds against the bail, and recovers judgment against him as well as the principal, without objecting to the sufficiency of the bail, at the rules or in court, at or before the first term after the return day of the writ, or at any time pending the suit. *Held*, the plaintiff cannot afterwards maintain an action of case against the sheriff for taking insufficient bail. Raynolds v. Gore, 4 Leigh 276.

2. FOR ASSESSMENTS.

Act Constitutional.—The act of June 7, 1853, Sess. Acts of 1852, p. 12, authorizing assessments in certain cases on the office of sheriff, is not unconstitutional. Gilkeson v. Frederick Justices, 13 Gratt. 577.

Act of 1852—Sheriff of Frederick County.—An assessment of $400 upon the sheriff of Frederick county, laid on the 4th of October, and to be paid on the 1st of February following, is not in violation of the Act of 1852, Sess. Acts 1852, p. 12. Gilkeson v. Frederick Justices, 13 Gratt. 577.

3. FOR ESCAPE.

Proof of Actual Escape—Negligence—Due Means to Retake.—In an action against a sheriff for escape, an actual escape must be proved by the plaintiff; but the sheriff, on the other hand, ought to prove that there was no negligence on his part, and that due means were used to retake the prisoner. Johnston v. Macon, 4 Call 367.

Deputy Allowed Prisoner Freedom with Sheriff's Knowledge and Direction.—The sheriff is the keeper of the jail, and the legal custodian of those who are lawfully confined in it. But there is no doubt that this duty may be performed by his deputy, and as a rule is performed by him, and the sheriff is not criminally responsible for the acts of such deputy. If, however, a prisoner with the sheriff's knowledge

and by his direction is allowed to go at large, and is thus permitted to escape, the sheriff is criminally liable for such escape. Watts v. Com., 99 Va. 872, 39 S. E. Rep. 706.

Fixing Escape—English Practice.—In Johnston v. Macon, 4 Call 367, according to the third headnote, "the fixing an escape from the sheriff by legal deductions, according to the practice in England, is done away by our act of assembly."

Release by Authority of Magistrate under Insolvent Laws.—A sheriff who has released a debtor taken in custody upon a *ca. sa.* by authority of a warrant of discharge from a magistrate under the act for the relief of insolvent debtors, is not liable to the judgment creditor in an action of debt for an escape, although it is shown that the notice by the debtor to the creditor, of his intention to apply for the benefit of the act, was insufficient. Price v. Holland, 1 Pat. & H. 289.

Liable Where No Jail—Escape without Consent or Negligence.—A return by a sheriff that the county court had not provided a jail, and that a debtor taken in execution had escaped without his consent or negligence, not adding that he had used due means to retake him, is not sufficient to protect the sheriff, and a motion may be maintained against him upon the return. Stone v. Wilson, 10 Gratt. 529.

Same—Debtor Permitted to Go at Large.—A return by a sheriff that the county court had not provided a jail, and that he had therefore permitted a debtor taken in execution to go at large, itself shows an escape, and will sustain a motion against the sheriff. Stone v. Wilson, 10 Gratt. 529.

Return of "Executed" and Proof of Escape—Presumptions.—Where a motion is made against a sheriff for an escape, the court occupies the place of the jury as to the facts, and is bound upon a return of "executed," and upon the proof of an escape, to presume that it was made with the consent of the sheriff, unless he proves that it was without his consent or negligence and that he had used due means to recapture the prisoner. Stone v. Wilson, 10 Gratt. 529.

4. FOR ACTS OF DEPUTY.

Done Colore Officii—Civilly Not Criminally.—A sheriff is liable civilly though not criminally, for all the acts of his deputy *colore officii.* Mosby v. Mosby, 9 Gratt. 584; Sangster v. Com., 17 Gratt. 131; Garrett v. Hutchinson, 86 Va. 874, 11 S. E. Rep. 406.

A sheriff is not liable to a criminal prosecution for a malfeasance in office committed by his deputy. Com. v. Lewis, 4 Leigh 664.

An action of trespass lies against a sheriff for the tortious act of his deputy, as such. Moore v. Dawney, 3 Hen. & M. 127.

A sheriff is *ex officio* jailer, and is liable for the misconduct of his turnkey or servant. Dabney v. Taliaferro, 4 Rand. 256.

It was held in White v. Johnson, 1 Wash. 159, that the high sheriff alone was liable for the official acts of his deputy; except in those cases when the law provides a special remedy against the deputy, as by motion.

Administration — Receipt of Rents and Profits.—Where the rents and profits of land, which has been committed to a sheriff for administration, have been received by the deputies of the sheriff, he is responsible for them. Mosby v. Mosby, 9 Gratt. 584.

Same—Money as Indemnity.—The principal deputy of a sheriff received from R., former administrator of H., a sum of money to hold as indemnity for the sureties of R. Subsequently R. was removed, and the estate was committed to the hands of the sheriff, who still had the same principal deputy. This sum was treated in a settlement of the estate as assets of the estate in the hands of the principal deputy, for the sheriff, as administrator. It was held that the sheriff and his sureties were responsible for such sum and interest to the distributees of H. Hudson v. Burwell, 1 Va. Dec. 364.

Same—Assets Received after Term.—A sheriff is responsible for assets of an estate committed to his hands, which come to the hands of his deputy after the expiration of the sheriff's term of office, unless he took steps to remove the deputy. Hudson v. Burwell, 1 Va. Dec. 364, *citing* Dabney v. Smith, 5 Leigh 13; Douglass v. Stump, 5 Leigh 392; Tyler v. Nelson, 14 Gratt. 214.

Default in Levying Execution.—A deputy levies an execution on property during the first year of the term of his principal, but there was no sale because of lack of bidders. On entering upon the second year, the sheriff gave new sureties, and the same deputy again qualified, and no order was made displacing him. At the end of this year another person qualified as sheriff, and the plaintiff in the execution caused a *venditioni exponas* to issue, directed to the first sheriff, which came in the deputy's hands, and was by him returned "satisfied." The sheriff and his sureties are liable for the deputy's default, and the levy being made during the first year, the sureties for that year are responsible. Tyree v. Wilson, 9 Gratt. 59.

Execution against Deputy—Receipt by Another of Money under Venditioni Exponas.—In an action against a sheriff, the facts were, that during the sheriff's term, an execution against one of his deputies and a third person went into the hands of another of his deputies, who made the return, "levied, and not sold for want of bidders." After the expiration of the sheriff's term, the creditor sued out a *venditioni exponas,* directed to the late sheriff, upon which the deputy, against whom the execution had issued, made the return that "he had received $500, which, after deducting sheriff's commission, gives a credit of $472.50, 16th of June, 1846, which is all that I have made." The sheriff was held liable, notwithstanding the levy by one deputy, and the return on the *venditioni exponas* by another, of the receipt of the money; and the sheriff cannot object that the deputy who received the money was the defendant in the execution. Tyree v. Donnally, 9 Gratt. 64.

Same—Same.—During a sheriff's term an execution went into the hands of one of his deputies against another deputy and a third person. It was levied but no sale was had for lack of bidders. After his term expired, a writ of *venditioni exponas* was directed to the late sheriff, on which the deputy defendant in the execution made a return that he had received a certain sum of money. As the sheriff was authorized to sell by the *fi. fa.,* and receive the money, and the *venditioni exponas* giving him no new authority, if prior to the issuing of the last writ, he sold the property or received the money, it was his duty to return the truth of the case on the writ, so as to give the plaintiff the benefit of it. He is therefore liable to the plaintiff, though the money was received by the deputy before the last writ was issued. Tyree v. Donnally, 9 Gratt. 64.

5. UNDER ATTACHMENTS, LEVIES AND PROCESSES.

Wrongful Attachment—Trespass.—Where a sheriff takes property belonging to one person under an attachment against another, he commits a trespass, and plainly violates the duty of his office, for which he is liable. Sangster v. Com., 17 Gratt. 124.

Wrongful Levy—Trespass—Indemnity Bond.—A constable, sheriff, or other officer, who sells property taken under execution, is not protected from an action of trespass by the claimant, unless the indemnifying bond taken by him under the act of 1812,

conforms in all respects to that act, and particularly contains the clause inserted for the benefit of the person claiming title to the property. M'Clunn v. Steel, 2 Va. Cas. 256. See further, monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Deed of Trust—Sale—Trespass.—If a deed of trust be fair, and the sale under it be fair also, the sheriff who levies an execution on the property so sold, which execution had issued against the goods and chattels of the debtor in the deed, and the property is in the possession of the purchaser, is a trespasser, and an action will lie against him. Claytor v. Anthony, 6 Rand. 285.

Goods of Tenant—Rent Not Paid—Measure of Damages.—An officer takes under execution, and removes goods of a lessee, without paying the rent in arrear due to the landlord. *Held*, in an action by the landlord against the officer for so doing, not the amount of the rent arrear, but the value of the goods, is the just measure of damages. Crawford v. Jarrett, 2 Leigh 630.

Liable for Value of Property Levied on at Time of Sale Directed by Writ.—When the return on an execution shows that the officer had levied upon certain property and that no other property was found to levy upon, the plaintiff can only recover the value of the property so levied, at the time it ought to have been sold by the mandate of the writ. Bank v. Horner, 26 W. Va. 442.

Failure to Execute and Return Process.—A sheriff is liable to the action of a party at common law, for not executing and returning the process of the court, which had been delivered to him for that purpose. Ronald v. Bentley, 4 Hen. & M. 461.

Execution Not Returned at Request of Plaintiff.—If a sheriff neglects to return an execution at the request of the plaintiff he is not liable to a fine. Bullock v. Goodall, 3 Call 44, affirming Goodall v. Bullock, Wythe 328.

Failure to Levy Execution.—The failure on the part of a sheriff to levy an execution, which has been placed in his hands, when he might have done so, renders him liable for the debt. O'Bannon v. Saunders, 24 Gratt. 138.

Sale under Execution in Good Faith—Caveat Emptor.—A sheriff selling under execution in good faith, incurs no responsibility as to title, there being no implied warranty, raised by law, under such a sale. The rule of *caveat emptor* applies to such a case. Saunders v. Pate, 4 Rand. 8.

Liable for Levy after Six Months.—At the end of six months from the date of an authorized county levy, the sheriff and his sureties at the time of the levy are liable to the creditors provided for therein, whether any collection has been made or not. Ballard v. Thomas, 19 Gratt. 14.

Same—Removal.—Although after a county levy the sheriff is removed from his office, before the next six months have expired, the sheriff and his sureties are liable to the creditors provided for in the levy. Ballard v. Thomas, 19 Gratt. 14.

Not Liable When Process Is from Court Having Jurisdiction.—A sheriff is protected from personal responsibility in the execution of process emanating from a court or magistrate having jurisdiction of the subject, although the judgment of the court or magistrate, upon which the process issued, is erroneous, and the error is apparent on the face of the proceedings. Price v. Holland, 1 Pat. & H. 289.

VIII. ACTIONS BY SHERIFF.

Against Purchaser—Deputy as Witness.—In an action by the high sheriff against a purchaser to recover the purchase money of lands sold by a deputy at auction of an insolvent's interests, the deputy is a competent witness for the plaintiff. Brent v. Green, 6 Leigh 16.

On Indemnity Bond—Proper Plaintiff.—In Lewis v. Adams, 6 Leigh 320, it was held that an action on an indemnifying bond given to a sheriff for the sale of property taken in execution must be brought in the name of the sheriff, and can be maintained only at the relation of the party injured; and that although such party was not named in the pleadings, the fact that he was the relator was sufficiently shown by the assignment of the breach and by a special verdict which showed that such person was considered the real plaintiff. See further, monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

IX. ACTIONS AGAINST SHERIFF.

1. ASSUMPSIT.

Money Received under Execution—Declaration.—*Indebitatus assumpsit* will lie against a sheriff for money received by himself, or his deputy, under an execution; but the declaration ought to be so far special, as to distinguish the demand from one against him in his private capacity. Overton v. Hudson, 2 Wash. 172. See further, monographic *note* on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 183.

2. CASE.

Levy on Tenant's Property without Paying Rent.—An action of debt will not lie against a sheriff for levying an execution upon the property of the plaintiff's tenant, without paying him a year's rent. The proper remedy is *case* for consequential damages. Byrd v. Cocke, 1 Wash. 232.

3. DEBT.

For Escape.—By sec. 3, ch. 186, 1 Rev. Code of 1819, an action of debt could be maintained against a sheriff where there had been a willful or negligent escape of a debtor taken under a writ of *ca. sa.* Stone v. Wilson, 10 Gratt. 529. See section "Liability," subsection "Escape."

Same—Evidence—Defense.—In order to maintain an action of debt against a sheriff who has willfully or negligently allowed a debtor to escape who had been taken under a writ of *ca. sa.*, it is only necessary for the plaintiff to show the escape, which may be done by evidence *aliunde* the return on the execution. To defeat the action the sheriff must show that the escape was tortious, and that fresh pursuit was made. Stone v. Wilson, 10 Gratt. 529.

Partiality on Election—Declaration—Allegations.—In an action of debt by a candidate against the sheriff for partiality in conducting the election, the declaration is sufficient on *general* demurrer, where it sets forth that the plaintiff sues *quitam*; that he demand the precise penalty imposed by law; that he was a candidate for the house of delegates at the August elections for Fayette in 1831; and that defendant, *being* sheriff and conductor of the election, did interfere and show partiality in favor of other candidates against him, "by advising and urging persons to vote against him, and by refusing to receive votes of persons known to be favorable to him, though duly qualified, and urging their right to be heard in the said election, and to have their votes received and recorded in his favor." Sims v. Alderson, 8 Leigh 479. See further, monographic *note* on "Debt, The Action of" appended to Davis v. Mead, 13 Gratt. 118.

4. NOTICE AND MOTION.—See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

Sufficiency of Notice—Judgment.—A notice that a motion will be made for a judgment against a sheriff, for the amount of his receipt for sundry executions for fines, "as appears by a copy of said receipt," is sufficient, without mentioning the aggregate sum

due, the separate amount of each execution, or the time when delivered to the sheriff. And a judgment thereupon, for the aggregate sum due, without distinguishing the amount of each execution, will be sustained, if conformable to law in other respects. Segouine v. The Auditor, 4 Munf. 398.

Proper Plaintiff—Board of Education.—It is proper to make a motion against a sheriff in the name of the board of education. Board, etc., v. Parsons, 22 W. Va. 308.

Same—Execution Indorsed.—Where an execution is sued out in the name of one person, and indorsed for the benefit of another, the indorsee cannot maintain a motion in his own name against the sheriff for the amount levied on the execution, or for his default in service and return of the writ. Tolson v. Elwes, 1 Leigh 436.

Same—Creditors in County Levy.—The remedy by motion for a sum appropriated by a county in laying a levy, lies in favor of the county creditors only; not in favor of those who, as trustees, have contracted, or may contract, on behalf of the county, with any individual. Stuart v. Hamilton, 2 Hen. & M. 48.

Same—When Debtor Pays Creditor.—A *fi. fa.* is delivered to the sheriff, and the debtor pays the amount of the execution to the creditor; the sheriff fails to make due return of the execution. *Held*, the debtor cannot maintain a motion in the name of the creditor against the sheriff for a fine for failing to return the execution, even though the debtor was a party injured thereby. Fletcher v. Chapman, 2 Leigh 560.

In Circuit Court or Clerk's Office—Residence of Officer.—The plaintiff in an execution may by notice and motion under sec. 35, ch. 19, W. Va. Acts 1881, obtain judgment in the circuit court, to which, or to the clerk's office of which, such execution is returnable against an officer although such officer may reside in a county different from that for which the court is held. Bank v. Horner, 26 W. Va. 442.

Recovery Where Return Shows Officer Entitled in Any Form of Action.—In a proceeding by notice and motion against an officer the plaintiff may recover in any case, where the return of the officer on the execution shows that the plaintiff would be entitled to recover from the officer money in any form of action. Bank v. Horner, 26 W. Va. 442.

County Levy—Sum Appropriated by Court.—The creditor of a county cannot make a motion against the sheriff for failing to collect the county levy, or any part thereof, but only for the sum appropriated by the court, in laying the levy, to pay the sum due to him, and this he can do after six months from the time when it was laid, whether the sheriff has collected the money or not. Stuart v. Hamilton, 2 Hen. & M. 48.

Failure to Pay Over Money on Execution.—A motion may be made against a sheriff and his sureties, for the failure of his deputy to pay the plaintiff money levied by the deputy on execution. Hogue v. Cottle, 2 Va. Cas. 229.

Same—When Can Be Made.—A motion against a sheriff, for the default of his deputy in paying over money received by execution, need not be made at the next succeeding court after the return day of the execution, but may be made at a subsequent court. Hogue v. Cottle, 2 Va. Cas. 229.

Fine for Failure to Return Execution—Discretion of Court.—The statute which gives a motion against a sheriff for a fine for failing to return an execution, is not imperative on the court to give such judgment, but the court, in its sound discretion, may give or deny judgment, in such cases. Fletcher v. Chapman, 2 Leigh 560.

When Proper for Escape.—By sec. 48, ch. 134, 1 Rev. Code of 1819, proceedings may be had against a sheriff for an escape by motion in the following cases: 1. Where a return on the execution states that the officer has taken the body of the debtor and has it ready to satisfy the execution, and the plaintiff can show the escape *aliunde*. 2. When the return shows such a state of facts as would entitle the plaintiff to a verdict in an action of debt for escape. Stone v. Wilson, 10 Gratt. 529.

5. INSTRUCTIONS.

Action on Case—Failure to Levy—Return.—In an action on the case, against a sheriff, for failing to levy an execution, if the return on the execution was "that there were no effects with which the debt could be satisfied," the burden is thrown on the plaintiff of proving the falsehood of such return and the court, if requested in a proper manner, ought so to instruct the jury. But if the defendant request the court to instruct the jury, "that it is incumbent on the plaintiff to prove the falsehood of the return mentioned in the declaration," and no return be distinctly stated therein, the court ought to decline giving any instruction in pursuance of such request. Davis v. Johnson, 3 Munf. 81. See further, monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

6. DEFENSES.

To an Action for an Escape.—Upon the proof of escape in an action of debt against a sheriff, under the statute the jury must presume all that is necessary to be found in their verdict, unless and until the sheriff negatives by his proofs all consent or negligence on his part, and also shows that he has made diligent efforts to retake the prisoner. Stone v. Wilson, 10 Gratt. 529.

To Suit by Deputy for Removal from Office.—If the deputy sue the sheriff, for turning him out of office in violation of his contract, a plea, that the plaintiff had been guilty of a certain misfeasance and other specified improprieties in his office, from which he was therefore dismissed by the defendant, is a full answer to the declaration. Hoge v. Trigg, 4 Munf. 150.

Case for Unlawful Levy.—In trespass on the case against a sheriff for the unlawful levy and seizure of plaintiff's goods, under an execution, the plaintiff need not offer in evidence the execution under which the levy was made; that the levy was made under a proper execution is a matter of defense. Garrett v. Hutchinson, 86 Va. 872, 11 S. E. Rep. 406.

Laches.—A sheriff collected the poor rates for the years 1803 and 1804. In 1823 proceedings were commenced against him by the overseers of the poor for balances unaccounted for. It was held that after such lapse of time the proceedings should not be entertained. Overseers v. Tucker, 2 Leigh 580. See further, on this subject, monographic *note* on "Laches" appended to Peers v. Barnett, 12 Gratt. 410.

Failure to Pay Over County Levy—Court Not Legally Constituted.—Commissioner's Book Irregular.—A county court having laid the county levy, and directed the sheriff to pay certain claims upon the county out of it, and the sheriff having received the commissioner's book and proceeded to collect the levy as far as it could be collected, and returned a list of insolvents, upon a motion by one of the creditors of the county, whose claim was directed to be paid out of the levy, against the sheriff and his sureties to recover the amount, it is not competent for the defendants to object that the county court was not legally constituted to be authorized to lay the levy when it was done; nor can they object that the commissioner's book was irregu-

larly made out and not properly authenticated. Cook v. Hays, 9 Gratt. 142.

7. JUDGMENT.—See monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

Error of Clerk—Relief from.—A judgment entered against a sheriff, under a false idea of the clerk, that the bail piece was insufficient where the plaintiff's counsel had agreed that it might be filed, was relieved against in equity. Smith v. Wallace, 1 Wash. 254.

For Fines Collected—By Default—Receipt Not in Record.—A judgment by default against a sheriff, for fines collected upon executions in behalf of the commonwealth, may be sustained, although his receipt for the executions be not inserted in the record. Segouine v. The Auditor, 4 Munf. 398.

Prior to February, 1812—Interest.—Where the default of the sheriff, or other officer, responsible for fines collected, took place before February 20, 1812, judgment ought not to be rendered for interest at the rate of fifteen per centum per annum, but for five per centum damages, and five per centum per annum interest, on the whole amount, as in the case of public taxes. Segouine v. The Auditor, 4 Munf. 398.

No Bail Required—Judgment by Default Improper.—In actions where appearance bail is not required, it is error to enter judgment by default against the sheriff for not returning the bail. Ruffin v. Call, 2 Wash. 181.

Same—Set Aside.—If judgment be entered against the defendant and sheriff, in a case in which the sheriff was not required to take appearance bail, the court ought to set it aside as to the sheriff, this being disclosed before executing the writ of enquiry. Williams v. Campbell, 1 Wash. 158.

8. DEMAND BEFORE SUIT.

Where Plaintiff Lives in Country.—Where the plaintiff, in an action against a sheriff to recover money received under an execution, lives in the country, no demand of the money is necessary before proceeding to subject the sheriff. Tyree v. Donnally, 9 Gratt. 64.

Creditor in County Levy.—A county creditor provided for in a county levy, which has not been accounted for by the sheriff, is not bound to apply to the sheriff or his deputies for payment, before he proceeds to enforce payment of his debts by the sheriff and his sureties. Ballard v. Thomas, 19 Gratt. 14.

9. DUTY OF DEPUTY TO DEFEND.—See section "Deputy."

Notice—Motion for Money Collected by Deputy.—Upon a motion against a sheriff for the failure of his deputy to collect and account for the county levies, which went into his hands, the deputy having notice of the motion, the deputy should defend the motion if he can. Lee County Justices v. Fulkerson, 21 Gratt. 182.

A decree is rendered against the administrator of a sheriff, for the default of the sheriff's deputy in not returning an execution; and thereupon a motion is made by the administrator of the sheriff against the executor of the deputy. At the hearing of the motion, evidence is offered to show that the motion against the sheriff's administrator was not within ten years from the return day of the execution. But it appearing that the executor of the deputy had notice from the administrator of the sheriff to defend the motion against the said administrator, and promised to attend to it, *held*, the sheriff's administrator is entitled to judgment against the deputy's executor. Scott v. Tankersley, 10 Leigh 581.

Same—Same—Estoppel.—Judgment having been recovered of a sheriff for the default of his duputy, of which proceeding the deputy had notice, but failed to defend, the sheriff is entitled to recover a judgment for the same amount against the deputy, and the latter is not entitled to the defense that he has not defaulted, but has made proper payments. Lee County Justices v. Fulkerson, 21 Gratt. 182.

Whenever a deputy has notice of an action against the sheriff, it is his duty to defend the action, if he has any defense. And when a sheriff has suffered judgment in such case for the deputy's default, when the former proceeds for reimbursement against the deputy, the latter cannot question the correctness of the judgment, in a proceeding by the sheriff against him. Allebaugh v. Coakley, 75 Va. 628.

X. DEPUTY.

1. AUTHORITY AND TERM.

Office Incompatible with Office of Justice.—The office of deputy sheriff is incompatible with the office of justice of the peace, though by the statute law of Virginia the office of high sheriff is not so; and the acceptance of the office of deputy sheriff vacates the office of justice. Com. v. Tate, 3 Leigh 802.

Expiration of Sheriff's Term—Revocation of Authority.—With respect to all duties that may be performed by him, the authority of the deputy sheriff continues after the expiration of the sheriff's term, unless the authority is revoked or the sheriff dies. Tyree v. Wilson, 9 Gratt. 59.

Removal by Sheriff—Contract for Whole Term.—A deputy sheriff holds his office during the pleasure of his principal, and may by him be removed from office, notwithstanding he has given bond and security to indemnify the principal in case of his neglect or misconduct, and it was agreed between them that he should be the deputy, for the time that the sheriff should continue in office under his then commission; but the deputy is not deprived thereby of his remedy against the principal, for an *undue* exercise of such power of removal. Hoge v. Trigg, 4 Munf. 150.

2. DUTIES AND POWERS.

Execution of Process.—Process may be executed by a deputy sheriff in all cases, unless the sheriff is required to go in person. Writs of *ad quod damnum* may consequently be executed by the deputy. Wroe v. Harris, 2 Wash. 126.

How to Sign Returns.—It was held in White v. Johnson, 1 Wash. 159, that the law required the deputy sheriff to add the name of the sheriff, as well as his own, to the return of all *mesne* process executed by him.

To Take Inquisition.—In Noel v. Sale, 1 Call 495, it was held that in proceeding to build a mill, the deputy sheriff could take the inquisition.

3. COMPENSATION.

Where Duties Diminished.—If a sheriff during his term of office, after the deputy has served two years, relieves the latter of a portion of the duties originally assigned to him, against his protest, but does not remove him, and no change is then made as to the original compensation, the fact that the labors of the deputy are thus diminished will not necessarily reduce his compensation. Davis v. Baker, 45 W. Va. 455, 32 S. E. Rep. 239.

4. LIABILITY.

a. TO THIRD PERSONS.

For Failure to Take Bail on Mesne Process.—The law does not authorize the rendering of a judgment against a deputy sheriff for failing to take appearance bail upon *mesne* process; and if judgment be so rendered against him, he alone may obtain a *supersedeas*. Armistead v. Marks, 1 Wash. 325.

Administration by Deputy—Decree between Defendants.—Where the representative of a sheriff is sued

on account of an estate committed to his hands, and it appears that his deputy (who is also sued) had the entire management of the estate, the court may decree against the deputy, in the first instance, if assented to by the plaintiff, reserving liberty to him to resort to the court, for ulterior decrees against the other parties; but if such consent be not given, it is the duty of the court to decree between the defendants, in order to throw the burden on the person ultimately liable. Cocke v. Harrison, 3 Rand. 494.

b. TO SHERIFF.

Judgment against Sheriff Erroneous.—If there be a judgment for too much money against the sheriff on account of money received by his deputy on an execution, he cannot recover the amount of that judgment against his deputy; for he shall not, by submitting to an erroneous judgment, saddle the deputy with it. Drew v. Anderson, 1 Call 51.

Judgment is rendered against a sheriff for a fine for the alleged default of his deputy, the sheriff making no defence, nor giving any notice to the deputy of the proceeding; this judgment is erroneous in point of law, and unjust upon the merits. *Held*, in such case, the sheriff is not entitled to recover the amount of the fine from the deputy. Fletcher v. Chapman, 2 Leigh 560.

Where Deputy Farmed Sheriffalty.—A judgment was recovered against a high sheriff for a fine for the failure of one of his deputies to return an execution, which the record showed had come into his hands. The execution, in fact, had been delivered to another deputy who farmed the sheriffalty, and who defaulted in paying the money, and in returning the execution. The sheriff is entitled to see the last deputy, and to recover what he had paid. Ramsey v. McCue, 21 Gratt. 349.

Same—No Default as to Original Sheriff.—A sheriff farmed his office to two persons, who by the contract were to manage the sheriffalty, to perform or have performed the duties of the office, to select and employ deputies, and to control and have power to dismiss them. This contract was construed not to deprive the sheriff of his power to dismiss any deputy, or to refuse to permit the qualification of any deputy selected by the parties to whom the office had been farmed. But they were held to be the general agents of the sheriff, and where they had required the deputies to pay over to them money collected, which had been done, but for which the sheriff had been held liable to the creditors, the deputies were held not accountable to the sheriff, as to him they were in no default. Holland v. Helm, 7 Gratt. 245.

When Interest Not Allowed.—The statute, 1 Rev Code, ch. 78, sec. 33, giving a summary remedy by motion for a sheriff against his deputy and sureties, does not authorize the court to allow interest. Jacobs v. Hill, 2 Leigh 393.

Sheriff as Witness.—In a proceeding by motion against his deputy to recover judgment for the amount of a judgment which the sheriff had suffered, the latter may give oral testimony that the recovery against himself was grounded on the misconduct of the deputy. Shelton v. Ward, 1 Call 588.

Record of Confessed Judgment as Evidence.—A motion is made against a sheriff for the default of his deputy, upon which the sheriff with the assent of his deputy, confessed judgment. The record of this judgment, is admissible evidence against the deputy's sureties, upon a motion by the sheriff against the deputy and sureties. Jacobs v. Hill, 2 Leigh 393.

Judgment against Sheriff Discharged.—When a judgment has been recovered against a sheriff, for default of his deputy in paying over money received under execution, although he has discharged the judgment, the sheriff may proceed by motion against the deputy. Weaver v. Skinker, 4 Gratt. 160.

Proceeding by Motion.—Under the act of 1793 (ch. 161, R. C. 314, Ed. 1803) a sheriff may proceed by motion against his deputy for judgment to recover the amount of a judgment obtained against the sheriff because of the deputy's misconduct. Shelton v. Ward, 1 Call 588.

Amount of Recovery—Amount of Original Judgment.—When a sheriff proceeds by motion against his deputy for the amount of a judgment, which has been recovered against the sheriff for the default of his deputy, the amount of recovery is the amount of the judgment recovered, and not the aggregate amount of debt, interest, and costs paid by him, with interest. Weaver v. Skinker, 4 Gratt. 160.

Same—Same—Costs, etc., of Appeal.—A high sheriff, against whom a judgment is rendered for the default or misconduct of his deputy, is entitled to recover of such deputy, not only the amount of the original judgment, but all additions thereto arising from coroners' commissions included in a forthcoming bond, cost of a judgment on that bond, and costs and damages on appeals, or writs of *supersedeas*, until its final affirmance by the court of appeals. Stowers v. Smith, 5 Munf. 401.

Cumulative Remedies—Before Judgment—After Payment.—By sec. 46, ch. 49, Code 1873, a sheriff is entitled to recover against his deputy whenever he becomes liable for the latter's default, whether a judgment has been recovered or not. By sec. 47 of the same chapter, the sheriff may proceed against his deputy only when there has been a recovery against the sheriff, and some payment to the creditor. The first section is cumulative, and the sheriff may avail himself of either course of proceeding. Allebaugh v. Coakley, 75 Va. 628.

Fine Imposed for Deputy's Default—Discretionary with Court.—The statute, which gives a motion to a sheriff against his deputy to recover the amount of fines imposed upon the sheriff for the alleged defaults of his deputy, is not imperative on the court, but lies in the exercise of a sound discretion. Fletcher v. Chapman, 2 Leigh 560.

XI. CONSTABLE.

Extent of Authority.—A constable is an officer appointed for the whole county, and though he is prohibited by law, under a penalty, from executing warrants and levying executions out of his particular precinct, yet his official acts in any part of the county are valid, and he and his sureties are responsible therefor. M'Neale v. Governor for Clarke, 3 Gratt. 299.

Process Directed to Sheriff—Service by Constable.—A process directed to a sheriff cannot be lawfully executed by a constable, unless the office of coroner is vacant, or, being filled, the incumbent is under some disability by which he cannot be authorized to act. See secs. 893-5, 3207, 3220 and 3224 of the Code; Andrews v. Fitzpatrick, 89 Va. 438, 16 S. E. Rep. 278.

Executions—Service.—An execution issued upon a judgment by a justice of the peace, from the court of a county or corporation, cannot be served by a constable, except in the city of Richmond. Stokes v. Perkins, 4 Rand. 356.

Same—Indemnifying Bond.—A constable is not authorized by section 25 of the act concerning executions to take the indemnifying bond there prescribed, when he levies an execution issued by a single magistrate on a judgment for a small debt. Martin v. Sturm, 5 Rand. 693.

Same—Same—Assumpsit.—A constable levies sundry executions sued out by A. on property of the

debtors; the removal and sale of the property is forbidden by the landlords of the debtors, claiming that it was liable for the rents; and A., the creditor, and B. enter into a written agreement, to indemnify the constable "agreeably to law"; which agreement is signed by A. and B. and by C. also, though C.'s name is not in the body of the instrument; and this agreement is delivered to the officer, on the day and at the place of the sale; A., B. and C. all acknowledging it as their act, and B. and C. declaring verbally, that they are A.'s sureties. *Held*, this is the *joint assumpsit* of A., B. and C. to indemnify the constable, for removing and *selling* the property under A.'s executions and paying the proceeds to him, and the sale of it by the constable is a consideration to support the *assumpsit* as to them all. Crawford v. Jarrett, 2 Leigh 630.

Receipt—Indication of Official Character.—A receipt of a constable for such claims as are properly placed in a constable's hands, to be collected according to law, signed by him, with initials appended to his name, which stand for constable of his county, sufficiently indicate the official character of the receipt. M'Neale v. Governor for Clarke, 3 Gratt. 299.

Same—Recitals—Presumption.—If from the receipt of a constable in his official capacity it does not appear who was the plaintiff in the execution, or in the case of any other debt or claim, who was the creditor entitled to maintain a warrant in his own name, then it should be intended that the person to whom the receipt was given was such plaintiff or such creditor, unless the contrary is made to appear by proper evidence. M'Neale v. Governor for Clarke, 3 Gratt. 299.

Same—Same—Same.—If the receipt of a constable in his official character, is for a debt or claim other than an execution, it need not be expressed, but ought to be intended, unless the contrary appears, that it was placed in the constable's hands to be warranted for, and that it might have been recovered by warrant. But if the receipt is for an execution it ought to be intended, unless the contrary appears, that it was placed in his hands not to be warranted upon, but to be levied according to law. M'Neale v. Governor for Clarke, 3 Gratt. 299.

Same—Same—Admissible Evidence.—If the receipt of a constable in his official character appears upon its face to have been given for an execution, in which the relator in the action is not the plaintiff, though he may be equitably entitled to the money, or to have been given for any other debt or claim upon which the relator could not have maintained a warrant in his own name, then the receipt is not admissible evidence to sustain the action of such relator. M'Neale v. Governor for Clarke, 3 Gratt. 299.

Same—Same—Weight as Evidence.—If the receipt of a constable for a debt, claim or execution, purports on its face to have been given by him in his official capacity, and six months have elapsed from the date thereof, before the commencement of the action against him, such receipt is *prima facie* evidence of the receipt of the money by the constable, when the debt, etc., was placed in his hands to be warranted for, and was such as might have been recovered upon by warrant. M'Neale v. Governor for Clarke, 3 Gratt. 299.

Same—Effect as Evidence.—The receipt of a constable for a debt, claim or execution, although not in his official capacity, is evidence against him that the debt, claim or execution has come to his hands. M'Neale v. Governor for Clarke, 3 Gratt. 299. See Smith v. The Governor, 2 Rob. 229.

Jurisdiction of Justice of Motions against.—A justice of the peace has jurisdiction to hear a motion and give judgment against a constable for his failure to pay over money which has been collected on execution. Hendricks v. Shoemaker, 3 Gratt. 197. See monographic *notes* on "Justices of the Peace" appended to Wallace v. Com., 2 Va. Cas. 130, and "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

Same—Amount—Other Motions.—The jurisdiction of a justice of the peace, where a constable has failed to pay over collections made under an execution, is not dependent upon the amount of the execution, or of the judgment on which the execution issued; nor is it affected by the prosecution at the same time, of other motions of the same kind, by the party prosecuting the motion, against the same parties, before the same or any other justice; whatever may be the number or aggregate pecuniary amount of the several defaults of the constable. Hendricks v. Shoemaker, 3 Gratt. 197.

Several Defaults—One Notice—Judgment.—One joint notice to the constable and his sureties, upon defaults of the constable in several cases, in sufficient, and the justice should give a separate and distinct judgment in each case. Hendricks v. Shoemaker, 3 Gratt. 197.

Judgment against as Evidence.—A judgment against a constable upon his official bond is not conclusive evidence of a defalcation, nor even *prima facie* evidence of such facts. Courtney v. Beale, 84 Va. 692, 5 S. E. Rep. 708.

Liability—Discharge in Bankruptcy.—The liability of a constable for failure to collect claims placed in his hands, is not a "defalcation" within the meaning of the United States bankrupt law of 1867, sec. 33, and the character of the liability is not changed by merger into a judgment, and if the original liability was dischargeable in bankruptcy it became none the less so by the rendition of the judgment. Courtney v. Beale, 84 Va. 692, 5 S. E. Rep. 708.

Ashby v. Kiger and Others.

November, 1820.

Forcible Entry*—Injunction of Legal Proceedings†—Equity Jurisdiction.—A court of equity has jurisdiction to stop proceedings at law, to reverse a judgment on a writ of forcible entry, in which a second writ of restitution has been granted; the first being lost, without any fault in the plaintiff in equity.

Same—Same.—Though equity in such a case will stop legal proceedings involving only the right of possession, it will do it, without prejudice to an action to try the right of property.

Injunction—Release of Errors—Appellate Practice.‡—The Judge failing to direct a release of errors on granting an injunction; this court will respect the principle.

Ashby brought ejectment in the district court of Moorfield against Kiger and others, for a piece of land in Hampshire; wherein

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***Forcible Entry.**—See monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 352.

†**Injunction—Equity Acts Only in Personam.**—In strictness, there is no such thing as an injunction to a judgment, because the court of chancery does not act upon the law court, and neither reverses, rescinds, nor annuls the judgment. It acts upon the party only, restrains him from enforcing a judgment by execution, and punishes him as for contempt for any violation of its mandate. For this proposition, the principal case is cited in Beckley v. Palmer, 11 Gratt. 628; Epes v. Dudley, 4 Leigh 148.

See further, monographic *note* on "Injunctions" appended to Claytor v. Anthony, 15 Gratt. 518; monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

‡**Injustice Caused by Oversight of Court—Relief.**—In Bank v. Hupp, 10 Gratt. 36, it is said: "In that case (Pulteney v. Warren, 6 Ves. R. 73), the doctrine is broadly avowed that it is the duty of the court to

a verdict was found for Kiger and others, designating the boundary line between them and Ashby; Judgment was given for them accordingly: and they proceeding to take possession under the judgment, without any writ of habere facias possessionem, took possession of more than Ashby thought the judgment gave them, or than they had title to. Whereupon Ashby obtained a writ of forcible entry and detainer; and the jury having in that proceeding, bound a verdict in his favour, the possession of the land, of which Kiger and others had unjustly taken possession, was restored to him.

154 *Kiger and others then exhibited a bill in the court of Chancery of Staunton, setting forth the matters contained in the record of the ejectment, and the proceeding on the writ of forcible entry and detainer, in the country; complaining of gross injustice in the last mentioned proceedings, but distinctly acknowledging that they had thereby been turned out of possession; not pretending that these proceedings were irregular, but insisting only that they were contrary to equity; and praying, that Ashby might be enjoined from trespassing on the land in controversy, from taking the profits thereof, and that they might be quieted in the possession. The injunction was awarded till further order, &c. Ashby answered the bill; and after various proceedings, first in the Staunton, and then in the Winchester Chancery court, the bill was in April 1817, dismissed with costs, but without prejudice, &c. on the ground, that the case was not proper for relief in equity.

In the long interval which had elapsed, the sheriff had lost the minutes of the proceedings on the writ of forcible entry and detainer: but the loss being proved to the satisfaction of the magistrate, who had awarded the writ, by the oath of the sheriff himself; the same magistrate thereupon awarded Ashby another writ of restitution; which was immediately executed.

Then on the petition of Kiger and others to the Superior court of law of Hampshire, suggesting error in the writ of restitution, a certiorari was awarded, to remove the whole proceedings on the writ of forcible entry and detainer into that court. The magistrate returned that the record of those proceedings were lost.

And thereupon the present suit was commenced by Ashby in the court of Chancery of Winchester. In this bill, he sets forth the whole history of the controversy as above stated, particularly the loss of the record of the proceedings on the writ of forcible entry and detainer; and prays, that Kiger and others may be enjoined

155 *from proceeding on their certiorari in Hampshire Superior court of law, and that he might be quieted in his possession of the land in dispute, till Kiger and others should establish a better title at law. Chancellor Carr refusing the injunction; it was awarded by a judge of the court of Appeals; and on the 2nd of December, 1817, the Chancellor dissolved the injunction, on the same ground on which he had at first refused it, that the case was not proper for relief in equity. From which decree, Ashby obtained an appeal.

Leigh for the appellant,

Said the only point in the case was, whether the Chancellor had jurisdiction. He clearly had, for the proceedings on the writ of forcible entry, are matters in pais; and equity has the same power to relieve against their loss, that it has for the loss of any other muniment of title.

Ashby must be taken to have been lawfully put into possession of the disputed land, under the judgment; and the appellees ought not to be allowed to avail themselves of the loss of the record, by which he was put into possession.

Wickham, contra. Proceedings on a writ of forcible entry, are not in pais, they are matters of record. And if they were in pais, they are of a criminal nature, and a court of equity has no cognisance of them. Then the party is to be in a better situation by the loss of the record, than if it was preserved. If it still existed, the judgment might be reversed. Here is an attempt in equity to reverse the judgment of a court of law, because the record is lost. It is wholly inadmissible.

Leigh said the proceedings on a forcible entry were of a civil and not of a criminal nature. They had long lost their original character and were as purely a civil remedy as ejectment.

156 *ROANE, Judge.* This is an appeal from an order of the court of Chancery at Winchester, dissolving an injunction, obtained by the appellant. Its object was, to restrain the appellees from proceeding on a writ of certiorari, obtained by them, from the Superior court of Hampshire county, to remove into that court, certain proceedings on a warrant of forcible entry and detainer; and that the appellant might be quieted in his possession of the land to which they related, 'till the appellees should establish a better title thereto, at law.

Many years ago the appellant brought his ejectment against the appellees, claiming land adjoining that now in controversy: in which action, a verdict was rendered for the defendants, embracing the land now in question, by a designated boundary. The appellees proceeded to take possession of the land, according to the verdict, and thus occupied some land which had been long in the possession of the appellant. To remedy this procedure, the appellant sued out a

relieve a party, as far as it can, from the injustice to which the shortness of its proceedings may have exposed him. It is said there to be a principle on which courts of justice should act without scruple, to relieve parties against the injustice that may be occasioned by its own acts or oversights, at the instance of the party against whom the relief is sought. The doctrine of this case is recognized as unquestionable by Lord Redesdale, in Bond v. Hopkins, 1 Sch. & Lef. 413, and by Lord Cotterham, in Sanxter v. Foster, 1 Cr. & Phil. 302, 18 Eng. Ch. R. 302. It is in effect recognized or acted upon in various other cases. Anonymous, 2 Ch. Cas. 217; Ross v. Reid, 8 Gratt. 229; Elliott v. Davis, Bumb. R. 23; Morgan v. Morgan, 2 Dick. R. 643; Grant v. Grant, 3 Cond. Eng. Ch. R. 533; O'Donel v. Browne, 1 Ball & Beat. 263. It is also recognized in 1 Story's Eq., § 514, p. 578; and it was distinctly acted upon in the case of *Ashby v. Kiger, Gilmer* 153. In that case the chancellor, on granting an injunction to a judgment at law, omitted to require a release of errors. It was held that the party should not be permitted to take advantage of the omission."

*CABELL absent.

warrant of forcible entry and detainer; and having obtained a verdict, thereupon the possession of the land was restored to him by the magistrate. After this, it was competent to the appellees to appeal from this decision, (as they have since done,) or to go into a court of equity for relief: but they ought not to have been permitted to harass the appellant in both jurisdictions. The appellees elected to go into a court of equity; complaining of this measure on the part of the appellant, but without charging any irregularity in the proceedings, competent to give jurisdiction to such court. They only prayed, that the appellant might be injoined from taking the profits of the land, and that they might be quieted in the possession thereof. This injunction was granted: but the Judge omitted to require any release of errors in relation to
157 *the proceedings aforesaid; and by its award, the appellees were again put in possession.

This first injunction after remaining in court many years, was dissolved in April 1817, and the bill dismissed, on the ground, that the case was not proper for relief in equity. On this termination of the cause, the appellant was again entitled to possession. He might have taken it himself in a peaceable manner; but he obtained it by means of a second writ of restitution, awarded by the same magistrate, and he now holds that possession. In thus obtaining that possession, the appellant was in no default. Although the proceedings on the warrant of forcible entry and detainer were lost, whereby the validity of his restitution might have been rendered questionable, they were lost through no default of his. On the other hand, the conduct of the appellees is not free from censure; they now attempt to deprive the appellant of his possession, in a court of law, under the writ of certiorari, after having long contested that possession with him in a court of equity: and they hope to succeed in this, in consequence of the loss of the proceedings aforesaid; a loss which probably resulted from the long delay of the appellees in the court of equity, and a consequent belief in the magistrate, that those proceedings would no longer be wanted. They not only wish to violate a principle always held dear by a court of equity, but also to make use of an advantage, produced by themselves as aforesaid. But for the loss of these papers this course of proceeding would not have been essayed by them. Although the Judge in granting the first injunction did not exact a release of errors at law, this court in adjusting the controversy between the parties, must respect the principle. It will emphatically, respect it, and prevent the resort which is now meditated, under the circumstances which have been detailed.

There is another principle which has
158 also its due weight *with the court, and that is, that it is time that this controversy for the mere possession of the land, should be put at rest. It is enough that, ratifying the possession where it now is, the appellees should be permitted by their action at law to establish their title to the land. This course while it is adequate to every purpose of justice between the parties, forbids the appellees to profit by their own wrong, and will operate as a bill of peace as to this obstinate contest for the mere possession.

The Judge whose opinion is now before us, seems to think, that such a course would be an unwarrantable interference with the jurisdiction of another forum. In this we are obliged to differ from him in opinion. It is but the common case, which every day occurs. The tribunal of the court of equity, does not act immediately upon that of the court of law, nor in any manner disrespectful to it: it only acts upon the party, and for good reasons existing in relation to him, restrains him from proceeding further. The Judge seems also to think, that the appellees should not be restrained in this instance, because, on the dissolution of the first injunction, that court informed the parties that the remedy was at law, and at law only. This court concurs with that in this position; but for the reasons assigned, it restrains the appellees from proceeding under their writ of certiorari. It expressly admits and recognises their right to proceed by a new action. It prefers a proceeding which will settle the right, to one which only respects the possession.

The opinion of the court, therefore is, that the injunction ought not to have been dissolved; and that on a final hearing, unless the case should be made different from what it now is, it ought to be perpetuated; without prejudice, however, to any action at law which either of the parties may be advised to bring, to establish the
159 boundary *between them. The decree is therefore reversed with costs, the injunction reinstated, and the cause remanded, to be finally proceeded in pursuant to these principles.

Carter v. Campbell.

October, 1820.

Chancery Jurisdiction—Suit Dismissed in Another District.—It is no objection to the jurisdiction of one Chancery court, that a suit not conclusive of the rights of the parties, had been dismissed in another district.

Real Estate—Sale by Acre—What Constitutes.*—An agreement to sell land contained within specified boundaries, supposed to be a given number of acres, at a fixed price per acre, is a sale by the acre, and not in gross.

Same—Same—Right of Survey.†—Where a sale is by the acre, the right of survey exists, whether reserved or not; and may be claimed at any time before the business is closed.

Issue Out of Chancery—Verdict—Conclusiveness.‡—In a case proper for an issue, the verdict is conclusive, where the evidence is conflicting.

***Real Estate—Sale by Acre—What Constitutes.**—As holding that an agreement to sell lands contained within specific boundaries, supposed to be a certain number of acres, at a fixed price per acre, is a sale by the acre and not in gross, the principal case is cited in Graham v. Larmer, 87 Va. 228, 12 S. E. Rep. 389. See also, Nelson v. Carrington, 4 Munf. 332; Bierne v. Erskine, 5 Leigh 59, and *fool-note*.

†**Same—Same—Right of Survey.**—Where there is a sale by the acre, a right of surveying exists, whether expressly reserved or not, and if no time is limited for making the election to survey, it may be done at any time before the whole business is closed between the parties. Crawford v. McDaniel, 1 Rob. 454, citing the principal case and Nelson v. Carrington, 4 Munf. 332.

‡**Issue Out of Chancery—Conclusiveness of Verdict.**—To the point, that, in a case proper for an issue, the verdict is conclusive, where the evidence is conflicting, the principal case is cited in Nease v. Capehart.

Real Estate—Sale by Acre—Deficiency—Compensation.—If land be sold by the acre, at different prices, and a deficiency occurs, a jury should assess the compensation.

In December, 1806, Hugh Campbell exhibited his original bill against Philip Slaughter and Charles Carter, in the superior court of Chancery of Richmond, setting forth, that in August, 1802, Campbell bought of Slaughter a tract of 949 acres of land, according to boundaries described in a written contract between them, at nine dollars per acre for 598 acres thereof, and eleven dollars per acre for the other 351 acres; that Campbell had paid all the purchase money, but the contents of two bonds, which Slaughter had assigned to Carter, and on which Carter had obtained judgments in the district court of Charlottesville; and that on a survey of the
160 *land it was found to fall short 82 acres, the value of which was more than the amount of the bonds on which the judgments had been obtained. Slaughter and Carter are made defendants. And the prayer is, that farther proceedings on the judgments at law, may be injoined; and that Campbell may be allowed a credit for the 82 acres deficient.

In an amended bill, Campbell states, that the land he bought of Slaughter, had been brought by Slaughter of Carter, and was conveyed by Carter, at Slaughter's instance, to Campbell; that the bonds Campbell gave Slaughter, were assigned by Slaughter to Carter, in payment of the purchase money which Slaughter had contracted to pay Carter; that Carter was apprised of the consideration of the bonds, and (as Campbell believed) of the terms of the contract between him and Slaughter. Wherefore, it is insisted, that Carter ought to be held liable, immediately, for the deficiency of quantity, &c.

An injunction was awarded March 20, 1806, for $902, with interest from August 24, 1302, (estimating the deficiency at $11 per acre).

Slaughter's answer states, that in March, 1802, he bought a large tract of land of Carter, containing, (with 24 acres he bought of Whitaker Carter,) 2717 acres, according to a survey made by James Higginbotham, the county surveyor; and in order to sell it himself more readily, he had the original tract divided into three parcels, by one Franklin, a surveyor. In August, 1802, he first sold Campbell one of the parcels, containing 598 acres, (as laid off by Franklin,) at $9 per acre, and then an additional quantity adjoining. The contract was reduced to writing on the 24th August, 1802, describing the land sold, by metes and bounds; and then Franklin laid off the additional quantity sold, which proved to be 351 acres. The whole quantity was 949 acres. Slaughter avers, that he offered to have the land re-surveyed to Campbell; but he expressly agreed to take it for 949
161 *acres, more or less, as laid off and computed by Franklin; by whose computation, all the other purchasers of parcels from Slaughter, bought and abided. Slaughter procured Carter to make deeds to Campbell, and the other sub-purchasers. And Campbell gave his bonds for the purchase money, and a mortgage of the land to secure the payment. In 1804, Campbell sold the land he had bought of Slaughter, to one Rivers, at so much by the acre: it was then surveyed by one Christian; and it is by that survey that the supposed deficiency of 82 acres is ascertained; which deficiency however, Slaughter does not admit. Slaughter attended Christian's survey: but (he says) only for the purpose of completing an arrangement by which Rivers was substituted as his debtor in place of Campbell; he did not consider himself at all interested in the survey. And it was after Christian's survey which shewed the deficiency, that Campbell gave his bonds to Slaughter for the whole purchase money, without claiming any allowance for the deficiency; which bonds are the same that Slaughter assigned to Carter, and on which the judgments were obtained at law, to which the injunction had been awarded.

The answer of Carter states, that in March 1802, he sold Slaughter a tract of 2650 acres of land; that by their contract, the land was to be surveyed, but afterwards Slaughter agreed to take it at the reputed quantity more or less; that he is ignorant of the terms of the contract between Campbell and Slaughter; that Campbell's bonds were assigned him by Slaughter in payment of the purchase money which Slaughter owed him; and that he cannot admit the truth of Campbell's bill.

The contract of sale between Slaughter and Campbell of 24th August 1802, binds Slaughter to sell a tract of land contained within certain boundaries described, supposed to contain between 800 and 900 acres, at $9 per acre, for 598 acres, and $11 per acre for the remainder, the quantity not mentioned in the contract.

162 *On the 8th of September 1809—upon bill, answers and exhibits, Chancellor Taylor dissolved the injunction.

On the 1st June 1810, the plaintiff not being an inhabitant of Virginia, the clerk demanded security for costs; which not being given, according to order, within 60 days, the bill was dismissed. And so the proceeding was at an end in the court of Chancery of Richmond.

But in August 1811, Campbell preferred another bill to the judge of that court, in vacation, wherein he sets forth the terms of his original contract with Slaughter, and adds, that the lands Slaughter sold him, were parcel of a large tract of 2717 acres, which Slaughter had bought of Charles and Whitaker Carter; that Slaughter procured the surveyor Franklin to subdivide the tract, not by actual measurement, but by laying off the parcels on the former plat;

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15 W. Va. 305; Miller v. Wills, 95 Va. 351, 28 S. E. Rep. 337.

And in Hickman v. B. & O. R. Co., 30 W. Va. 301, 4 S. E. Rep. 657, it is said: "In Nease v. Capehart, 15 W. Va. 300, this court, following the law as settled in Virginia and elsewhere, decided, that 'the object in directing the issue is to satisfy the conscience of the chancellor, but that conscience must be satisfied with the verdict of the jury upon an issue properly directed, where no errors have been committed during the trial thereof, either by the court or by the jury, to the prejudice of either party.' *Carter v. Campbell, Gilm.* 159; Lee v. Boak, 11 Gratt. 182; Fitzhugh v. Fitzhugh, 11 Gratt. 210; Henry v. Davis, 7 W. Va. 715."

See further, monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

whereby it was found, that the boundaries by which Campbell bought, contained 598 acres at $9 per acre, and 351 acres at $11 per acre; that Campbell gave his bonds for the purchase money, according to that estimate; that Campbell, being about to go to the western country, sold his parcel to Robert Rivers, who insisted on a re-survey; that the land was re-surveyed by Christian, deputy surveyor of the county, Slaughter having notice and attending the survey; that it was found, that there had been a mistake in the survey of the whole tract sold by Carter to Slaughter, and that the part sold by Slaughter to Campbell, fell short 87 acres, which at $11 per acre amounts to $957; that Campbell having bought by the acre, insisted on a deduction for the deficiency; that Slaughter said Carter was liable to him for the deficiency, he would arrange the matter with Carter, and if Carter would not come to terms, Campbell might exhibit his bill of injunction against Carter as well as himself, and so make the loss fall on the right person; that thereupon Campbell gave his bonds to Slaughter, for the balance of purchase money, without regard to the deficiency; that Slaughter assigned the
163 *bonds to Carter, who prosecuted them to judgment; that Campbell then filed his original bill, depending on Slaughter to see justice done him, and went to the western country, but Slaughter answered his bill and denied his equity; that the deed which Slaughter procured Carter and wife to execute to Campbell, was without Campbell's privity; that in Campbell's absence his injunction was dissolved; and that suit had been instituted, and judgment obtained, on the injunction bond, and a scire facias had been sued out against the bail. Campbell denies any agreement to take the land, at the quantity estimated by Franklin, as set forth in Slaughter's answer to his original bill; avers that the facts stated in that answer are not true, and that his conduct was fraudulent; and prays, that his injunction may be re-instated, and the judgment on the injunction bond may also be enjoined.

Subjoined to the above (which is called a supplemental and amendatory bill) is a petition to the judge of the court of Chancery of Richmond, briefly stating the result of the proceedings on the original bill; referring to the new bill, and to two annexed affidavits in support of its allegations, and praying general relief in the premises.

Upon this application, Chancellor Taylor said, that, in term time, the order of dismission to the original bill might be set aside, and the injunction reinstated, but not in vacation: and, if this were considered as an original application for an injunction, the common law court which had rendered the judgments, being within the district of the Superior court of Chancery of Staunton, he could not grant the injunction.

And in Nov. 1812, Campbell preferred a bill to the judge of the Superior court of Chancery of Staunton, referring to his original bill in 1806, and the proceedings thereupon referring also to his supplemental bill of 1811, and his petition thereto
164 annexed, and Chancellor *Taylor's order thereupon; stating, that he was absent from the commonwealth, when his original bill was dismissed; and praying Chancellor Brown to grant him relief as prayed in his supplemental bill of 1811.

December 8, 1812, Chancellor Brown "granted the injunction on the usual terms."

Then Campbell exhibited another amendatory bill, correcting a mistake in his former allegations, respecting the proceedings on the injunction bond against his sureties and their bail; and stating that the real proceeding was an attachment in Chancery, and decree thereon, in the County court, against the representatives of the surety in the injunction bond; and praying that the Chancellor would enjoin further proceedings on that decree. The injunction was granted.

The answer of Slaughter to the supplemental and amendatory bills and petitions of 1811 and 1812, refers to his answer to the original bill of 1806; and states, that after his contract with Carter, he made a new agreement with him, whereby he took the whole tract at the estimated quantity, more or less, and so he had no claim on Carter for deficiency in quantity. He denies the new allegations in Campbell's suppemental bills altogether; the most material of which were not set up or pretended in his original bill. He states, that Campbell's first injunction was obtained in 1806, and dissolved in 1809, and his bill dismissed for want of security for costs in 1810; and complains, that, in consequence of this unusual delay, he had lost the benefit of the testimony of his three most material witnesses.

The answer of Carter, is in substance the same with his answer to the original bill of 1806. It is acknowledged by Slaughter, that he has no claim on Carter for any deficiency.

A general replication was filed.

165 *There were depositions proving the allegations in Campbell's original and supplemental bills; the deficiency in the quantity, as shewn by his survey; and that Slaughter took no concern in the survey:

Proving the facts stated in Slaughter's answers, and that an actual measurement was made by Franklin.

Chancellor Brown ordered a survey. The survey, reported by the surveyor of Amherst, makes the land hold out only 846 acres.

The cause came on for hearing; and the Chancellor ordered an issue to be made up, and tried in the circuit court of Amherst, to ascertain, whether the contract between Campbell and Slaugther of August 24, 1802, for a sale by the acre, had been rescinded by the parties, and a new contract for a certain sum in gross (each party taking on himself all risk of the quantity sold) entered into?

Slaughter's counsel moved the Circuit court to certify, that the verdict was against the weight of evidence; but the court said, that there was a great deal of circumstantial evidence, which it could not state with accuracy, and if it had been a trial at law; it could not have granted a new trial: and therefore refused such certificate. Then they moved the court to certify the evidence

given at the trial, to the Chancellor; stating the written evidence, and offering to reduce the parol evidence (of which no note had been taken at the trial) to writing, and present it for correction, to the court and the opposite counsel: but the court thought the parties had no right in such cases, to have the evidence certified to the Chancellor, and that it would be inconvenient in practice and often impracticable; and therefore overruled the motion. Slaughter excepted.

Slaughter's counsel upon their exception to the opinions of the Circuit court, moved the Chancellor, to order a new trial: he overruled the motion. Then they
166 moved *him, to set aside the order directing the issue, because, upon the evidence and exhibits, the issue ought never to have been directed; which was also overruled.

The Chancellor perpetually injoined Carter's judgments on the original bonds, and on the first injunction bond, and his decree on the attachment in Chancery against the surety therein; the amount of that decree being $1499 32, with interest on $902, part thereof, from Sept. 8, 1809, and costs; and being principal, interest, damages and costs of the sum injoined by the Chancellor at Richmond, in 1806, when the deficiency was supposed to be 82 acres, rated at $11 per acre. And, as the deficiency now appeared to be 103 acres, (the whole of which he rated at $11 per acre) he decreed, that Slaughter should pay Campbell, on account of the additional deficiency, $212, with interest from January 1, 1803, and costs.

From which decree, the defendants appealed to this court.

Leigh, for the appellant. All the proceedings before Chancellor Brown are coram non judice. They may be considered either as the continuation of a previous suit, or as original. In the first point of view, though the Chancellor at Richmond might in term time have granted a bill of review, it is clear that the Staunton Chancellor with co-ordinate powers, could neither review nor reverse proceedings in the Richmond Chancery. If this be considered an original suit, the Chancellor at Staunton has granted an injunction in direct violation of an order of the Chancellor at Richmond; and if it be allowed, no order of any Chancellor, can be of any force on any other Chancellor.

The issue tried in the court of law was not the same issue of fact which was made in the court of equity: and was therefore an immaterial issue. The defence of Slaughter was not, that a new contract
167 was made, but *that the old contract was executed, according to the survey actually made, and the Chancellor directs the jury to inquire, whether the old contract was rescinded and a new one made for a quantity in gross. Slaughter's defence therefore was not embraced in the issue.

The case of Fleet v. Hawkins,(a) shews the distinction, between a sale for a quantity in gross, and a sale to abide by a survey actually made, before the contract.

In the case before us, both the verdict and Slaughter's defence, are actually true; the issue should have been, on the new contract set up by Campbell; the issue directed then, was immaterial.

The decree is wrong in its details, in supposing the whole deficiency to have occurred in the land sold at the highest price, without proof of the fact. It allows for a deficiency of 103 acres, when in fact a deficiency is shewn, of only 83 acres.

Wickham, contra. On the question of jurisdiction it is admitted, that the proceedings in the Staunton Chancery cannot be considered the continuation of a suit commenced in Richmond. It is a new bill, and the proceedings at Richmond are referred to, merely to lay the whole case before the Chancellor. It is said the Chancellor at Staunton was bound by the proceedings in the Richmond Chancery. But surely this comity cannot bind the Staunton Chancellor to give more weight to these proceedings than the Chancellor of Richmond would have given, and even he, would have granted the injunction if the locality had allowed his jurisdiction, after the court of law in which the suit was brought, was attached to the Staunton district; or have reviewed his decree, had that been allowable in vacation.

168 *As to the merits, the verdict puts an end to the controversy: unless as is said, the issue was immaterial.

There can be no doubt, that the original contract was for an unknown quantity per acre: but the subsequent agreement to abide by Franklin's survey, was an alteration of the original contract; and to alter any essential part of an agreement, makes the whole a new contract; whether the contract for a sale by the acre then, had been rescinded, was the proper form in which to express the issue to be tried. There can be no doubt, that the whole merits of the case came fully before the jury, were discussed, and have been decided, and if the form of the issue was objectionable, it should have been changed in the court below. It is too late to object, after a verdict, and decree.

Hull v. Cunningham,(b) and Nelson v. Matthews,(c) have decided, that a party is entitled to relief for a mistake of quantity. In the case of Fleet v. Hawkins,(d) referred to, the parties had agreed to abide by a particular survey already made, and they would have been bound by it, whether there was a mistake or not; but if a mistake had been made in a subsequent survey, by which the quantity was to be determined, equity would have relieved against it. Here, there is no evidence that the parties agreed to be bound by the survey. Carter's deed was executed without the knowledge of Slaughter.

As to the error in the details of the decree, it relates to res inter alios acta, and the parties to this record cannot object to it.

Stanard, concluded for the appellant.

He objected first, that a surety had injoined a judgment against the principal without being a party to it. [Mr. Wickham cited West v. Logwood,(e) as an
169 authority *for this, and added, that

(a) 6 Munf. 188.

(b) 1 Munf. 330.
(c) 2 H. & M. 164.
(d) 6 Munf. 188.
(e) 6 Munf. 491.

no objection appeared on the record for want of parties.]

Vance v. Walker,(f) recognised in Aclin v. Walker,(g) shews, that a contract made, and bonds given in pursuance, cannot be varied as to the manner of execution, unless supported by a memorandum in writing, made at the time. The deeds then in this case fixed irrevocably the contract as to quantity. The parol agreement which Campbell sets up would therefore be unavailing, even if it were proved, but none such is proved.

The Chancellor by the form of the issue has referred a question of law to the decision of the jury. For whether the agreement to abide by Franklin's survey, rescinded the contract, is a question of law. The distinction between mistakes in surveys already made, and surveys to be made, is without foundation.

The decree is erroneous in its details, for the Chancellor has allowed Campbell more than he claims.

ROANE, Judge. The court is of opinion that there is no objection to the jurisdiction of the court in the case before us. The case made by the bill is as to its allegations, its objects, and the evidence by which it is supported, a new case, with reference to that formerly acted upon, by the court of Chancery for the Richmond district: and the power of the Judge of the Staunton Chancery court is justified by the intermediate annexation of the county of Albemarle to that district.

On the merits, the court is clearly of opinion that the purchase by the appellee of the appellant Slaughter, was by the acre, and not by the tract. This appears manifestly from the written agreement of the parties of August 24th, 1802. The case of Nelson v. Carrington(h) is an authority to shew, that where the original agreement is for a sale by the acre, the contract
170 will retain that *character, until it clearly appears, that it has been subsequently changed by the parties.

The same case shows us, that where the sale is by the acre, a right of surveying exists, whether such right be expressly reserved or not. It also proves, that if no time be limited for making the election to survey, it may be done at any time before the whole business is closed between the parties.

These principles sustain the appellee in now making his election, and repel the idea of an abandonment thereof on his part. He may have been induced to give his bonds as by a computed number of acres, on the grounds stated by him; and his acceptance of the deed which was made to him, ought not to bind in this particular; that deed was besides, procured by the appellant Slaughter, and forwarded to him. It was not emphatically and peculiarly his act; and the deed is not shewn to have been accepted by him, prior to his sale to Rivers.

As the Chancellor had power in this case, to direct an issue to try the material fact in controversy between the parties, and there being contrary and conflicting evidence concerning it, the court is of opinion, that it ought to abide by the verdict found upon that issue. The verdict upon the issue is, therefore, conclusive in this case, unless that issue were materially variant from, and inapplicable to, the question controverted between the parties. The court cannot see that this was in any degree the case in this instance. It being admitted that by the written agreement the sale was one by the acre, the defence set up by the appellant Slaughter was, that this agreement was afterwards changed into one of hazard, so far as related to the sum to be paid; or in other words that the appellee subsequently agreed to waive his right of surveying, and take the tract for a specific number of acres. This is all that was pretended on the part of Slaughter. He never for a moment admitted, that the contract for the sale of the land was
171 totally rescinded and *done away; and this was also precisely the meaning of the Chancellor, and is the true construction of the order directing the issue. Although that order in its first member, speaks of a rescission of the contract, and also speaks of a new contract, both the one and the other are narrowed down by the subsequent terms thereof, to an enquiry, whether the sale by the acre was converted into a contract of risk, as to the number of acres purchased. We cannot give into the idea of the appellant's counsel, in this respect, without expunging from this order a material member of it, which was intended to limit and explain the preceding terms thereof.

As to the deficiency of the land in question we are of opinion, that the extent thereof would regularly be estimated by Norvell's survey, made under an order of the court in this cause, and to which no objection had been taken. The appellee ought not to be bound by the survey made between him and Rivers. His prayer of general relief protects him therefrom; and Slaughter cannot contend, that the appellee is bound by a survey, the binding force of which to himself he has rejected.

If this case stood therefore, merely upon the written contract between the parties, we should be of opinion, that Norvell's survey is conclusive, and that the decree, in toto should be affirmed. But it does not stand merely on that contract. We must bring into the case on this question of deficiency, the admissions of the appellee in his bill. In the bill preferred to the Judge of the Richmond Chancery court, and which is also made a part of the bill before us, we are of opinion, that the appellee has brought Higgenbotham's survey, with Franklin's subdivision thereof, into this cause. We have no doubt, that he had that survey before him at the time of the contract, from his own shewing. That survey is in this record, and exhibits one part of the land in controversy by metes and bounds, as
172 containing 598 acres, and *another, as containing 351 acres; whereof the former was sold at 9, and the latter at $11 per acre. If this be the fact, exact justice between the parties seems to require, that the deficiency in each part should be ascertained by a jury, and that compensation be

(f) 3 H. & M. 288.
(g) 2 Munf. 357.
(h) 4 Munf. 332.

made therefor, according to the prices respectively agreed to be given for them. The decree has made compensation for all the deficient land at the rate of $11 per acre; whereas it may turn out that the deficiency exists in the other part: a tract bought by the appellant at $9 per acre.

With this variation the decree is approved: but it must be reversed with costs and the cause remanded, in order to be finally proceeded in as to the measure of relief, pursuant to the principles of this decree.

Mosby v. Taylor.

October, 1820.

Equitable Relief—Penalty—Back Interest.—A court of equity will relieve against back interest secured by way of penalty.

W. and L. Mosby by their bill in the Richmond Chancery, prayed an injunction to prevent farther proceedings on two forthcoming bonds, executed by them to Taylor, on the ground, that the penal bills on which the judgments at law had been rendered, were altered after delivery, without the knowledge of the plaintiffs, which prevented their making the proper defence against the back interest in the court of law. The bills on which the judgments were obtained, were "to pay by a given day, with interest from a prior day if not punctually paid, and then followed a penalty of double the amount of the 173 *debt. The erasure alleged was of the words "if not punctually paid," which had the mark of a pen drawn over them. To prove that the erasure was before delivery, several affidavits, and a third penal bill executed at the same time, and for part of the same debt, were offered in evidence. The answer denied that the erasure was after delivery. The Chancellor dissolved the injunction, and Mosby appealed.

J. Robertson and S. Taylor, for the appellants.

The injunction was dissolved for want of sufficient proof that the erasure was after delivery. We maintain the proof is adequate; and Waller v. Long(a) shews, that a note or bond purporting to bear interest from the date if not punctually paid, is a contract with a penalty for default, against which a court of equity will relieve. If it be said that there is no occasion to come into equity for the erasure, which is a forgery that cannot alter the contract at law, the answer is, that the penalty gives jurisdiction; and the party should stand in the same situation in equity, that he would have done in a court of law, had the contract remained unaltered.

Leigh, contra. One comes into equity on the conscience of his case. The plaintiff admits he owes the debt: and that he would pay the back interest, if he was not punctual in the payment of the principal. The injunction too, was for the whole debt, when there is no dispute except as to the back interest. Waller v. Long, is a technical exception founded on the particular penalty, it has no application to a case like this. There is here no proof that the erasure was after delivery, which is the foundation of the defence.

ROANE, Judge.* The decree is to be reversed; the injunction reinstated, and made perpetual as to the back interest, and to be affirmed for the residue.

(a) 6 Munf. 71.

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174 *Trent v. Trent's Executrix and Others.

February, 1821.

Wills—Direction for "Payment of Just Debts"†—Effect.—Directing by will "the payment of all just debts," charges the whole estate; which charge is not released, by a subsequent selection of particular parts to be sold for that purpose.

Same—Charging Estate with Particular Debts.—Charging the whole estate with particular debts, lets in every creditor on the whole estate. Quære.

Same—Annuity—Chargeable on What.—An annuity, is a legacy charged on the whole estate, not specifically devised.

Same—Realty Charged with Debts—Who Entitled to.—The heir is entitled to the real estate, though charged with debts, until convicted of mismanagement, or misapplication of profits.

Edward W. Trent of the town of Manchester, having a wife, a brother, Dr. J. Trent, and a sister, Mrs. Leiper, but no children, and being the proprietor of Trent's Bridge over James river, a stone quarry and lands adjoining, and sundry lots in Richmond and Manchester, and other property real and personal, made his will on the 29th of March 1818, which contains the following clauses: "I direct the payment of all my just debts, and wish the whole of my Richmond property sold for that purpose, and my land in Dinwiddie,

*BROOKE absent.

†**Wills—Direction for Payment of Just Debts—Effect.**—The proposition of the principal case that where a will directs that all the testator's just debts shall be paid, this acts as a charge on the testator's real estate, was approved and followed in Clarke v. Buck, 1 Leigh 490; Thompsons v. Meek, 7 Leigh 429, 432.

In Downman v. Rust, 6 Rand. 589, it is said: "Every question of the charge on land under a will, is a question of intention. In the case of debts, it is so natural to suppose that a man in that solemn act, intended to be just, that courts have taken very slight words in a will to imply a charge upon lands. The books are full of such cases. *Trent v. Trent*, in *Gilm. Rep.* 174, is one of that class."

See further, monographic *note* on "Marshaling Assets" appended to Carrington v. Didier, 8 Gratt. 260.

Same—Legacies—When a Charge on Real Estate—Parol Evidence.—In Read v. Cather, 18 W. Va. 267, it is said: "Whether a legacy is a charge upon the real estate devised in a will is a question of intention upon the part of the testator. According to the English rule that intention is to be derived exclusively from the provisions of the will; and parol evidence is inadmissible to aid in ascertaining that intention. 1 Rop. Leg. 451 (576, 4th Ed.); Parker v. Fearnley, 2 Sim. and Stu. 592. In Virginia the rule is not so strict; and parol evidence is admissible. Downman v. Rust, 6 Rand. 587; Clarke v. Buck, 1 Leigh 490; *Trent v. Trent's Ex'r, Gilm.* 174. CHANCELLOR KENT thus states the law: that the real estate will not be charged with the payment of legacies, unless the intention of the testator to that effect is expressly declared, or clearly to be inferred from the language and disposition of the will; and that it was not sufficient, that debts or legacies are directed to be paid, that alone does not create the charge; but they must be directed to be first or previously paid, or the devise declared to be made after they are paid. Lupton v. Lupton, 2 Johns. Chy. 614."

See the principal case also cited with approval in Clarke v. Buck, 1 Leigh 491; *note* to Black v. Scott, 3 Fed. Cas. 516, Cas. No. 1,464.

See further, monographic *note* on "Marshaling Assets" appended to Carrington v. Didier, 8 Gratt. 260.

together with as many of the lots in the town of Manchester, not including in the number, these devised to my wife as will be sufficient; I wish my executrix and her friends hereafter named, will sign such conveyance of all my estate as the several banks many require to secure them, not doubting but that they will give such indulgence as to effect a sale without sacrificing the property. I shall rely much on the liberality of the Bank of Virginia." And after directing that no part of his property should be sold to Wardlaw & Co. within twenty years, for the purpose of enabling them to conduct water
175 through his land, except *under certain circumstances, he devises to his wife, his land on the Manchester side of the bridge, together with his household and kitchen furniture, his negroes, and fifteen hundred dollars a year, the money for life, the residue as her absolute property, she to have at all times the use of the bridge, in selling rock and passing toll free. He then gives a legacy of six hundred dollars to his adopted daughter N. E. T. Callaway; the residue of the will, is in the following words: "I am under an obligation to make provision for two unfortunate females that owe their existence to me, of which I recommend them to my wife and my affectionate brother to do as they think best, they have power under this will to do what they think best. If N. E. T. Callaway shall die before my wife, or after the death of my wife and not married, or married and without issue, and my wife shall not have disposed of the property hereby given to her, of which she is at liberty to give, sell, or will as she pleases, and not accountable to any person in the world for her acts, she will recollect at her death the quarter from whence it came: if she should die without will, the balance, or the whole of the undisposed part of this property will go to my brother and sister, and she will, I hope, make provision for the unfortunate persons heretofore mentioned or alluded to, she knows to whom I allude, my brother also. I rely on their justice and magnanimity. I appoint my wife sole executrix of this my last will, and my brother John Robertson, attorney at law, and John G. Smith her friends, to aid and assist her in the execution of this will. I wish she may not be ruled to security by the court. My library I give to John Robertson, and Lot 216. I recommend the best understanding between my friends and family with my most amiable and affectionate wife, and trust she my live through this life with as much comfort as this world will afford, she deserves every blessing. I write this
176 in great haste, *I am sick at the time or should copy it over. It will do."

"E. W. Trent."

"I estimate my estate at Two Hundred and Fifty Thousand Dollars."

The testator died soon after, and the widow, Martha Trent, qualified as executrix.

In September 1819, she filed her bill of injunction in the Superior court of Chancery for the district of Richmond, referring to the will, stating, that she had authority thereby to pledge all her testator's property for the payment of his bank debts; that her annuity is a charge upon the whole estate; that the bridge was the most productive part of the estate, and that if the tolls were diverted from the payment of the testator's debts and her annuity, it would be highly injurious both to the estate and herself; that she had sold the personal estate not devised her, and applied the proceeds, deducting expenses, and a part of her annuity to the payment of debts; that debts were still due to a large amount, great part of which were due to the banks; that Dr. Trent and Mrs. Leiper having failed in a writ of unlawful detainer to obtain possession of the bridge, the former had surreptitiously taken possession of it, and of the toll-house on her land, had got the toll books and was in receipt of the toll; that by his keeping possession of the only productive part of the estate, the personal property bequeathed her, will become in the first instance subject to the payment of debts: she prays an injunction prohibiting them from the receipt of tolls; and to compel them to put her in possession, until they shall give her security for her annuity, and for the application of the residue of the profits to the payment of debts; and if necessary, that all the property not devised to her, should be sold for the payment of debts.

177 *An injunction was awarded prohibiting the defendant from receiving toll, and from the use and possession of the bridge, &c.—and if the defendant should refuse to deliver, &c. the marshal or the sheriff of Chesterfield was directed to take possession, &c.

The defendant Joseph Trent answered—insisting that himself and his sister had a right to the possession of the bridge, and that the complainant with himself and the other persons named in the will, had only a collateral power to pledge it for the debts to the bank; that the rights of the banks were transferred to him, as he had been obliged to take up the testator's notes, of which he was indorser to the amount of $22,000; he avers that he is willing that such sales may be made, as are necessary and proper, for the payment of the debts, and justice and expedience may require; but objects to the complainant's having possession of the bridge, and applying the profits to her own use; he also objects to the process which has been awarded, as being irregular and illegal; and says, that the bridge may be injured by casualties, and suffer for want of repairs, if taken out of the hands of the proprietors.

Mrs. Leiper also answers, referring to Doctor Trent's answer, and alleging that the estate of her deceased brother, is indebted to her, to the amount of 40 shares of Virginia Bank Stock.

The deposition of John Robertson, the agent for the complainant, is taken in the cause—it proves that the estate was much in debt; that the defendant Joseph Trent, was largely a creditor, and details various communications between the parties, in relation to their controversy.

On a motion to dissolve the injunction, the court rejected the motion, and directed a commissioner to state accounts, &c. and

ordered the sheriff of Chesterfield who had taken possession under the order of court, to restore the bridge, and pay over the profits, &c. to the plaintiff, rendering an account, &c.

178 *From this order and decree the defendants prayed an appeal.

Stanard for the appellant.

The first objection I have to make to the order of the Chancellor taking the possession of the bridge from the appellant is, that it is in effect a peremptory ejectment, granted on ex parte application, in vacation.

The assertion of this unheard of power is sought to be vindicated by the general power of the Chancellor to award injunctions. Granting injunctions ex vi termini imports a power to prevent some impending injury, and not that of redressing a wrong already done. The very object of an injunction is to keep things in the condition in which they stand when the application is made. In England the whole proceeding is in personam. Our laws have scrupulously guarded against all changes of property, without allowing to the party the benefit of an appeal to correct errors of law. Every interlocutory order in Chancery professing to change the possession, is subject to revision and reversal by this court. But there is no appeal from a pending injunction; tolerate the principle now asserted, and one may be turned out of his house, in the most inclement seasons, by ex parte proceedings, in vacation, of which the first intimation he has, is the order to leave his own fire-side, and family mansion. There is no precedent for such a proceeding in any volume of cases; no principle to sanction it in any writer on equity.

As little can the power be maintained under the law giving authority to the Chancellor to grant ne exeats. That proceeding is justified only by the strong necessity of the case: only on the supposition, that the property is about to be removed beyond the jurisdiction of the court. But the bridge cannot be removed. A ne exeat to arrest the removal of fixed property is an absurdity in law, and a solecism in language.

179 *The whole proceeding of the Chancellor is then, unknown to our laws, unheard of in our courts; it is hazardous, mischievous in its consequences, and arbitrary in its nature. No case then, could warrant such an interposition of the Chancellor, but this case, would be wholly beyond the reach of the Chancellor, if in any imaginable instance he possessed the power he has asserted.

The executrix has only a collateral claim at best, to secure the payment of her annuity, and of debts generally. But that does not authorise the executrix to take the real property from the heir. Courts have never gone farther where lands are charged with payment of debts, than to create an implied charge on the realty in the hands of the heir.(a)

The clause in the will then, gave to the personal representatives, no right to the possession of the real estate. The Chancellor has not observed the distinction which exists between an express power to sell, and a charge by implication on the real. He has proceeded on the authority of Maddox.(b) Donne v. Lewis,(c) contains the law at this time for the order of subjecting property to the payment of debts. There is but one case contrary to the doctrine there laid down: in Newman v. Johnson,(d) it was held that "a devise that debts and legacies being first deducted, all the real and personal to J. S.," was a devise to sell for payment of debts.

But if the testator had authorised the executrix to sell the real, for payment of debts, the executrix would not have had a right to take possession of the real estate. For such a power however clearly expressed, would not break the descent; the realty would pass to the heir subject to the devise.(e)

180 *The executrix then has a mere power to sell, and that is derived not from the power given in the will, but from the act of Assembly in conjunction with it, which provides, that the executor or administrator may sell, where the will appoints no one for that purpose. Prior to the act of Assembly, the sale could only have been made by a trustee appointed by the Chancellor for that purpose.

Mrs. Trent is by the will devisee, and legatee of an annuity. As devisee she surely has no right to property not devised to her. As legatee of the annuity, she is a creditor to that amount, but no creditor under the will ever claimed possession of any part of the realty, and much less a creditor by legacy. The will charges the payment of debts, on the realty, but not of legacies, and a legacy unless expressly charged on realty cannot be by implication. It may be said that if debts are paid out of real estate, her annuity shall be charged on personal estate; but if the right exist, it extends only to substituting her in place of specialty creditors, who had themselves no right to possession of the real. Even if the annuity had been by express words charged on the bridge, the heir would have the right of possession of the bridge, and to the residue of tolls.

S. Taylor, contra. The bill charges that the whole personal estate of the testator is disposed of: that the defendant had tried an unlawful detainer and had been defeated, and nevertheless had, in the absence of the keeper of the bridge, taken possession of the toll-house, within the limits of the land devised to Mrs. Trent. The order of the Chancellor is, that the defendant shall be injoined from receiving the tolls, if the injunction was proper, the appointment of a receiver was a matter of course.

Mrs. Trent, is the legatee of an annuity, and we may go into evidence aliunde to shew that the testator designed

181 *to charge the payment of it, on the real property.(f) To do this even parol evidence is admissible. But in this case the face of the will proves that it was the intention of the testator, to charge the

(a) Prec. in Chan. 262, 397, 430; 3 Ves. jr. 738, 551, 359.

(b) 1 Mad. 474.
(c) 2 Br. Ch. 263.
(d) 1 Vern. 45; 1 Mad. Ch. 483.
(e) 1 Bro. Ch. 137; Bennet v. Newton.
(f) 1 Wash. 96, 272, 56.

real with the payment of the annuity, for there was no other property not specifically appropriated, on which it could be charged but the realty.

The preference given by the common law to the heir so much relied on, has no existence in Virginia: our statute of descents has destroyed every pretext for such preference.(g)

And even in England, annuities are chargeable on the real estate.(h) There is no difference between charges by implication, for the payment of debts, and of legacies; and it is clear, that debts charged by implication bind the realty.(i)

In this case it is to be remarked, that the annuity is to a wife entitled to dower in the real estate; and this testamentary provision is instead of dower. She is then a purchaser for a valuable consideration.(k)

The heir should at least give security for the payment of the annuity: that may be demanded wherever the legacy is payable at a future day.(l)

W. Hay, on the same side. It is unimportant, who has the right to execute the trust. The rights of Mrs. Trent in her individual character, are enough to warrant the decree. Nor does it matter whether the order was made in term or vacation. The bill states that the toll house descended clothed with trusts, the power of the court is clear if a trust existed; is that the case?

182 *There are cases in which creditors come in to be satisfied out of a trust fund, and the personal estate being exhausted the Chancellor has appointed a receiver.(m) In this case the profits are liable as well as the subject: and the reason for a receiver's being appointed is the stronger, from the destructible nature of the property. We have then, to sustain our case, to shew only, an interest in Mrs. Trent; and probability that the personal estate is already exhausted. That is charged in the bill; the answer neither admits, nor denies it; and the depositions prove not merely the probability, but the certainty of the fact.

The equitable construction, and operation of such devises, as to the liability of respective portions of the testator's estate, has often been considered by the courts in England. The court is referred to the numerous cases without commentary.(n) The will charges the annuity on the whole estate,(o) and the implied charge binds the bridge.

There is no distinction between charges by implication of debts and legacies; if there were, one would think it should be in favor of legacies.

Leigh, on the same side. This court is now sitting in judgment on an appeal from an order of the Chancellor, made in term time and not in vacation. If the decree be right in its main principles, but wrong in its details, it will be corrected and not wholly reversed.

The general direction that debts shall be paid, charges the whole real estate with

183 all the testator's debts. The *cases are numerous to shew that such is the effect of a clause in the commencement of a will,(p) and the reason is the same wheresoever the clause occurs in the will.

If the real estate is charged with the payment of debts, the real estate descended must be subjected, before that specifically devised to the widow.(q)

The annuity is a pecuniary legacy charged on the real estate descended, from the plain intent of the will. The personal estate is inadequate to the payment of debts; it cannot be charged on the personal property given the widow; not on property specifically devised for the payment of debts; and there remains nothing on which it can be charged, but the real estate descended.

If the annuity be in lieu of dower, the widow is a purchaser for value.(r) The court has generally a power to appoint a receiver in such cases, where the heir refuses to give security: or it may even direct the descended property to be sold, and hold the proceeds subject to the annuity.

No matter in what right the defendant holds, the trust attaches to the property in his hands.(s)

Wickham, concluded for the appellant. From the nature of bank debts, the moment the defendant assumed the payment of the debt due the bank by the testator, the estate of the testator was discharged, and Trent the defendant to the bill, became bound for the debt. This at once makes the defendant a creditor of the testator's estate to a large amount. But for this prior and stronger claim, the complainant might have had all that she has asked.

184 *The will incontestibly shews, that the testator designed his heirs should take the bridge. He gives to his wife a right of passage over it; a provision wholly unnecessary and even absurd, on the supposition he had already given her the subject itself.

By the true construction of the will, the widow is devisee of certain slaves; of household furniture; and legatee of an annuity of $1500 per annum. If the estate be insolvent, she can receive no portion of the property thus devised; and whether it be so or not, she must be postponed to the defendant to the bill, who is a creditor. If not, it would be to take from the defendant's pocket without any equivalent, the whole bank debt which he has assumed to pay for the estate. He enters on the property as heir at law, which he is entitled to do: but even if he entered as a creditor (for he unites both characters) the widow whose right is subordinate, has no cause of complaint. Had she the possession, she

(g) 1 Wash. 100-1.
(h) 2 Vern. 228; 1 Ves. 499; 2 Vern. 443.
(i) 3 Ves. jr. 551; 2 P. Wms. 190, note (2.)
(k) 1 P. Wms. 127.
(l) Wyatt's Pr. Reg. 270; Amb. 273; 1 Mad. 178; 1 Br. Ch. 105; 3 P. Wms. 299.
(m) 8 Ves. jr. 71.
(n) 2 Ves. 568; 1 Br. Ch. 455; 3 Ves. jr. 738; Shalcroft v. Finden. That the annuitant had the right to come into equity to subject the realty: 3 Bro. Ch. 347, 351, note; 1 P. Wms. 729; 8 Ves. jr. 382, for the whole doctrine.
(o) 4 Viner, "Charge;" D. pl. 15.
(p) 1 Br. Par. Ca. 511; 1 Ves. 271; 3 Ves. jr. 551, 738.
(q) 2 Atk. 424-7-9; 2 Br. Ch. 263; 2 Ves. jr. 114.
(r) 1 P. Wms. 679, 549; 5 Ves. jr. 359; 2 Atk. 424.
(s) Jones v. Pugh, 8 Ves. jr. 71.

would be obliged to give security to account for the profits which must be applied to the payment of the debts due the defendant, before any part is appropriated to the discharge of her legacy. The defendant exempts her from this responsibility without the least prejudice to her interest: she cannot therefore desire the possession for any equitable purpose.

The case does not present a proper subject for an injunction. It is not one in its operation. It is in fact a writ of habere facias possessionem. The Chancellor proceeds upon the supposition that the descent is broken: but a devise that debts shall be paid does not break the descent. He perhaps has misapplied an expression used in Maddox, that "the testamentary disposition rides over the title of the heir," the real meaning of which, is no more, than that the heir takes the property subject to the charge, and in subordination to it.

It is not pretended that the original order of the Chancellor was right: and that
185 being the foundation of all the *subsequent proceedings, it is tantamount to a confession of error throughout.

The case of Jones v. Pugh,(t) which is relied upon, at most proves only the power of the court, where a proper case occurs for its interposition. The power in conceivable cases, surely does prove the propriety of its interference in this. It is a rule in marshalling assets, never to take the estate from the heir until the personal estate proves insufficient; another rule of marshalling assets is, that the heir is not responsible for profits; it is true that a creditor may extend the lands; and equity follows the law, but neither law nor equity will subject the profits in the hands of an heir or devisee, when they accrue before judgment.

Admitting the power of the court asserted under the authority of Jones v. Pugh,(u) the question recurs, is this a proper case for the exercise of such power?

Whenever a receiver is appointed, it is on the supposition that the person in possession is not to be trusted. Is the defendant unworthy of this trust? If any injury can result from his possession it is to the creditors: but they are thrown on another fund. Whereas the defendant's debt is to be paid out of this very subject. He is obliged to account for the debt he has assumed even should the estate prove insolvent; and to take the complainant's annuity out of this fund would be a fraud upon the creditors. He ranks first in the order of creditors on this fund, and unites to that character the quality of heir to the testator. The property then cannot be in safer hands. The very objection drawn from the perishable nature of the subject proves the superiority of his claim, for there is no one so strongly interested in its preservation. Even if the complainant had possession of the bridge, we could sue to divest her, or for the profits. If we be called on to marshall the assets, we
186 say *we are applying them according to the distribution equity makes.

Having taken this general view of the case, I come to reply more in detail to the several arguments on the other side.

And 1st, That the annuity is chargeable on the real property.

The parol evidence resorted to, to prove this intention, is inadmissible. Shermer v. Shermer, and Kennon v. M'Roberts,(v) were not cases in which parol evidence was admitted to explain the intention of the testator. In cases in which parol evidence has been admitted it has been confined to explanations of the true intention of the testator; here it is offered to shew his situation. And if the court will look into the actual state of his affairs, it will find the testator was wholly ignorant of it; he estimates his estate at more than $200,000. It is insisted that his charging debts on the real, is proof that he knew the personal estate was insufficient to pay his debts. The inference is not necessary. And if he meant to charge the legacies on the real, why did he not do it expressly, as he has the debts?

It is a rule of law that the heir shall not be disinherited by implication. The rule is a wise and politic one; the objections made to it, apply not to the rule, but to the particular application of it, to the English law of descent; our statute has altered the persons who are heirs, but the rule remains unchanged: and this court is bound to respect it.

It is said that, legatees stand in place of creditors, having a right to be satisfied out of this fund, which brings me to the 2d point made by the other side.

But debts are not charged on the lands, except that due by the defendant. The clause in the will is, that particular real property shall be sold, and then "as
187 *many of the lots in the town of Manchester as will be sufficient;" which confines the charge to the Manchester lots, and the property specifically directed to be sold.

The 3d point, that the legatees may marshall the assets, therefore fails; for debts cannot claim satisfaction out of this fund; and legacies being in their place, can be in no better condition. But suppose the debts had been a charge on this subject, legatees can stand in place only of debts that have been satisfied out of the personal estate, that might have ranked on the real. But a legatee shall never rank as against the devisee of real estate; for both are objects of the testator's bounty, and he who has the possession shall hold it. A legatee can only claim against the heir, not against a devisee, and surely a legatee can have no better right against a devisee merely because he is also heir.

The widow can derive no advantage from the circumstance of her having no dower allowed her. She might have insisted on her dower, but in that case she should not have acquiesced in the will. She has submitted to the will, and she must take all the consequences of her act. But if she could claim right of dower in the bridge, it would be to one third of the tolls: not to the entire bridge. The clause allowing her to pass toll free, negatives the idea, that the

(t) 8 Ves. jr. 71.
(u) Ibid.

(v) 1 Wash. 266; Ibid. 96.

testator intended she should receive any portion of the tolls.

Something was said of the toll house being on land expressly devised to the widow, but it is a mere accessory, and will follow the principal subject.

ROANE, Judge.* The court is of opinion that according to the true construction of the will of Edward W. Trent, a charge was created upon the whole estate, for the payment of his debts. It was created by these words in that will,—"I direct the pay-
188 ment of all my just *debts;" and is not retracted by the subsequent selection of a part of his estate, to be sold for that purpose. The devise being in the first instance pure and simple, for the payment aforesaid; is not made conditional by what follows in another sentence, and respected the performance, and not the substance of the grant; which regarded rather the mode in which the payment should be made, than the question whether the payment should be made at all. Nor is this construction varied by the probable mistake under which the testator laboured as to the sufficiency of the property selected to pay the debts aforesaid. Estimating that property by the very high scale of value, by which he estimated his whole estate, and which the peculiar character of the times justified, there could be no doubt in his mind of its adequacy; and if so, his will did not contemplate a contrary state of things, nor, consequently, revoke the unqualified charge in it, before noticed.

The court is further of opinion that, exclusive of that charge, the result would probably be produced, by the express charge upon all the testator's property in favor of the debts due to the banks, and by the consequent right of his other creditors to throw the bank creditors upon the other and ulterior property, so as to get satisfaction, themselves, out of the property which was particularly charged and selected.

It is further the opinion of the court that the whole estate of the testator, not specifically devised or bequeathed is charged by his will to pay the legacy or annuity of $1500 per annum, given to the appellee. We are so to consider it, because this fact is charged and relied on in the supplemental bill, and because sufficient facts are disclosed in the testimony, in relation to the insufficiency of the personal estate, to shew that this must have been intended by the testator. If he meant the legacy to be paid at all, he must have intended that it
189 should be *charged on the realty: yet this charge should not rest exclusively on the bridge now in question, not only because there are no words in the will so as to restrict it, but because an annuity which was intended for the maintenance and support of the widow, for life, ought not to depend on the existence of a subject which is of a nature peculiarly destructible. The appellee is therefore in the condition of a legatee having her legacy charged upon land, and her claim as such, must be postponed to those of the creditors having a lien upon the same subject.

We cannot consider that the appellee has claim upon the bridge in question, in part of her right of dower in the real estate; nor that the annuity in question was intended to be in lieu of dower, and therefore (as it might be contended,) has a pre-eminence over a mere and simple legacy. Neither of these grounds of claim is asserted by the bill or proved by the testimony. We cannot make the appellee's case better than she has made it. We cannot injure the appellants by sustaining grounds of claim which were neither charged nor proved on the part of the appellees, nor could have been regularly disproved by the appellants, as they were not put in issue by the pleadings. We can only consider the appellee's claim, upon this record as a simple legacy.

Subject in common with all the other real estate to pay the debts of the testator, and this legacy in subordination to those debts, the bridge in question descended to the present appellants. They took it, liable to the charge aforesaid, and they only in the first instance were entitled to the possession. The possession ensures to them not only on general principles, but by a construction growing out of the particular provisions of the will in question. A general right of possession in the appellee, of the bridge aforesaid, is inconsistent with that provision in the will, which gives to her the use of it for particular
190 *purposes. The right of possession thus doubly guaranteed to the present appellants, ought not to be disturbed, until a change of possession should be made necessary, in fulfilment of the charge imposed on this property by the will; or until some mismanagement thereof, or misapplication of its profits, should render it improper that the appellees should hold the possession any longer. In either of these events however, the case ought to be previously made out, to justify the interposition of the court. Until the change shall be shewn to be necessary, the regular principles of the common law, in relation to the possession ought not to be departed from. They ought not, especially in this case, in which the appellants have superadded to their characters of heirs, that of extensive creditors. Nor ought this peculiar kind of property which is always in want of repairs, and is emphatically liable to destruction, to have been lightly taken from the owners, and put into the hands of a mere bailiff. The permanent interest of all the parties would strongly lean against such a procedure.

We are therefore of opinion, that the change of possession of the bridge in question was, in this case, irregular and premature. Circumstances had not yet been disclosed to the court, sufficient to justify a change of that possession. It had not yet been shewn that the appellants were misapplying the profits of the bridge; or that they had been required, or had refused to give security for the due application thereof. The main ground of the present proceeding was on account of the appellee herself. Without either charging or proving, that she had any claim of greater dignity than that of a mere legatee, she gets in the van of the creditors, and claims to possess and occupy for her own use, property which may eventually be exhausted by them. So far as respects her own rights,

*BROOKE absent.

she has a decree from the court which is not justified by the premises she has
191 established; and which may *never be proper, on account of the superior and conflicting rights of the creditors.

We are therefore of opinion, the decree is erroneous, and ought to be reversed, so far as it conflicts with the foregoing principles; that the injunction should be dissolved; the possession of the bridge restored to the appellants, and the cause remanded to be further proceeded in, pursuant to the principles stated in this decree.

Metcalfe v. Battaile.

February, 1821.

Negotiable Note—Endorsement—Note for Payment of Money.*—A negotiable note is not as to the indorser, a note for the payment of money within the meaning of the act of 1804.

Same—Judgment—Jury Necessary.†—Judgment cannot consequently be rendered in such case, without the intervention of a jury.

Same—Same—Rights of Defendant on Reversal.—On reversing such judgment, where there has not been a jury, the defendant will be allowed to object on the merits, in the court below.

The writ issued from the county court office of Caroline, in the name of Metcalfe against Lawrence Battaile, in debt, for $1500, due on a negotiable note, indorsed by the defendant; damage $200.

The declaration was in debt, against Thomas R. Rootes jr. maker; and Thomas Rootes, and Lawrence Battaile, successive indorsers of a negotiable note, for $1500, and $3 70, notarial charge of protest.

The defendant not appearing to defend the suit, the court gave judgment for $1500 and $3 70, with interest from the time the money was due on the face of the note.
192 *On appeal to the Superior court of the county, the judgment was reversed, and the cause remanded for farther proceedings. The plaintiff's counsel objected, that the judgment should be entered for the principal due; the defendant's counsel, insisted on the liberty of pleading to the action.

Stanard for the appellant.

The objection that the declaration contains parties not found in the writ cannot be sustained. (a) And in this case justice having been done by the judgment of the county court, it should not be disturbed. (b)

It was proper to give judgment for interest as well as principal: for the statute directs execution in such cases, to be issued, for interest, and principal. (c) Indorsers of negotiable notes, are to every intent, principal debtors; and judgment should be for interest, as well against the indorser as the maker.

As to the notice of non-payment, or protest; there is no law requiring it. The indorser is bound for the debt, with or without notice.

Wickham and Robinson, contra.

The variance between the writ and declaration, in joining persons in the latter, not parties to the former, is error. The cases cited to shew the contrary, are where there is an appearance, which waives the objection. There can be no office judgment without a declaration, which is founded on the writ, and they must agree.

The variance in giving judgment for a larger sum than is claimed in the writ, is equally fatal. The writ demands but $1500; the judgment is for $1503 70.
193 *The Superior court could not correct the error, for the clerk of the county court, did wrong to enter an office judgment; the variance precluded it; every thing done after the declaration was filed is erroneous; and the cause must be sent back to the rules.

It must appear from the declaration, that the plaintiff has used due diligence, before he can charge the indorser. (d) This necessarily results, from the statute placing negotiable notes on the same footing with bills of exchange; (e) for that is undoubtedly the law as to bills. There must be the most speedy notice of the protest. (f)

Stanard, said the protest was but one of the remedies of the holder; it was not a duty but a right; and no law required it to be done, to entitle him to recover of the indorser.

ROANE, Judge.* The court is of opinion, that if the writing on which the action in this case was founded, could be consid-

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***Negotiable Note—Indorsement—Note for Payment of Money.**—The proposition of the principal case, that an indorsement of a note is not a note in writing for the payment of money within the meaning of the act of 1804, was approved in Hatcher v. Lewis, 4 Rand. 156.

And in Commercial Union Assurance Co. v. Everhart, 88 Va. 956, 14 S. E. Rep. 836, it was said: "It was held before the statute was changed to its present form, that a negotiable note was not, as to the indorser, a writing for the payment of money, although so as to the drawer, because the undertaking of the indorser is not for the payment of money absolutely, but is a collateral contract to pay it under certain circumstances. Hatcher v. Lewis, 4 Rand. 152. *Metcalfe v. Battaile, Gilm.* 181. See also, Rees v. Conococheague Bank, 5 Rand. 326; Shelton v. Welsh, 7 Leigh 175."

†**Same—Action against Indorser—Office Judgment—Writ of Inquiry Necessary.**—Where a joint action is brought against the drawer and indorsers of a negotiable note, an office judgment cannot be confirmed against all or either of the defendants without a writ of inquiry. Hatcher v. Lewis, 4 Rand. 152, 154, citing the principal case as decisive of the point. See, to this same effect, the principal case cited in Hickman v. B. & O. R. Co., 30 W. Va. 301, 4 S. E. Rep. 657.

In James River, etc., Co. v. Lee, 16 Gratt. 427, 429, after setting forth the facts and decisions in the principal case, Hunt v. McRea, 6 Munf. 454, Hatcher v. Lewis, 4 Rand. 152, Rees v. Conococheague Bank, 5 Rand. 326, and Shelton v. Welsh, 7 Leigh 175, JUDGE MONCURE, delivering the opinion of the court, said: "These cases clearly show that under the Code of 1819, the award of a writ of enquiry was necessary in every case of an office judgment against a defendant, except the case of an action of debt upon an instrument of writing for the payment of an ascertained sum of money, absolutely and unconditionally. The present Code, ch. 171, sec. 43, seems to have made no other change in this respect than to extend the exception to an action of debt against endorsers, as well as the drawer, of a bill of exchange or negotiable note: and to an action of debt or *scire facias* upon a judgment or recognizance: in which cases it had been held, as we have seen, that a writ of enquiry was necessary, under the Code of 1819." See Va. Code 1887, § 3285.

See further, monographic *note* on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425, and monographic *note* on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 622.

(a) Spencer v. Scott, 1 Bos. and Pul. 19; Stables v. Ashley, 1 Bos. and Pul. 49.
(b) Cox v. Kitchen, 1 Bos. and Pul. 338.
(c) 1 Rev. 508.
(d) Rushton v. Aspinall, Dougl. 679.
(e) 2 Rev. 78.
(f) Tindall v. Brown, 1 T. Rep. 167; Goodall v. Dolley, 1 T. Rep. 712.
*BROOKE absent.

ered as a note or writing for the payment of money within the meaning of the Act of 1804, c. 8,(g) no objection would lie to the judgment before us, on the ground that it included interest when none is demanded in the declaration, (as was decided by this court in the cases of Wallace v. Baker,(h) and Baird v. Peter,)(i) since if the judgment were rightly entered, the clerk, under the act, would have included interest also in the execution, which therefore would produce the same result.

But the court is, at the same time, of opinion, that this writing is not of that character, and that, therefore,
194 *neither the interest, nor a final judgment for the principal sum could be given upon it, without the intervention of a jury. It is not a writing for the payment of money absolutely, but a collateral contract to pay it under certain circumstances. The opinion of this court discriminating between these two classes of contracts has been heretofore given, and particularly in the cases of Ruffin v. Call,(k) and Henderson v. Hebburn, (l) and by that opinion, this writing falls within the latter class of contracts.

The court is therefore of opinion, that the judgment of the Superior court be affirmed, by which the interest and damages will be hereafter assessed under a writ of enquiry. It is the right of the appellee to reverse this erroneous proceeding altogether, and thus be let into his objections on the merits, instead of being subjected to pay the principal sum, under the consent of the appellant.

Didlake v. Hooper.

March, 1821.

Executory Limitations—Dying without Issue.*—Devise of slaves for life, should devisee die without issue, remainder over, is not too remote a limitation.

Didlake for himself and wife, and as attorney in fact of Sarah Hooper, filed his bill in the Chancery court of Richmond, stating, that Jeremiah Hooper was about to sell certain slaves, to persons residing without the state, the reversionary interest in which, belonged to the complainants. A ne exeat, and security to have the slaves
195 *forthcoming, when the reversion vested, were therefore prayed.

The question was on the clause of the will of Unity Hooper, in these words; "Item, to my son Jeremiah Hooper during his life, one hundred acres of land, to be taken off the tract I bought of Benjamin Howard, adjoining Absalom Melton; I also lend him three negroes, by name, Hannah, Sukey, and Maria, during his life, and if he should have lawful issue, I give the land and negroes to them at his death. I also lend him one feather bed, and furniture, and one horse and saddle; and if he should die without issue, I give the whole of the property that I have lent to him, to Sarah Hooper, and Judith Hooper, daughters of my son William Hooper deceased."

The Chancellor heard the cause on answer, replication, &c., and dissolved the injunction; because, the limitation in the will of Unity Hooper, was too remote; being on a "general failure of issue." Didlake appealed.

By the Court.

The court is of opinion that the limitation in the will of Unity Hooper is good; and that the decree of dissolution is therefore erroneous. The decree is reversed with costs; and the cause remanded for farther proceedings, according to the principles here stated.

See Higgenbotham v. Rucker, 2 Call 316; Royal v. Eppes, 2 Munf. 491; Dunn v. Bray, 1 Call 344; Timberlake v. Graves, 6 Munf. 174; Gresham v. Gresham, 6 Munf. 187.—Edition 1821.

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196 *Childers v. Smith.†

October, 1820.

Elegit—When Title to Land Should Not Be Disturbed—Case at Bar.—A title to land should not be disturbed, on an elegit, when derived by sale to raise the purchase money; no security but the bond of the first purchaser, being taken for the payment: and a deed of trust given on the land, which was never recorded.

Childers by his bill, praying an injunction from the Chancellor at Richmond, set forth the following case.

In October 1807, John Baker, executor of Solomon Gordon, sold to one M'Tyre, a lot

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(g) See 1 New Code, 508, § 79.
(h) 2 Munf. 334.
(i) 4 Munf. 76.
(k) 2 Wash. 181.
(l) 2 Call 232.

***Personalty—Limitation Over upon a Dying without Issue.**—The principal case is the last of a series of cases, beginning with Higgenbotham v. Rucker, 2 Call 313, and including Timberlake v. Graves, 6 Munf. 174, Greshams v. Gresham, 6 Munf. 187, James v. McWilliams, 6 Munf. 301, and Cordle v. Cordle, 6 Munf. 455, which hold that a limitation over of personalty, after a dying without issue or without heirs, to a person merely and not to him and his heirs, or executors, excludes the idea of an indefinite failure of issue, and is not too remote. See 2 Min. Inst. (4th Ed.) 443.

But the authority of these cases has been shaken, if not overthrown, by the subsequent cases of Bells v. Gillespie, 5 Rand. 273; Broaddus v. Turner, 5 Rand. 308; Griffith v. Thomson, 1 Leigh 321; Callava v. Pope, 3 Leigh 103; Deane v. Hansford, 9 Leigh 253; Nowlin v. Winfree, 8 Gratt. 346. See Moore v. Brooks, 12 Gratt. 150.

In Deane v. Hansford, 9 Leigh 259, JUDGE BROCKENBROUGH, in delivering his opinion, said that the case of Timberlake v. Graves, 6 Munf. 174, had been generally disapproved by the profession and was disapproved by two judges in Griffith v. Thomson, 1 Leigh 321, and, if it stood alone, he would concur in overruling it; but, as it was followed in quick succession by Greshams v. Gresham, 6 Munf. 187, James v. McWilliams, 6 Munf. 301, and *Didlake v. Hooper, Gilm.* 194, these adjudications ought to be considered as settling the law in cases exactly resembling them, more especially as in devises made since the statute of 1819 took effect, the statutory rule would prevail. In this case (Deane v. Hansford), a testator, by his will "lends slaves and their increase to his grandson and his heirs of his body, and if he shall die without a lawful heir, then he bequeaths them to the children of their daughter." This was held to be an executory limitation after an indefinite failure of issue of the grandson, and therefore void; and the slaves were held to vest in the grandson in absolute property. JUDGES BROCKENBROUGH, PARKER, CABELL, and BROOKE, all, saw a distinction between this case and the cases last cited above. TUCKER, P., said that, though he agreed in the result reached by his brethren, he could see no essential difference between the executory limitation in the case at bar, and the limitation in Timberlake v. Graves and some of the cases following the principle on which that case was decided; but that, in defence to the opinion to his brethren, he would forbear to enter into an examination of that class of cases.

See principal case also cited on this subject in Griffith v. Thomson, 1 Leigh 336; Glinn v. Glinn, 1 Va. Dec. 460.

†See principal case cited with approval in Glazebrook v. Ragland, 8 Gratt. 340; Roush v. Miller, 39 W. Va. 643, 20 S. E. Rep. 665.

in Manchester, under a power given by the will. M'Tyre executed a deed of trust to Cheatham and Childers, to secure the payment of the purchase money. This deed was never recorded; that from Baker to M'Tyre was recorded. The purchase money not being paid, the property was sold under the deed of trust, and Baker became the purchaser.

In July 1810, the administrators of Smith, obtained a judgment against M'Tyre; and an inquisition was held by the sheriff, from the purpose of extending the lot in question. The jury found, that M'Tyre had no estate in the lot which could support the extent. Baker filed a bill in 1812, to have his title to the lot, confirmed; and a conveyance was decreed to him from M'Tyre and wife; and on the following day, Baker executed a conveyance to Childers the plaintiff. The administrator of Smith tried a second time to extend the lot; but the jury being unable to agree, a juror was withdrawn. The lot was also sold for taxes, and redeemed by Childers, who claimed an absolute title in that right: an injunction was granted, prohibiting the administrators of Smith from proceeding in the extent.

197 *The answer of Smith's administrators insisted on the facts, that the deed of trust was not recorded; that their intestate had no knowledge of its existence; and that Childers had full knowledge; that neither they nor their intestate were parties to the suit, in which a conveyance was decreed to Baker; that the same objection applied to the sale for taxes, and the redemption by Childers; on a general replication, the bill was dismissed; and Childers appealed.

Upshur, for the appellant. The fact that the deed of trust was not recorded, is of no importance. For a complete title was conveyed before the lien of Smith attached. The lis pendens for the conveyance was notice. It is true that a subpœna is no notice, but the bill refers back to the subpœna. (a)

S. Taylor, contra. The deed of trust is a mere nullity, because not recorded. The act does not make deeds not recorded void as to judgment creditors only: but as to all creditors. (b) Notice to a creditor whether constructive or actual, cannot affect his rights. He has advanced his money, and shall have his lien on the debtor's estate.

Upshur cited several other cases on the point, that a lis pendens (c) is notice; and mentioned Quarles v. Lacy, (d) as a case, in which a defective conveyance had been upheld, in order to place money where it ought to be.

198 *COALTER, Judge.

On the 13th October 1807, Baker, executor of Gordon, by virtue of a power to that effect in the will of his testator, sold the lot in controversy to M'Tyre, it being agreed, that for the balance of the purchase money not then paid, the purchaser, who was to receive a conveyance, was, as a cotemporaneous act, to give his bonds, as also a deed of trust on the lot, to secure the payment. The deed from Baker to him was accordingly executed, and on the same day two bonds were given by M'Tyre, without surety, for the residue of the purchase money, specifying that they were for the purchase money of the lot aforesaid; and he also, at the same time, executed a deed of trust to secure the payment of the debts due by those bonds. At this time, it is said, M'Tyre was indebted to the intestate of the appellees, who afterwards, namely, on the 9th July 1810, obtained a decree in Chesterfield county court, against him for 1911. 8s. with interest from the first of January 1804, on which decree they sued out an elegit on the 7th day of May 1816.

The deed from Baker to M'Tyre, was acknowledged and ordered to be recorded, on the 12th Sept. 1808. The deed of trust was never recorded; Baker not being able to procure the attendance of the witnesses, or the acknowledgment of M'Tyre, who had removed out of the state. On the 13th of June 1808, however, it was taken into court and proved by one witness.

When the purchase money became due, Baker, instead of going into a court of Chancery, to have his original equitable lien on the land for the purchase money inforced; and the trust executed in the same manner as it might have been, had he not by accident been deprived of the benefit of having the deed recorded, applied to the trustees to sell the property, who accordingly did so; and he, as the highest bidder became the purchaser; and the trustees by their deed dated the 15th July 1809,

199 reciting *the deed of trust to them, as remaining in the county office, conveyed the lot to him. This deed was fully proved on the 12th Feb. 1810, and is recorded.

At this time M'Tyre, could have resold and conveyed to Baker for the payment of this debt, or in any other bona fide way, notwithstanding the suit then depending against him by the appellee; and if he had done so, and joined with the trustees in a deed, as well the legal title in them, as the equity of redemption in him, would have passed to Baker. But if the sale by the trustees was such, as to bar his equity, and if nothing was done in this case, except what in equity ought to have been done, and what a court of equity would have decreed and confirmed, it might be a question, whether the title being thus passed by his agents, shall not avail as much, as if made by himself together with them.

But waiving this for the present, and supposing no such sale and conveyance to have been made, M'Tyre, after the lapse of twelve months from the date of the decree aforesaid, supposing it to affect the land in the same manner as a judgment at law, but concerning which, perhaps, there may be some doubt, could have sold and conveyed, bona fide, as aforesaid, and a subsequent elegit could not have overreached this mesne act. Baker then, might have procured him and the trustees to make a fair sale and conveyance for this purpose; and situated as he was, he had a right, in equity, to demand it; and a court of equity

(a) 1 Vern. 318, but see Preston v. Tubbin, 1 Vern. 268-7.
(b) Anderson v. Anderson, 2 Call 198.
(c) Amb. 76; 2 Atk. 174; 3 Atk. 392; 2 P. Wms. 484.
(d) 2 Munf. 260. Quære.

would have decreed it; and he was not bound to call on any or all of M'Tyre's other creditors to intercept him, by inforcing any legal liens they may have acquired; they were to look to their own legal remedies, if they had any. He does in effect bring such suit. He asserts in his bill, his original lien and contract, to have the purchase money secured on the land; his failure by fraud, or accident, to have the deed recorded; the sale by the trustees, &c. And on the 29th June 1812, the Chancellor by his decree confirms the sale made by 200 the *trustees, and directs M'Tyre also to convey. This decree only differs from the one which would have been made in the case supposed, by confirming the acts of the trustees as theretofore rightly done, instead of decreeing, that they should then make a sale. Take it though, that the decree had been such as in the case supposed, and that the trustees had, in pursuance thereof, sold and conveyed to Baker before an elegit issued: could the creditor have taken this lot by his elegit, because M'Tyre had not joined in the deed? It is believed he could not. Nay, it is believed, that considering the original lien in this case, and that the title, by the original contract, was to be in M'Tyre but for a moment, and that for the purpose of more effectually securing the purchase money, it should be considered in equity, and taking all the papers as evidencing one transaction, as though the deed from Baker to M'Tyre had been defeasible, on the latter not paying up the purchase money. The hardship of a contrary construction would be extreme, as the deed from Baker, though not recorded within the eight months, conveyed the title from him, and he would then, by fraud or accident, be deprived of that security on condition of which, he had made the deed. Under this view, a court of equity would have injoined the creditor, had he attempted to affect this land by his elegit, after such a decree as is above supposed, and before a sale and conveyance by the trustees. But the prior sale by the trustees is confirmed, and so it is, as to them, in the same plight, as if they had sold and conveyed under a decree. In that case, the other creditors could not, by subsequent elegits, as I apprehend, affect the land at law; they could only do so in equity, and there Baker is also a creditor, having a prior lien, and the legal title in him. But if Baker had also conveyed, whether by a bona fide agreement, or in obedience to a decree, a subsequent elegit surely would not affect the land as is 201 above observed; but *he also conveyed to Baker in obedience to that decree, by a deed made on 7th May 1816, the very day on which the elegit issued. Had this deed been executed the day before, no doubt could have existed: but both being executed on the same day, which shall be considered as prior? If neither, if in this respect they stand equal, and a resort must be had to a court of equity, then the doctrine laid down in 1 Eq. ca. abr. 320, would strongly apply, viz. "that if a man mortgages by a defective conveyance, and there are subsequent creditors, whose debts did not originally affect the land, equity will supply such defective conveyance against such subsequent incumbrances who acquire a legal title afterwards; for since the subsequent creditors did not originally take the land for their security, nor had in view an intention to affect them, when afterwards the lands are affected, and they come in under the very person who is obliged in conscience to make the defective security good, they stand in his place, and shall be postponed to such defective conveyance." But what had M'Tyre to convey? Not even an equity of redemption. That was gone, if not at the moment the trustees sold and conveyed, at least as soon as that sale was confirmed by the decree above-mentioned.

For these reasons I am of opinion, that the decree of the Chancery court is erroneous, and must be reversed with costs; and a decree entered that the injunction be made perpetual.

ROANE, Judge. Admitting but not deciding, that the legal estate was vested in M'Tyre by means of the deed from Baker to him, the deed of trust made by him did not pass that title in prejudice of his (M'Tyre's) creditors, for want of being recorded according to the provisions of the statute. Nevertheless (under the same admission,) however the case might be at law, in equity the elegit of the appellees ought not 202 to be inforced. The *ground of this opinion is, that cotemporaneously with the receipt of the deed from Baker, he subjected the land to a lien, for the purchase money, by means of the deed of trust aforesaid. This is evinced as well by the special provisions in that deed, to that effect, as by the omission to take sureties to the bonds for the payment of the purchase money: and the said land having been fairly sold, to satisfy the lien aforesaid; and that sale ratified by a decree of the court of Chancery, in pursuance of which, a title has been regularly derived to the appellant, that title ought not to be disturbed. The decree dismissing the bill ought, therefore, to be reversed, and it is further decreed and ordered, that the injunction awarded in this case be made perpetual.

Rowt's Adm'r v. Kile's Adm'r.

October, 1820.

Witnesses—Heir—Competency—Release of Interest—Effect.*—The release of an heir, and distributee to the administrator, of all interest, in the matter of controversy, and contract, does not restore his competence.

Non Est Factum—Evidence—Character of Plaintiff's Son.†—On the plea of non est factum, it being proved that a son of the plaintiff said he could counterfeit the hand of the defendant, evidence may be given to shew the infamy of the son's character, circumstances existing, to render the execution of the instrument doubtful.

The appellee brought debt against the appellant, on the following paper: "settled with Fanny Kile, and remains due her sixty dollars a year, from the year of seventeen

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***Witnesses—Competency—Release of Interest—Effect.**—The principal case was cited as authority in Reynolds v. Stephenson, 11 Leigh 372. See also, Murray v. Carret, 3 Call 373, and *foot-note*; Mandeville v. Perry, 6 Call 78, and *foot-note*.

†**Non Est Factum—Evidence.**—See principal case cited in McDowell v. Crawford, 11 Gratt. 396, 400; Shiffiet v. Com., 14 Gratt. 656, 657.

hundred and seventy three, in November, *for her keeping of my house, witness my hand and seal,
203
John Rowt." (L. S.)

Jan. 3d, 1807.

Test,
Robert Kile,
Richard Staige,
William Rowt.

The defendant pleaded payment, and non est factum.

On the trial the plaintiff offered in evidence the deposition of William Rowt, who was son, heir, and distributee of Fanny Kile. To remove the objection to his competence, a release from William Rowt to the administrator of Fanny Kile was offered, which was a transfer to the administrator, of all interest the witness had to the matter in controversy, or in the writing on which the suit was brought. The defendant objected to the competence of the witness, but was overruled, and excepted.

The defendant in aid of other evidence proving the paper a forgery, offered testimony, to shew that Richard Rowt another son of Fanny Kile had said that he could counterfeit the hand writing of John Kile; and that he could in fact imitate it well: and also to prove that Richard Rowt was a man of infamous character. But the evidence to character being objected to, was excluded; and the defendant excepted.

The verdict was for the debt in the declaration mentioned, with interest, without specifying the rate, from the 5th of July, 1815. The judgment was accordingly.

Stanard, for the appellant. The release did not restore the competency of William Rowt. It is of all his interest in the matter of controversy, and in the writing
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*on which the suit is brought. But suppose there are debts due by Fanny Kile's estate; the money recovered in this suit, would be assets to discharge them, which would increase the distributable fund.

Again, the administrator of Fanny Kile if defeated must pay costs; and the statute makes them payable out of the estate of the intestate. The witness could become competent, only by a reciprocal release from the administrator of all costs, to which the intestate's estate was liable.

The evidence of the declarations of Richard Rowt was received below without objection, and all accessory evidence should have been admitted; testimony as to his character was therefore admissible.

Debts contracted antecedent to the statute changing the rate of interest, shall continue at the rate it stood when the debt was contracted. A verdict giving interest without fixing the rate, is therefore erroneous, where the contract was made before the rate was changed.

Lastly, annuities of all kinds are due at stated and unalterable periods; fractions of years cannot be allowed for. This was formally the case in rent, but the statute has allowed a pro rata compensation. The verdict is wrong then, because the fractions of years are charged; and even including them, it is beyond the pro rata allowance.

COALTER, Judge. I am of opinion that the release executed by William Kile was not sufficient to restore his competency as a witness.

The intestate, Fanny Kile, died possessed of other personal estate than the paper on which this action is founded, and in which the witness is interested. Should the administrator be cast in this suit, that estate would be answerable for the costs; and of course, the interest of the witness therein be so far diminished. If Fanny Kile owed debts, which might be paid by the
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money *recovered in this suit, in the event of such recovery, or which would be chargeable on the other estate, in case of failure, and concerning the existence of such debts, it is impossible now for either him or us to determine, his interest would be more largely affected. So too, if she left real estate, which might be exonerated from debts, otherwise chargeable upon it by a recovery in this case. It is enough though that the witness is interested, as aforesaid, in the personal estate, and that his release extends only to a part thereof, in order to exclude him. His testimony, therefore, was improperly received.

As to the second point in the bill of exceptions. The testimony in it went to establish the forgery of the paper in question, on Richard Rowt another distributee. If this paper was in existence in the lifetime of Fanny Kile, the intestate, and came, with the other papers, into the hands of the administrator, Richard Kile would have had no interest in the alleged forgery, at the time it must have taken place, other than the remote possibility of his claim as one of her distributees. Nevertheless, he may have forged this paper, as any other person, having the capacity to do so, may have done. But the mere fact, that a person having such capacity was in the neighbourhood, and intimate or connected with the intestate, I incline to think, would not be proper evidence, unless there was some proof as to his agency in the execution of the paper itself.

In 1 Peake, 68, it is said, that where it was alleged, that the paper produced, was the forgery of a third person, evidence that such third person had forged the defendant's signature to instruments of a similar nature, was held not to be admissible; and this, as I understand, on the ground, that the plaintiff could not be prepared to support the authority of other deeds. In this case, not only the capacity to do so, but the actual forgery of other similar papers, was offered to be proved.
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*In the case before us, the ability to imitate the hand writing is attempted to be proved, and instead of the actual forgery of other papers, the general character of this person is offered in evidence, in order to shew, from his moral turpitude that he might be guilty of such act. Surely this must be evidence inferior to that rejected in the above case.

If the plaintiff had known such evidence would be offered, he might have disproved even the capacity of Richard Rowt to imitate the hand-writing, and might also have rebutted the evidence as to his character: and though if a party introduce a witness he must be ready to support his credit, yet he cannot be supposed prepared to support

the character or transactions of a person brought before the court by his antagonist, unless indeed the agency of that person in the matter in controversy is made out, so as to connect him therewith, in which case he must be ready to explain every thing touching that transaction.

But the other evidence, not set out in the bill of exceptions, may have tended to prove an agency in Richard Rowt in the execution of the paper in question, and thereby have legalized the evidence touching his capacity to imitate the hand-writing of the intestate John Rowt; and if so, I can see no good reason against an inquiry into his general character. Surely the plaintiff might have proved the fairness of his character on the one side, and I can therefore see no reason why its foulness might not be relied on as a circumstance on the other. As the first branch of the evidence was not objected to by the plaintiff, we must at present, perhaps, take it to be legally received, and that consequently the other part was improperly rejected. It may however have happened in this case, as it frequently does, that in the hurry of a trial, improper evidence has been received, which the party on a subsequent trial may object to; and as the bill of exceptions may 207 *be, and probably is defective, in not setting out the import of the other evidence introductory of that in controversy, so as to enable this court to say whether the whole testimony in regard to Richard Rowt was not improper; for if it was, an objection to any part of it ought to have been sustained, and as the case must go back for a new trial, I do not wish a conclusion to be drawn, that a mere capacity in a third person to forge the hand-writing of the alleged obligor, even admitting that person to be a notorious forger, or person of bad fame, is proper evidence, unless his agency in producing the paper in dispute, can in some way be brought home to him. All papers executed in the neighbourhood of such a person might, in this way be thrown under a cloud.

As to the interest, the verdict and judgment must be taken as giving six per cent.; a less rate not being fixed. In this, I think, there was no error.

The sealed instrument which recognises a debt then due, partly for services rendered before the change of the rate of interest, and partly after, merged the simple contract, whether expressed or implied, which existed before the execution of that instrument: it acknowledged a debt then due for past services. The contract to be enforced is not that which existed before the sealed instrument, but that which arises out of it. The plaintiff could not resort back to the original simple contract, so as to sue upon it, and get interest, if allowed by the Jury. The principal alone is acknowledged to be due, and the party accepts that deed in discharge of the prior contract. It is like a new bond taken before the change of the rate of interest, after such change, and for a further forbearance, of which the party may then take six per cent.

As to the month of November being included in the computation, if this was clearly wrong, and the only error, I should be sorry to reverse this judgment for this matter of $5, on an objection first taken here, 208 when, had *it been insisted on in the court below, it might have been yielded, or released on a motion for a new trial. But the writing acknowledges a debt due for services rendered at the rate of $60 per year, from the year 1773, in November; whether the first or last, or any intermediate day is not stated, the Jury took it to be the first, and they may be correct.

The judgment I think ought therefore to be reversed, and the case remanded with instructions to the court below, to reject the testimony of William Rowt; and to receive or reject that in relation to William Rowt, as shall appear consonant to the principles which I have above stated in regard to it.

ROANE, Judge. The evidence of Wm. Rowt should have been rejected for the reasons assigned at the bar; and that tending to impeach the general character for Richard Rowt should have been received. That forms one of the links of circumstances to shew, in aid of other proof, that the bond in question was not the deed of the intestate. The objection that it affects the character of an absent person is of no avail. When it becomes necessary to do this for the purpose of attaining justice, it must be submitted to. On this ground it stands on a common foundation, with evidence tending to affect the feelings of third persons, evidence contra bonos mores, &c.

The judgment must be reversed, and a new trial awarded, in which the deposition of William Rowt is to be rejected, and the testimony just mentioned, in relation to the character of Richard Rowt is to be received.

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209 *Blanton v. Taylor.

November, 1820.

Fraud of Husband—Effect of Wife's Participation.*—The participation of a wife in the fraud of her husband will not impair her rights.

Provisions in Lieu of Dower—Fraud—Effect.†—Provisions in lieu of dower will not be disturbed as fraudulent, as far as it is only equivalent to dower.

This was an injunction obtained from the Chancellor at Richmond, by Taylor, trustee of Langhorne. The deed of trust dated March 1809 recited, that Langhorne had sold to Hobson a tract of land in Cumberland, to which Langhorne's wife had not relinquished her right of dower; and that Hobson refused to pay the purchase money, unless she would. The deed of

*Fraud of Husband—Effect of Wife's Participation.—Where all the parties to a fraudulent transaction are *sui juris*, it is null and void as to all of them, though it may have been founded on a valuable consideration. It is not valid even to the extent of such consideration. But this is not the case in regard to a *feme covert*, who may be a party to such a transaction, and have given value, or relinquished a right or interest, or incurred a loss or risk in consideration thereof. In such a case, the transaction is valid as to her, to the extent of affording compensation for the value given, or right or interest relinquished, or indemnity for the loss or risk incurred as aforesaid. The participation of a wife in the fraud by her husband will not impair her rights. Penn v. Whitehead, 17 Gratt. 512, citing the principal case, Quarles v. Lacy, 4 Munf. 251, and Taylor v. Moore, 2 Rand. 563.

†Postnuptial Settlements—Fraud—Effect.—Thus, although a *postnuptial* settlement in favor of the wife may have been made under such circumstances that it must be pronounced fraudulent and void as

trust vested in Taylor, for the use of Langhorne's wife for life, remainder to their joint children in fee, nine negroes, in consideration of her relinquishing her right of dower, love and affection &c. The bill stated that Blanton had levied an execution obtained against Langhorne on part of the trust property, and prayed an injunction, &c.

Blanton's answer averred, that part of the debt was due prior to the execution of the deed of trust; and charged the deed to be fraudulent as to all creditors, because when executed Langhorne was largely in debt.

Depositions were taken to prove Langhorne was largely in debt when he executed the deed of trust; to prove the value of the slaves; that he said they were his, after the execution of the deed; and that he and his wife exercised a joint ownership over them; and sold some of them by joint bills of sale. The Chancellor perpetuated the injunction.

210 *Bouldin for the appellant insisted, that the deed was absolutely void because made to defraud creditors. If it be voluntary it is clearly void as to creditors. But that is not the only badge of fraud. Granting all one's effects is another badge, as Twine's case proves: a conveyance for the use of one's wife and children is another mark of fraud. Selling property for less than its value is certainly no conclusive evidence of fraud; but selling it to a person, and under circumstances, in which it is the interest of the party to get the least sum possible, is suspicious. At least the deed is voluntary as to all the property beyond the value of the wife's dower, which is the consideration alleged.

S. Taylor contra. The argument that the deed is void as to the excess beyond the value of the dower, applies only to creditors at the time.(a)

But Bouldin said, if the deed be fraudulent at all, it is as to every creditor whether before or after, and cited Fonblanque's equity.(b)

ROANE, Judge.* The court is of opinion, upon the testimony that the deed of March 1809, in the proceedings contained, from Wm. B. Langhorne to Samuel Taylor, is fraudulent and void, so far as it respects the creditors of the said Langhorne; but as the dower interest of Mrs. Langhorne in the tract of land conveyed to Thomas Hobson by the deed, also among the proceedings, is admitted to have been relinquished by her in consideration of the provision made for her and her children by the deed first mentioned; and as the fraud of her husband in relation to the said deed, if she participated in it, should not be imputed to her, by reason of her coverture, the court is further of opinion, upon the principles settled by the court in the case of Quarles v. Lacy,(c) that the

211 *provision made by the said deed should not be disturbed, so far as it does not exceed the value of the dower interest for which it was substituted.

The decree is therefore to be reversed with costs, and the case is remanded in order to have that value ascertained; after which the injunction is to be perpetuated to the extent of that value, and dissolved for the residue.

Brent v. Dold.

November, 1820.

Chancery Practice—Directing Issue to Try Whether Will Executed.*—An issue will be directed, on satisfactory proof adduced, to try whether a will said to be lost, was ever in fact executed, and what were its provisions.

There were cross bills. The first as by William Dold and Sarah his wife, daughter of James Brent, against Landon Brent and others, children of James Brent deceased, claiming their distributive share of James Brent's estate; alleging, that he died intestate; and that Landon and James Brent, claimed the estate under a forged will, which they pretended was lost.

The defendants averred a genuine will was made, and that Sarah, the wife of the plaintiff, had concealed or destroyed it.

Many depositions were taken. Among others, that of the widow of the decedent, which was objected to. She swore, there was a will; and that it was missed, after a very short absence of her son Landon

212 from the house, no *one being in it but herself, a deaf and dumb daughter, and her daughter Sarah.

One Ballard swore, that he saw the original will, and believed it to be in James Brent's hand throughout. He knew his hand.

Another witness employed as counsel when it was to have been offered for pro-

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to the creditors of the husband, yet if the wife have relinquished her interest in property on faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with, and this though the settlement may have been made subsequent to the relinquishment. For, in such case, the fraud of the husband, though the wife participated in it, will not be imputed to her by reason of her coverture. William and Mary College v. Powell, 12 Gratt. 385, 387, citing principal case. To the same effect, see the principal case cited in Penn v. Whitehead, 12 Gratt. 81; Taylor v. Moore, 2 Rand. 579, 584, 592; *foot-note* to William and Mary College v. Powell, 12 Gratt. 372; Perry v. Ruby, 81 Va. 327; Strayer v. Long, 86 Va. 560, 10 S. E. Rep. 574; Glascock v. Brandon, 35 W. Va. 90, 12 S. E. Rep. 1104.

(a) 4 Munf. 251.

(b) 1 Fonbl. 261.

*CABELL absent.

(c) 4 Munf. 251.

***Chancery Jurisdiction—Establishment of Lost Will—Directing Issue.**—In Dower v. Seeds, 28 W. Va. 153, it is said: "In Lemon v. Reynolds, 5 Munf. 552, decided in April, 1817, it was held, that a county court or a court of probate can set up and establish a will and have the same recorded. In Banks v. Booth, 6 Munf. 385, it was decided, that a court of chancery can set up and establish a lost or destroyed will; and that in such a case issue out of chancery should be directed to ascertain facts essential to a just decision of the cause. This case was decided in April, 1819. The same was decided in March, 1821, in the case of *Brent v. Dold*, *Gilm.* 211. These cases assumed that a court of probate in Virginia could set up a lost or destroyed will and probate the substance of it as proved by witnesses and have the will thus established recorded as the last will of the deceased; and that the same could be done by a court of chancery in effect by its setting up and establishing the will, which had been lost or destroyed; but these cases do not show, what should be the form of a decree of a court of chancery establishing and setting up such a will. Though no reasons are assigned for these decisions, yet, as we have seen, they are supported both by reason and the weight of authority and must be regarded as binding authority on us, unless the law has been changed either by constitutional provisions or changes in the statute-law."

bate, but was not, from the difficulty of proving the hand, believed it genuine, from comparison of hands.

Others swore, that the testator declared he never intended to give the plaintiffs any thing.

The second bill was to set up the will. It was by Landon and Kendall Brent, who offered what they averred was a copy; and called on the plaintiffs in the first bill, to answer whether it was not a copy. They denied the genuineness of the will. Sarah denied she had concealed or destroyed it.

The chancellor at Lynchburg dismissed the bill in the second suit; and decreed distribution, appointed commissioners &c. in the first. Landon Brent appealed.

The court of Appeals* reversed both decrees; directed the issue [which had once been directed, but the order for which was rescinded] to be reinstated, preparatory to a final decree.

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213 *Staples v. Commonwealth.

March, 1821.

Statute—Appropriation for Completing Armory—Construction.—The act of Assembly of 3d March, 1821, appropriating $20,000 to the completion of unfinished work in the armory, construed to mean, $20,000 in addition to what had been expended when the act passed; and not including what had been previously applied.

An act was passed by the legislature on the 3d March 1821, directing, that the operations of the armory should cease, after the 1st January 1822. That in the mean while, the appropriation made at that session of the Assembly, shall be applied exclusively to the completion of unfinished arms, and repairs.

An appropriation was made of $20,000 for the armory, including salaries &c. The fiscal year beginning on the 1st October; and it being customary to anticipate the appropriations of the current year, about $14,000 had been expended in the armory before the act appropriating $20,000 had passed. The auditor was of opinion, that $6,000 in addition to the $14,000 expended when the act passed, was all the manager of the armory was entitled to draw under this law; and refused his warrant for more. Staples, the superintendant, presented a petition, by way of appeal from the auditor's decision, to the judge of the Superior court of law for Henrico county, then sitting. That judge gave the same interpretation of the law with the auditor, and confirmed the judgment, refusing the warrant.

On argument in the court of Appeals, by Selden, for the appellant, and the Attorney General for the state, the judgment was reversed.†

214 *ROANE, Judge. This court not concurring with the Superior court in its construction of the acts relating to this subject, reverses its judgment; and proceeding to give such judgment as the said court ought, reverses both decisions; and orders a warrant to issue.

*CABELL absent.

†The arguments are not reported, because it is purely a case of construction.—Edition 1821.

Moore v. Fenwick.*

March, 1821.

Bonds†—Declaration—Evidence—Variance.—It is a fatal variance to offer in evidence a bond executed to A. surviving partner of A. B. & Co., on a declaration making profert of a bond to A. Quære.

Same—Profert.—It is error to dispense with the actual production of a bond of which profert is made in the declaration.

Penal Bond—Judgment.—Judgment on a penal bond should be for the penalty, to be discharged by the payment of the sum actually due.

Fenwick brought debt against William and Samuel Moore, in the Superior court of Rockbridge. The declaration claimed 2,325l. 3s. 4d, to be due on a bond executed April 4th 1795, by William and Samuel Moore. The bond offered in evidence on the trial, was executed by William and Samuel Moore to William Fenwick surviving partner of William Fenwick, & Co.: the condition of the bond was "to pay to William Fenwick, his heirs &c.;" and was signed by William Moore "for self and partner," and one scroll was annexed.

The defendant's counsel objected to its being received, because variant from the declaration. The court sustained the objection; it was rejected, and the plaintiff's counsel excepted.

The plaintiff's counsel then contended, that he was entitled to a verdict, without producing the bond described, 215 *in the declaration; the defendant's counsel moved for an instruction, that the plaintiff could not recover without producing the bond, of which profert was made in the declaration; the court refused this instruction; and the defendant's counsel excepted.

Nicholas, for the appellant. The court did right in rejecting the bond; the variance was fatal.(a) On the second point, it was undoubtedly necessary for the plaintiff to produce the bond declared on, before he could have judgment. The act directs the judgment to be for the penalty to be discharged, by the principal and interest actually due; this can appear only by inspection. Besides, there may be credits indorsed on the bond; there were in this case.

Bouldin, contra. Where no bond is taken, the surviving partner of a firm may sue in his own name; and if in such case, a bond be taken in the name of both parties, inserting the name of the deceased member, is mere surplusage. In this case, the variance relied on, is merely descriptive of the character in which the bond was due to Fenwick, it cannot destroy his right to recover.(b) If this was not the bond of both the Moores, it could be shewn only on the plea of non est factum. It would undoubtedly have been S. Moore's bond, had he authorised W. Moore to sign it; if he

*For monographic note on Profert and Oyer, see end of case.

†**Debt on Bond—Plea of Payment.**—In an action of debt on bond, upon the plea of payment, the plaintiff is required to produce the bond. Hutsonpiller v. Stover, 12 Gratt. 587, citing the principal case.

See principal case also cited in Rand v. Hale, 3 W. Va. 498, 500; Hubbard v. Blow, 4 Call 224.

See generally, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

(a) 1 Chit. Pl. 304; Tuttle v. Eskridge, 2 Munf. 330; Shelton v. Pollock & Co., 1 H. & M. 423.

(b) Peter v. Cocke, 1 Wash. 257.

did not authorise him, he should have put it in issue by pleading; it is of itself no variance.

COALTER, Judge.

I am of opinion, that the bond in this case, was improperly rejected. Its being taken to William Fenwick surviving partner to Fenwick & Co., for a debt due 216 *from the obligors as partners in trade, is to be considered as merely descriptive of the persons, and the consideration on which the obligation was founded; and in order to shew, that the account of Fenwick & Co. against Wm. and Samuel Moore was thereby discharged. Suppose the bond had been given by William and Samuel Moore, sealed and signed by them both, to Wm. Fenwick, stating in the body of it, that it was in liquidation, and on account of a debt due by the obligors, as partners in trade to the late firm of Fenwick & Co. This bond would have been good evidence in support of a declaration which omitted to set out the consideration, and this description of parties, as has been decided in Peter v. Cocke, (c) which doctrine is abundantly supported in all the books. (d)

I have always understood, that the best way is, to declare according to the legal effect of the instrument, in order to avoid being entangled with objections, on account of variance. But the legal effect of this obligation, supposing it to have been executed by William for himself, and Samuel Moore, by the authority of the latter, is the same. It must pass for something or nothing: as a firm, they could not give a bond. If it is not the bond of William Moore, he ought to have pleaded non est factum; but if he executed it in the form in which it is, I presume he could not have done that. (e) Whether Samuel Moore could, or would, have pleaded non est factum, we know not; but if he had, and had succeeded, this would not have exonerated William Moore. The plaintiff had a right to take it for what it imports to be, the bond of both, and that William who sealed for both, had authority to do so; leaving it to the defendants, who had both been arrested, to make their defence. In that case, William Moore might have furnished evidence, perhaps of authority in him to charge his co-obligor, so as to prevent a judgment against 217 himself *alone. He may have a power of attorney in his pocket, and surely ought not to be permitted to deny on the trial, and without a plea, so as to apprise the party of such defence, that he had authority to do, what he has said, under his seal, he had: but he could not plead non est factum for Samuel. But Samuel Moore is out of the case, and the appellant has not denied his own seal, consequently the bond was good evidence against him. The bond however was rejected and the plaintiff had two courses, one was to suffer a nonsuit, and the other to submit to such verdict as the Jury might find, and if against him, to rely on this error. Indeed this latter was his safest course, if his action was well brought, and was supported as I suppose. But he insisted, that the Jury could find a verdict for him without the bond, the defendant not having denied the debt, but taken upon him the proof of payment. Suppose the defendant had not objected to the production of the bond, but had agreed it should be produced, and had gone on, to set up his credits, could he afterwards, on failing to do this, insist, that the plaintiff should not recover without producing the bond? Had the verdict in the case before us been for the defendant, and I am right as to the first point, we would have reversed the judgment, not for the supposed error in the second bill of exceptions, but for that in the first. If we now reverse it, it will also be in effect and substance to cure that error; and to send the cause back, in order to have the bond given in evidence; which bond, the appellant who procures this reversal, objected to; and of course, waived all benefit which he might derive from its production. The error, in this respect was one against the appellee; and but for that error, the second, if it is one, would never have existed; and in consequence of this anomalous proceeding, and supposing I am correct as aforesaid on the first point, we are to reverse a judgment, for error against the appellee, produced by the appellant himself; so that the appellee in fact 218 substantially *prevails, and yet a judgment which he does not object to, is to be reversed. This would be so much like permitting a man to take advantage of his own wrong, and would result in so singular a state of things, and so strange a judgment, that I am not prepared to agree to it.

What would be our judgment? That the cause be remanded for a new trial, with instructions to the Judge, to admit the bond in evidence? Would we give any instructions, as to the alleged error in the second bill of exception? No; because it is impossible the point could arise on the second trial. How then is the appellant injured by it? But he was injured by it. He had a right to see the bond, and take advantage of the condition; but if he had pleaded regularly, it would have been after taking oyer of the bond and condition, which would in that case have made them part of the declaration: and then, he could have pleaded non est factum, or have demurred for the variance; but if he had, after oyer, pleaded payment, could he then take advantage of the variance? I incline to think not. Before the statute, the defendant, to avail himself of the condition, must have taken oyer, and pleaded payment before the day. Since the act, he may plead payment before suit brought; but I do not understand that this act, changes the forms of pleading. The plea of payment is an affirmation plea, and the defendant takes the onus probandi on himself, and has a right to introduce his evidence, and to open and conclude the argument. If the plaintiff was bound to produce his evidence first, then he would have the onus probandi on him, and could open and conclude. The plea is not to the bond, it is that he has paid the debt in the declaration; had he craved oyer and pleaded non est factum, the onus probandi would be on the plaintiff. Every plea in bar must

(c) 1 Wash. 257.
(d) 1 Call 582; 1 Chit. 304; 4 Term. Rep. 688; 2 Blac. Rep. 1104.
(e) 4 Term. Rep. 313.

go to the whole action; must either deny that a cause of action ever existed, as non est factum to a bond, or must confess the original cause of action, and 219 *avoid it by matter since, as payment; a plea by a party in court confessing and avoiding, cannot have a less effect as to the admission of the debt originally, than a judgment by default. In slander, if justification be pleaded, and the defendant fails in his proof, speaking the words need not be proved, to entitle the plaintiff to full damages. So if payment is pleaded to a bond with condition to pay a less sum; if the defendant does not crave oyer of the condition, he cannot avail himself of it on the trial; except by virtue of the statute; in which case, the court is, ex officio, if required, to enter judgment according to the condition. But he relinquishes this by objecting to the bond: he is to judge of his defence, and not the court for him.

It has been decided in an action against an acceptor of a bill of exchange, in which there was judgment by default, that where the plaintiff, on executing a writ of enquiry, produced a bill like that declared on, but there was no acceptance; an objection to it on account of this variance could not be sustained. It might have been accepted, though not in writing, and by suffering judgment to go by default, the defendant admitted the action to the amount of the bill; and it is produced only to see, whether any part had been paid. And in another case referred to in the same book, it is said, it need not be produced; for if the defendant had paid part, he might have pleaded that. Here the party has pleaded payment; the plaintiff is willing to give him the benefit of the bond but he refuses to avail himself of it.

The proper, legal evidence, if I am right on the first point, was offered; it was rejected by the defendant or at his instance, and if we reverse, this is the only error, in my opinion which we now have, in fact, to correct, and that too at his instance.

This seems to be a struggle between the parties; the one trying to obtain, the 220 other to evade just judgment, *and as before shewn and stated, results in so strange a state of things, and in so singular a legal phenomenon, that I am disposed to let justice turn the scale and affirm the judgment. We must take the bond as single, the defendant not only having failed, in the legal way, to take advantage of the condition, but having actually refused to do so; and taking it as single, this court has heretofore decided, that the verdict and judgment ought to be, as in this case, for the sum found due. The defendant has set up his credits, or the plaintiff has admitted them, the verdict being for a less sum than that declared for. If he had made further payments, he ought to have been prepared to verify his plea as to them. He was in court for that purpose; the jury were sworn to say whether he had paid or not; and there is no reason to believe he had not a fair trial on that plea.

ROANE, Judge. The court is of opinion that as the bond described in the declaration is one from W. Moore, and S. Moore, to W. Fenwick, and is stated to have been sealed with their seals; and as the bond which is copied into the record, is not made a part of the declaration by oyer, or otherwise, the declaration is to be taken as setting out the first bond, and not the last. if it be materially variant therefrom: and the bond stated in the first bill of exceptions being materially variant from that described in the declaration, in purporting to be a bond given by W. Moore and S. Moore, and to be signed and sealed by W. Moore, for himself and partner; the court is of opinion, that on account of the variance it ought not to have been given in evidence in support of the declaration; and that there is no error in the opinion of the Superior court, which withheld the same from the jury. But the court is of opinion, that as in all actions of debt upon bonds for the payment of money, judgment is to be rendered for the penalty, to be discharged 221 *by the payment of the principal money and the interest due thereon, which cannot be ascertained but by inspecting the same, to see the amount and dates of the credits indorsed thereon, the instruction of the court comprised in the second bill of exceptions is erroneous.

The court is also of opinion, as aforesaid, that the judgment is erroneous, in being rendered for the sum found due by the jury, instead of the penalty, to be discharged by the payment of that sum.

The judgment is therefore reversed with costs, and a new trial awarded, on which trial the said last mentioned instruction is not to be repeated: but the appellee is to be at liberty to exhibit, if he can, a bond corresponding with that described in the declaration.

PROFERT AND OYER.

Profert Not Necessary in an Action on Bill of Exchange.—In action of a debt on a bill of exchange profert is not necessary. Terrell v. Atkinson, 2 Wash. 143.

Effect of Profert upon Instrument as Evidence.—Where, in an action on a deed, the plaintiff makes profert of the deed in his declaration, and the defendant takes oyer of it, the deed is thereby made a part of the declaration, and the defendant cannot object to the deed as evidence at the trial, on the ground of variance. Jarrett v. Jarrett, 7 Leigh 93.

Where in an action of debt on a bond, with profert, the defendant craves oyer, which is given, the bond shown is a copy, and the defendant pleads payment, he waives the necessity of producing the original, and a copy may be given in evidence at the trial, upon due proof of the loss or the destruction of the original. Taylor v. Peyton, 1 Wash. 252.

Where Profert Is Made Bond Must Be Produced.—It is error to dispense with the actual production of a bond of which profert is made in the declaration. Moore v. Fenwick, Gilm. 214.

If a bond or deed sued on is not filed with the declaration, and the defendant appeared at rules and craves oyer of it, which the plaintiff does not give, and the defendant will not plead without oyer, the clerk may properly take the rules without regard to the craving of oyer so that the case may be ready to be disposed of at the next term of the court. Smith v. Lloyd, 16 Gratt. 295.

Excuses for Profert.—In an action of debt upon a

bond, the plaintiff to excuse the nonproduction of the bond in answer to oyer craved by the defendant, replied that the bond was filed in another court, that he applied to that court for it and that his application was opposed by the defendant and was refused by the court. This was held a sufficient excuse for not producing the original bond. Smith v. Lloyd, 16 Gratt. 295.

So in Simmons v. Trumbo, 9 W. Va. 362, it was said: "The court properly refused to grant the defendant oyer of the bonds, the excuse for not making profert of them, alleged in the declaration, that they were in the defendant's possession, being a sufficient excuse."

Excuse May Be Made Ore Tenus.—An excuse for not producing the original bond sued on may be *ore tenus*. Smith v. Lloyd, 16 Gratt. 295.

Profert Not Necessary under Virginia Statute.—It is now provided by the statute in Virginia (Code, § 3244), that it shall not be necessary in any action * * * to make profert of any deed, letters testamentary, or commissions of administration; but a defendant may have oyer in like manner as if profert had been made.

Faulkner v. Alderson.*

March, 1821.

Landlord and Tenant—Illegal Search of Premises by Landlord—Effect.—The landlord of a tenant at will, may peaceably enter the premises, but an illegal search for stolen goods, makes him trespasser ab initio.

Trespass—Damages—Injury to Character.—In trespass quare clausum fregit, for such an injury, the Jury in assessing damages, may estimate the injury necessarily resulting to the plaintiff's character. Quære.

Tabitha Alderson brought trespass quare clausum fregit, against John and Joseph Faulkner, in the Superior court of Halifax. The declaration first charged the trespass as usual, and added, that the defendants broke and entered the plaintiff's house, opened, and searched her trunks; and did other wrongs, &c. Plea not guilty; on which the plaintiff had a verdict for $733; of which $300 were released.

222 *At the trial, the defendants moved the court to instruct the Jury, that the defendant having entered the plaintiff's house to search for stolen goods, the Jury should not in their estimate of damages, consider the injury necessarily resulting to the plaintiff's character. The court refused the instruction.

After the verdict, the defendants moved for a new trial, on the ground that the action was not maintainable; it appearing in evidence, that the plaintiff was tenant at will of the defendant, of the house in which the trespass was alleged to have been committed, and had neither paid nor agreed to pay him any rent for the same. The court overruled the motion, and the defendants excepted.

Bouldin, for the appellant.

The court by refusing the instruction first moved for, have in effect controverted trespass quare clausum fregit, into an action of slander: which is to confound all actions and rules of pleading.

On the second point, it is clear, that tenant at will cannot maintain trespass, quare clausum fregit. (a) The landlord by cutting trees determines the estate; any hostile entry produces the same legal result. (b)

Leigh, contra. One of the trespassers was not the landlord of the plaintiff, and the objection to the action cannot apply to him. As to the other, his conduct after entry made him trespasser ab initio. The landlord had the right of entry undoubtedly, but that did not give him a right to search without a regular warrant. The cases in Bacon's abridgment, shew this. (c)

As to the circumstances aggravating the damages, it must frequently happen; for there is often no other mode

223 *of redress for outrageous injuries. Trespass in some cases lies for malicious prosecution, but if the circumstances be not allowed to aggravate the damages, the remedy is illusory. An action for malicious prosecution could not be maintained in this case, for there was no prosecution. Slander would not lie; for the circumstances can be reduced to no description of slander.

Bouldin, said slander would lie, for injurious pictures, caricatures, &c.; and in general for whatever brought one into contempt, or injured his character. Surely nothing was more calculated to do both, than searching one's trunks for stolen goods: it is an allegation by an act done, of theft, and roguery, as plain as language can speak.

COALTER, Judge. This was an action of trespass, quare clausum fregit, by the appellee against the appellants. The declaration alleges a breaking, and entering the close, dwelling-house, &c., and then charges, that the defendant did then and there make a great noise and disturbance; and opened, searched, and examined divers chests and trunks; and tumbled about, and damaged the clothing and furniture of the plaintiff, &c.

There were several bills of exceptions tendered to the opinions of the court.

The first states, that on the trial of the cause, it appeared by the testimony of the witnesses, both for the plaintiff and defendants, that the defendants went to the house of the plaintiff, at the time of committing the several trespasses stated in the declaration, for the purpose of searching for stolen goods: whereupon, the defendant's counsel moved the court, to instruct the Jury, that, in estimating the damages, they were not to take into consideration, any injury which might have necessarily resulted to the character of the plaintiff from the said trespass; which instruction the court refused to give; and

224 *thereupon the Jury assessed $733 damages to the plaintiff.

The second bill of exceptions, states a

***Trespass—Aggravation—Provable under General Allegation.**—In trespass, when the act complained of is accompanied by circumstances of aggravation, they may be proved under the general allegation of *alia enormia*, without further specification, when they do not afford a substantial ground of action. They give character and quality to the act complained of, and show the degree of injury, and could not be redressed at all if not allowed to be proved as incidents of the trespass complained of. Peshine v. Shepperson, 17 Gratt. 487, citing the principal case. To the same effect the principal case is cited in Fishburne v. Engledove, 91 Va. 558, 22 S. E. Rep. 354. See also, *foot-note* to Peshine v. Shepperson, 17 Gratt. 473.

(a) Co. Lit. 55. b.
(b) 1 Esp. N. P. 289; 4 John. Rep. 150; 7 T. R. 431.
(c) 6 Ba. abr. "Trespass" C.

motion for a new trial on this ground; that the plaintiff could not maintain this action; it appearing in evidence that she was a poor woman, who had a large family, and a very uncomfortable house, and that the defendant Joseph, had at the request of his brother, permitted her to occupy his house, when the alleged trespass was committed; and that there was no proof, either of payment, or agreement to pay rent.

The first point, as I understand it, was this; testimony was given by all the witnesses, that the trespass was committed in search of stolen goods. This must have been made known at the times; for declarations either before or after, would have been improper evidence. The manner of entering and searching, combined with insinuations or declarations, that the defendants were in search of stolen goods, would either impress on the by-standers a charge of crime in the plaintiff, or it would not: if it did, or her character was, or might have been injured thereby, this would be an injury, far beyond that arising from a wanton trespass on goods, however aggravated; and as there is nothing laid in the declaration but a wanton and aggravated trespass on the house and goods, the question is, whether, if the Jury believed, that the character of the plaintiff was assailed or injured, they were to consider that in estimating the damages. It will not do to say there were no words spoken, nor insinuations made at the time, and of course no charge on the reputation of the plaintiff; because if that was the fact, the instruction was unnecessary, and would have been a mere abstract point of law; but as evidence of the intention to search was given; and as the jury might, from such evidence, as it seems from their verdict they probably did, think the plaintiff's reputation injured; as from the manner,
225 signs, *insinuations, &c., a charge against the plaintiff of stealing or receiving stolen goods may have been conveyed; ought the Jury to have given damages therefor? Declarations before the trespass, that the plaintiff had stolen or received stolen goods, although the parties intended to search for them, would not be proper in aggravation of damages, in a trespass afterward committed; it would be a distinct cause of action. So too, declarations before, of a simple intention to search for stolen goods, if no imputation against the character, would be no evidence in any action. The like will hold, as to declarations after the trespass. A party cannot justify or excuse a trespass, by declarations afterwards, nor will such declarations add to the injury done at the time; they either give a new cause of action, or amount to nothing: and we will not presume that improper evidence was given.

Suppose it had appeared, that the plaintiff had sued the defendants severally for slander; and had laid in her declaration certain acts, insinuations, signs, and declarations, at the same time and place with this trespass, with an inuendo, that she was guilty of stealing, &c.; ought the Jury in the action of trespass, to have given damages for the injury to her character? But if she could bring such suit, and recover damages, the case, in point of law, is as strong as if she had done so. No one is entitled to double damages for the same injury. This must be prevented by the pleadings, and confining the parties to the issue. Perhaps if she had laid this special damage, with a per quod, in her declaration, she could have recovered therefor; but this would be on the ground that it would be a bar to another suit, for an injury to the reputation; and the party could have defended himself, at least by proving her general character.

The court was of opinion, that the damages were excessive; and a new trial
226 would have been granted, if the *plaintiff had not released $300 of them. The want of the instruction to the Jury probably led them into this excess; and though the damages have been lessened, yet the Jury are to find the damages, under a proper instruction as to the law; and even the Judge seems to have been of opinion, that damages could be given for the slander, although not laid, and although the defendants may have been surprised thereby, and deprived of any defence they might have made as to that matter.

As to the second bill of exceptions. I think the right of the landlord to enter to determine the lease, in case of an estate at will, if this was such, cannot justify such a trespass as is here complained of. Indeed it is admitted to have been proved, that he entered for another purpose; and therefore the rule is, that where entry, authority, or license is given to any one by law, and he abuses it, he shall be a trespasser ab initio; for the court will judge by the subsequent act, quo animo, or to what intent he entered.

I think therefore the judgment must be reversed, and the cause sent back for a new trial.

ROANE, Judge.* Although it may be, that, upon the facts stated in the second bill of exceptions, the appellee was a tenant at will of the premises in question to the appellant Joseph Faulkner, and although in point of law such appellant might without committing a trespass, have entered upon the premises; yet the appellants as charged in the declaration, and found by the Jury, having, after such entry, broken open the house and trunks of the appellee, and committed other enormities, such last mentioned acts, shewed quo animo the appellees entered, and made them trespassers ab initio. The verdict in question is not therefore on this ground a verdict
227 against *law, nor the judgment of the court overruling the motion for a new trial liable to error.

As to the point made in the first bill of exceptions, I understand the law to be, that while every act of trespass which will bear an action, must be stated in the declaration, in order to be relied on at the trial, such facts as are of an opposite character may be given in evidence, under the clause of alia enormia contained in the declaration. Great injury may have arisen to the reputation of the appellee, from the breaking and searching her trunks, &c.; and yet that

*CABELL absent.

injury could not be recompensed by an action of slander. That action only lies for a defamation of character by speaking, writing, signs, or pictures; and it is not shewn that any of these existed at the time of the trespass in question. The appellee would therefore be without remedy for a crying injury, unless she could rely upon the injury to her reputation arising from the facts aforesaid. It is also entirely reasonable, that that which is a consequence of the facts proved, should be relied on as well as the facts themselves. Unless this was the case, a man of high character, having his nose pulled, for example, would be limited in his recovery, to the pain arising from a petty scratch inflicted on him, on the occasion.

Although it is stated to have been been proved, that the appellants went to the house of the appellee for the purpose of searching for stolen goods, it is not further stated to have been proved, that they then declared that such was their intention, which might probably have given a foundation for an action of slander, and so have distinguished that case from the one before us: nor do the witnesses even say, that they then knew this to be the intention of the appellants. Their testimony on this point may be satisfied, by their having acquired this knowledge after this action was brought, and only an hour before they were examined.

228 *I am of opinion, therefore, that the Judge committed no error in refusing the instruction in question, and the opinion of the court is, that that judgment should be affirmed.

Nadenbousch v. M'Rea.

March, 1821.

Plea of Payment—General Replication.*—General replication to the plea of payment, does not of itself constitute an issue.

Appearance Bail—Rights of.—Appearance bail becoming special bail, should be allowed to prove the similiter to a replication was added by the clerk, without his consent: and in such case, the bail should be allowed to rejoin, demur, &c.

M'Rea and Company brought debt in the Superior court of law for Berkley county, against Nadenbousch and Offeral, on a note for $500. One Beeson became appearance bail, and defended the suit. The writ was returnable to June rules, when the declaration was filed; and Beeson prayed an imparlance. July rules, rule to plead. August, the defendants pleaded 'payment;' to which plea, there was a general replication; and Beeson joined issue. Beeson afterwards became special bail; but the pleadings not being set aside, the case went on against him as appearance bail. At the trial, he moved the court, to suffer him to amend the rules, by setting aside the proceedings subsequent to the replication; and proved, that the issue was joined by the clerk without his consent, and against his wish; the court however refused the order moved for, and Beeson excepted to the opinion.

229 *Tucker for the appellant.

The English practice is, for the plaintiff to add the similiter to his replication, for the defendants; the defendant has then a certain number of days to strike it out, and demur; or to go to trial on the issue thus made up.(a) The law of Virginia differs from that of England, only in allowing a longer time for the defendant to make his election, it allows him one month.

In this case the exercise of the right is very material, for had it been allowed, the appellant must have had judgment in his favor. The declaration would have been bad on demurrer, for it appears upon its face, that there are plaintiffs beside M'Rea, who are not named, a defect fatal on demurrer.(b) The replication is also bad, for it states that the plaintiff replied generally. The plea of payment also, concluded with a verification, which tendered no issue, and the similiter was improperly added.

It is no answer to say the verdict cures the error, for it was wrong to take any verdict; and a verdict improperly taken can cure nothing.

Nicholas contra. The entry of special bail discharged the appearance bail from the record. And the special bail had no right to make the objection: for giving special bail does not set aside the office judgment against the principal. He also relied on the error being cured by the verdict.

Tucker held that an office judgment against principal and bail, could be set aside by either, only by giving bail and pleading to issue.(c) And if the

230 appearance *bail give special bail, and defend the suit, new pleadings must be made up by the defendant.(d) And so Beeson had a right to make the objection.

The Court not concurring in opinion with the Judge of the Superior court, that a general replication to a plea of payment constituted an issue, and left no room for further proceedings, unless thereafter the parties considered it as an issue, and submitted the case to a Jury; is of opinion,

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***Plea of Payment—General Replication.**—To the point that a general replication to the plea of payment does not of itself constitute an issue, the principal case was cited in Wyatt v. Woodlief, 1 Leigh 475.

In Douglass v. Central Land Co., 12 W. Va. 509, it is said: "In Henderson v. Southall, 4 Call 372, the court were unanimously of opinion, that the plea of payment was responsive to the negative of nonpayment in the declaration, and should therefore conclude to the country. On the contrary, in the case of *Nadenbousch v. M'Rea, Gilm.* 228, the court held that a general replication to a plea of payment did not constitute an issue, and a *similiter* to such plea entered in the office against the plaintiff's consent by the clerk ought therefore to be set aside. This decision is based on the idea that a plea of payment should conclude with a verification. In rendering it the court did not refer to the unanimous decision of the court in 4 Call, which they indirectly reversed, probably because 4 Call had not been then published. So that these two decisions may each be regarded as original decisions entirely independent of each other. And we must determine which of them lays down the law correctly." In this case (Douglass v. Central Land Co.) it was held that the plea of payment must in every case whether the action be assumpsit, debt or covenant, conclude to the country. This seems the settled law of West Virginia. See Bank v. Kimberlands, 16 W. Va. 555, 572; Kinsley v. Monongalia County, 31 W. Va. 464, 7 S. E. Rep. 445.

(a) 1 Chit. Pl. 628.
(b) 1 Chit. Pl. 29, 255; 4 Munf. 430; 2 Munf. 349; 2 Term. Rep. 282.
(c) 1 Munf. 284; 2 Call 64.
(d) Dunlop v. La Porte, 1 H. & M. 22.

that the said Superior court should have permitted the appellant Beeson to prove that the similiter entered in the office, was entered without his authority, and against his consent; and should also, in that case, have corrected the proceedings in the office, by giving him a rule to rejoin, or take other measures in relation to the appellees' replication. The judgment is therefore reversed with costs, and the cause is to be remanded to the rules of the said Superior court, to be proceeded in from the replication, pursuant to the principles now declared.

George v. Richardson.

April, 1821.

Chancery Practice—Setting Aside Contract—Inadequacy of Consideration.—A contract will be set aside in equity for inadequacy of consideration, where there is inequality in the condition of the parties.

Appellate Practice—Reversal of Decree—Costs.*—On reversing a decree because injurious to the appellee, costs will be allowed if he substantially prevail.

Lucy Richardson set forth in her bill, filed in the Chancery court of Richmond, that on the 5th July *1801, she 231 obtained a decree in the county court of Nottoway, against John Patterson, administrator of one Anderson, for 50l. with interest from February 1st 1801; and for 22l., with interest from 5th July 1801. That in 1812, she gave to Peter Bland, an order for the money, who had received it, and had never paid it over; he is a defendant to the bill. Living at that time in the family of Charles D. George, who was a witness to the order to Bland; he [George] fraudulently obtained from her an assignment of the debt; promising her $150 for her interest; she executed the assignment, without understanding its import, [being wholly illiterate]. George assigned this paper to James Rice; both are made defendants, and required to answer.

George admits in his answer, that he was to give but $150 for the claim; he says, he had paid about $50, in consumable commodities, meal &c.

Bland admits the allegations of the bill as to him; that he had received the money, and would have accounted, but for the conflict of the claims; and was at all times ready &c.

Rice says, he was accidentally called by George, to witness the assignment to him by the plaintiff; that it was read to her; and she was satisfied with it; that George then proposed to sell it to him; and that he bought it for 80l., for which he gave his bond.

On general replications to the answers, without depositions, the Chancellor decreed, that Bland should pay over to the plaintiff the 50l. with interest from 1st January 1806; and the 22l., with interest from 5th July 1801; deducting a small sum due Bland by agreement. George and Rice appealed.

May, for the appellant, cited Whitehorn v. Hines,(a) to shew, that a subsequent purchaser, was not affected by the fraud of a prior holder: and therefore Rice's 232 claim *was good, because he was not privy to George's contract.

Spooner, contra; relied on the gross inadequacy of price as a strong badge of fraud.(b) That the appellee was moreover wholly illiterate; a negro, and living in the family of George, was liable to imposition, and oppression.

The assignee cannot have a better claim, than he had, from whom he derives.(c)

The Chancellor has made a mistake of five years in the interest, to the appellee's prejudice.

ROANE, Judge. There is no error in the decree to the prejudice of the appellants; but it is erroneous, as it respects the appellee, in allowing interest on the 50l. from January 1806, instead of the 1st February 1801. The decree is therefore reversed, as to this, and affirmed for the residue. Costs are allowed the appellee, as the party substantially prevailing.

Barnett v. Sam.

April, 1821.

Slaves—Statute—Application.*—The act of 1792 requiring persons removing to Virginia with slaves, to observe certain formalities, has no application to a citizen of Virginia, removing to another state with slaves; and returning with them to Virginia, before the repeal of the law.

This was a suit for freedom in forma pauperis, by Sam. The following case 233 was made by a demurrer to *evidence in the county court of Amherst. Sam was born in the county of Augusta, about the year 1788, the slave of Mary Teas, a native of that county, then residing there. Mary Teas, removed to North-Carolina about 1790, where she resided and Sam with her, three years. In 1793 she returned to Virginia, bringing Sam with her; and not complying with the requisitions of the statute of Virginia of 1792.(a) She continued in Virginia until the year 1811; when she sold Sam to Barnett.

A deposition taken in the cause, was objected to, because the commission was not directed to Justices of the Peace, nor did the persons taking it, describe themselves as such. The county court gave judgment for the plaintiff on the demurrer to evidence; the judgment was affirmed on appeal to the Superior court of law; and an appeal was taken to this court.

The case was argued by Wickham for the appellant, and Leigh for the appellee.

The case of Murray v. M'Carty,(b) was mentioned by a Judge; which on examination, seemed conclusive on the merits; and there was judgment against the pauper.

ROANE, Judge.† The court is of opinion, that Mrs. Teas, under whom the appellant claims, having never renounced her character of citizen of Virginia; nor acquired that of a citizen of North-Carolina; is not embraced by the first part of the

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*Costs.—See monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

(a) 1 Munf. 557.

(b) Sugd. Vend. 192-5.

(c) Norton v. Rose, 2 Wash. 233.

*For the proposition laid down in the headnote, the principal case is cited in Betty v. Horton, 5 Leigh 621.

(a) Rev. of 1792, p. 103.

(b) 2 Munf. 393.

†BROOKE absent.

proviso of § 4, ch. 103, (pa. 186, of Pleasants' edition of the laws,) under the decision of this court in the case of Murray v. M'Carty; so as to deprive a slave purchased by her in another state, after the passing of that act and brought into this commonwealth, of the right of freedom, enuring to him under the 2d § thereof: but the appellee in this case having been at the time of the commencement of this act, actually owned by the said Mrs. Teas, his right to
234 freedom is *barred by that circumstance, under the provision as to citizens of the commonwealth, contained in the last part of the said proviso; and this a fortiori, as the said Mrs. Teas had owned the appellee as a slave in Virginia, and carried him with her into the state of North-Carolina.

Under this opinion against the appellee, on the merits, it is unnecessary, however plain, to inquire into the sufficiency of the depositions excepted to in the proceedings: but if that deposition ought to have been rejected, it shews more strongly, that the judgment in his favor is erroneous.

Both judgments are to be reversed and entered for the appellant.

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235 *Baker, [Treasurer,] for the Commonwealth v. Preston and Others.

June, 1821.

Before a special court of appeals, consisting of SPENCER ROANE, ROBERT WHITE, HUGH HOLMES, PETER JOHNSON, WILLIAM DANIEL, and GEORGE PARKER.*

Evidence—Deed—Certified Copy.†—The copy of a deed acknowledged by the grantor before Justices, by them certified to the Clerk for record, and by him certified to be a true copy, is admissible as primary evidence, equivalent to the original.

Same—Treasurer's Books—Conclusiveness.‡—The books kept by the Treasurer, are conclusive evidence of the balance actually in the treasury at any given time, both against the Treasurer, and his sureties, without being pleaded as an estoppel, so as to charge them with balances carried forward from year to year, as if those balances were actually on hand.

Treasurer—Annual Bonds.—The statute of 1792 authorized the executive to demand annual bonds of the Treasurer.

Same—Depositing Unaudited Monies—Effect.—Monies deposited in Bank by the Treasurer in 1818 without being audited, will be considered as part of a larger sum turned over to his successor in office in 1819, nothing appearing to the contrary.

Same—Application of Money Turned Over by Predecessor.—The Treasurer has a right to apply the money turned over to him by his predecessor, to the extinguishment of any balance due by such predecessor, in consequence of his not crediting the Commonwealth with the same money on the treasury books; it being a payment by the preceding to the succeeding Treasurer.

This was a motion made by Jerman Baker [Treasurer], on behalf of the commonwealth, under the 11th section,
236 *chap. 174, of the Revised Code;

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*When commissions were about to be issued by the Clerk, for organizing the Special court, the ordinary court of Appeals directed the Clerk, to send a summons to every Judge capable of sitting in a special court of Appeals. The practice before had been, to suffer the party at whose instance a special court was called, to take out the summons.

When the court above, was organised, and before its proceeding to act, Leigh made a question, whether the court was legally constituted; since JUDGE BROOKE had withdrawn, without being interested in the matter, or under any permanent disability to sit: being unwell, and having a sick family. It was urged, that the law contemplated some durable impediment, and not a temporary incapacity, which might be obviated by a continuance of the cause. The motion being submitted, the Judges withdrew to the conference room to deliberate: after a few minutes they returned, and were unanimously of opinion, that the objection should be overruled, and that the court as constituted, should proceed to hear and determine the cause.—Edition 1821.

†**Evidence—Copies of Deeds.**—See, on this subject, *foot-note* to Maxwell v. Light, 1 Call 117; *foot-note* to Anderson v. Dudley, 5 Call 529.

In Petermans v. Laws, 6 Leigh 529, it is said: "It is not necessary to consider, whether the case of *Baker v. Preston* settles the rule, that office copies of deeds registered in Virginia, are primary evidence. Whether copies of deeds recorded in Virginia are or are not primary evidence, the copy of a deed recorded in North Carolina cannot be so, without proof, that it would be received as evidence, in lieu of the original, in the courts of that state; for such faith and credit only are to be given to it here, as it would have, by law or usage in the courts of that state. On this subject, we have no proof; and without proof of a rule in their courts, which permits the introduction of the secondary evidence instead of the original deed, the general principle must prevail, which excludes such evidence."

See generally, monographic *note* on "Deeds" appended to Flott v. Com., 12 Gratt. 564.

To the point that a recorded deed is evidence of itself, the principal case is cited in Johnston v. Slater, 11 Gratt. 324.

Same—Certificate of Auditor.—Upon general principles, and without reference to any particular statute, the certificate of the auditor of a fact appearing from the books under his control, and upon whom the law imposes the duty of examining such books, and giving a certificate of the facts thereby appearing, as a guide for other officers in the performance of duties imposed on them, would be competent as evidence of such fact. Ushers v. Pride, 15 Gratt. 195, citing the principal case.

‡**Same—Judgment against Principal—Conclusiveness as to Surety.**—In Munford v. Overseers of the Poor, 2 Rand. 315, JUDGE GREEN, delivering his opinion,—in which the other judges concurred—said that the question how far sureties are bound by a judgment or other evidence against their principal, which estops or concludes him, had never been settled in Virginia except in *Baker v. Preston*, where the court argued that, if a judgment against the principal would conclude his sureties, so ought the evidence on which such judgment is rendered to conclude, them and relied on the cases of Braxton v. Winslow, 1 Wash. 31, and Greensides v. Benson, 3 Atk. 248, to show that a judgment against the principal is conclusively binding on the sureties. JUDGE GREEN, then goes into a somewhat extended review of the two cases just cited to prove that no such point was decided in either, and concludes that the question is still open whether or not a judgment against the principal is conclusive evidence against his sureties. In this case (Munford v. Overseers of the Poor), it was held that a judgment against a principal in a bond is not *conclusive* evidence against his sureties.

In Craddock v. Turner, 6 Leigh 124, 126, TUCKER, P., in delivering his dissenting opinion refers with evident approval to the opinion of JUDGE GREEN in Munford v. Overseers of the Poor, 2 Rand. 315, and says: "As to the case of *Baker, Treasurer v. Preston, Gilm.* 235, it turned upon the question of the conclusiveness of the books of the treasury, and not upon any previous verdict or judgment against the principal, though JUDGE ROANE relied on the two cases just cited, to sustain his opinion. That opinion has, certainly, not been very acceptable to the profession. It was most ably combated at the time, by one of the most distinguished judges of the general court, then sitting as a member of the special court of appeals which decided the cause. If it can be sustained, it is only sustainable, I think, upon grounds wholly different from those upon which the question as to the sureties for a due administration rests. Perhaps, it may be supported on the principles of the case of Goss v. Watlington, 3 Brod. & Bing. 132, 7 Eng. C. L. R. 379, though, as Preston was in full life, even this seems difficult." What is said by JUDGE GREEN in Munford v. Overseers of the Poor, 2 Rand. 315, concerning the principal case is quoted in Crawford v. Turk, 24 Gratt. 182.

In State v. Nutter, 44 W. Va. 389, 30 S. E. Rep. 69, the court said: "I think that in this state a judgment against a principal does not bind the surety, as a general rule. Bigelow, Estop. 145; Craddock v. Turner, 6 Leigh 116; Munford v. Overseer of Poor, 2 Rand. (Va.) 313; Jacobs v. Hill, 2 Leigh 393; Black, Judgm. § 586. These cases overrule *Baker v. Preston, Gilm.* 235. There is high authority, however, in favor of the conclusiveness of a judgment against the principal upon the sureties. Stovall v. Banks, 10 Wall. 583; Bigelow, Estop. 146, *note* 2."

against John Preston and nine persons, his sureties, on a bond given in conformity with the 9th section of the same act.(a) The condition of the bond, after reciting that Preston had been elected Treasurer, concluded, "now if the said John Preston shall faithfully account for all monies and other things which shall come to his hands in virtue of his office, and perform all other articles thereof according to law, then this obligation to be void, otherwise to remain in full force and virtue."

The notice of the motion recited the bond, and the condition; averred that it had not been complied with, and claimed the penalty of one million of dollars.

There was no appearance for John Preston the principal. The sureties appeared by counsel, and the following pleadings were made up.

The 1st plea craved oyer of the bond, which being read, was incorporated into the plea. The election of John Preston to the office of Treasurer on the 18th day of January 1819 (the date of the bond) and the determination of his office on the 17th January 1820, and the election of Jerman Baker as Treasurer on that day were
237 *all recited. And the plea averred, that during the whole of Preston's said office of Treasurer, to wit: from the 18th January 1819 to the 17th January 1820, he did faithfully account for all monies and other things which came to his hands in virtue of his said office, and perform all other articles thereof according to law.

The plaintiff replied, that between the above dates, and during Preston's continuance in the said office, large sums of money, viz. $2,000,000, had come to his hands, and that he did not faithfully account, &c.

Rejoinder, that during Preston's continuance in the said office from the said 18th January 1819 to 17th January 1820, there came to his hands in virtue of his office only dollars, and no more, and that he did faithfully account, &c. Issue was joined on this rejoinder.

2d plea. After the same recital as in the first plea, averred, that on the day of the commencement of Preston's said office, to wit: on 18th January 1819, there was actually in the treasury, and in the hands of Preston in virtue of his said office, the sum of $407,000 and no more money or other thing; and between the commencement and expiration of his said office, to wit: from 18th Jan. 1819 to 17th Jan. 1820, there came to the hands of the said John Preston, in virtue of his office, divers sums of money, amounting to the sum of $793,251 36-100 and no more money or other thing, which two sums of $407,000 and $793,251 36-100 amounting together to the sum of $1,200,251 36-100, was all of the money or thing, that came to the hands of the said Preston in virtue of his said office; and that he had faithfully accounted for all the said monies which so came to his hands in virtue of his said office, during his continuance therein; and had performed all other articles of the said office, &c.

Replication, that on the 18th January 1819, there was actually in the treasury and came to the hands of Preston
238 *in virtue of his office, the sum of $800,000; and between the 18th Jan. 1819 and 17th Jan. 1820, there came to his hands in virtue of his said office, divers other sums amounting to and that the said Preston did not account for or pay the said sum of money, but did divert, misapply and convert the same to his own use; and so had broken and violated the condition of the bond. The replication concluded to the country, and issue was joined.

3d plea. That John Preston was first appointed Treasurer on the day of October 1808, by the Governor with advice of council: and executed his bond with security on the 18th October 1808: that he was first elected by the legislature in January 1809 and gave bond with security for the faithful discharge of his duties on the 12th Jan. 1819. That he was successively re-elected every year, until January 1819. That the bond of 1819 was not taken on "his first election"(b) but on his 10th and last election, and was not required or authorised by law, and was void.

There was a general demurrer, and joinder in demurrer to this plea. The demurrer was sustained by the general court.

A Jury was then sworn to inquire of damages as to John Preston; and the truth to speak upon the issues joined as to the other defendants. In the progress of the cause several instructions to the Jury were asked for by the plaintiff, which will appear in the bills of exceptions which follow:—

239 *The 1st bill of Exceptions taken by the plaintiff states, "That on the trial of this motion, and before the jury were sworn, the plaintiff, in the presence of the court, and on the day the jury were sworn, gave notice to the defendant, Francis Preston, to produce an original deed executed by a co-defendant, John Preston, and his wife, and at the time of giving said notice offered to the said defendant, if further time was requisite to enable him to produce the said original deed, that he, the plaintiff, would ask a suspension of the proceedings until it could be obtained, or move for a continuance of the motion till the ensuing term of the General Court, in order that such time might be afforded. To which proposal the said defendant declined to give any other reply, than that the plaintiff's counsel must take their own course, and manage their cause in their own way. And then the plaintiff offered to introduce a copy of the said deed, duly certified by the clerk of the Hustings Court of the City of Richmond.

And the plaintiff proved, that the said original deed was about eight months ago, delivered by the clerk of the said court to

(a) It will be observed, that the words, "and every year thereafter," were incorporated into the statute after the execution of the bond.—Edition 1821.

(b) The expression "on his first election, before he shall have power to act, he shall give bond" &c. relates to the provision in the first sentence of the section, authorising the Treasurer to continue in office to the end of the ensuing session of the legislature without re-election. After his first election he may do this without giving bond; but when first elected he shall do no act, before he has given bond.—Edition 1821.

the said Francis Preston; and proved by the oath of the said clerk, that the same was a correct copy, and that the trustees under the said deed, and one of the defendants, to wit: Bernard Peyton, had acted under the said deed, by authorising and effecting sales of property therein specified:—Whereupon the said Francis Preston came into court and stated, that the original deed was carried by him and delivered either to Henry Edmundson, or James M'Dowell, but he does not recollect which, to be recorded in the several distant counties wherein the lands mentioned in said deed respectively lie. But that he the said Francis did not know whether the said deed had been so recorded, nor where the same was, nor whether the same was now in existence, or not; but he believes it to be in existence, and now in the hands
240 *of either the said Edmundson or M'Dowell. Whereupon the defendants moved the court to exclude the said copy from going in evidence to the jury, which motion the court sustained; and the said plaintiff excepted to the opinion of the court rejecting the said copy, and prayed, that this his bill of exceptions might be signed and sealed which was done accordingly."

Another bill of Exceptions taken by the plaintiff states,—"That on the trial of the issues joined in this cause, the said Baker to support the said issues on his part proved, that the said John Preston was elected treasurer of the commonwealth according to the laws and constitution, on the day of January 1809, and was successively and annually, in like manner, re-elected to, and continued in the said office, from year to year, until the 17th day of January, 1820, when he resigned the said office; and on the day of January, 1820, the said Jerman Baker was elected his successor in the said office."

"The said Jerman Baker then gave in evidence the annual reports made to the General Assembly, by the said John Preston, from the said day of January, 1809, to the 13th day of January, 1819, (inclusive;) and the annual reports of the joint committees of both houses of Assembly, from the said day of January, 1809, to the said 13th day of January, 1819, inclusive; and the books of the Treasury Department, during the whole period during which the said John Preston was treasurer of the commonwealth, by virtue of his successive annual elections aforesaid. And according to the said annual reports, and the said books of the treasury department, it appeared, that on the 1st of Oct. 1818, (being the end of that fiscal year) there ought to have been a balance in the treasury, to the credit of the commonwealth, of $390,702,95; and on the 18th day of January, 1819, being the date of the bond on which this motion is grounded, and the day
241 of *the commencement of the said John Preston's last term of office, there ought to have been a balance in the treasury, to the credit of the commonwealth, of $648,412,23; and on the 17th day of January, 1820, when the said John Preston resigned his said office, there ought to have been a balance in the treasury, to the credit of the commonwealth, of $333,297,07.—But the said Jerman Baker proved, that on the said 17th day of January, 1820, he found in the coffers of the treasury office, and to the credit of the treasury in the two banks of Virginia, only the sum of $250,197,77; so that there was a difference of the sum of $83,099,30, between the balance so shewn by the books of the treasury department, as the sum which ought to have been in the treasury to the credit of the commonwealth, on the said 17th day of January, 1820, (when the said Preston resigned his office,) and the cash actually in the treasury: and that the said Jerman Baker, the now treasurer, immediately passed to the credit of the commonwealth, the said sum of $250,197,77, as so much money turned over to him by his predecessor; of which sum $250,197,77, the sum of $248,086,62 was money in the two banks of Virginia, to the credit of the treasury, and the rest was in the public coffers in the treasury office; and the said sum of $248,086,62 was carried, by the said two banks, to the credit of the said Jerman Baker, the now treasurer, immediately that he took charge of the treasury, without any check for the same drawn in his favor by the said John Preston, the late treasurer, in whose name, as treasurer, the treasury account at bank stood; and the said transfer at bank was made in the presence of the said John Preston's agent, who went to the bank with the said Jerman Baker, to have such transfer made; and the said Jerman Baker gave his receipt to the said John Preston, for the said sum of $250,197,77 so turned over by the said John Preston to the said Baker. And it further appeared, by the said books of the
242 treasury department, *upon examination and correction, that there were errors and omissions in the Ledger (on which the said annual reports were founded) against the commonwealth, to the amount of $4,488,08; of which $3,488,08 was an error in addition in the accounts of 1810, and the rest consisted of divers errors and omissions all prior to June, 1818. And the said Jerman Baker proved, that the said John Preston, so being treasurer of the commonwealth for the time being, on the day of July, 1814, received of the Bank of Virginia the sum of $39,000, being for dividends due to the commonwealth, on the stock of that bank owned by the commonwealth; which sum of $39,000 was passed by the said bank to the credit of the said John Preston, as treasurer of the commonwealth, on the day it was so by him received; but it was never audited, nor credited by the said John Preston to the commonwealth, on the books of the treasury department. And the said Jerman Baker further proved that the said John Preston, so being treasurer for the time being, on the day of July, 1816, received the further sum of $5,431,57, for interest on treasury notes of the U. States, the property of the commonwealth, which he deposited to his credit, as treasurer of the commonwealth, at the said bank of Virginia; but the same was never audited, nor credited to the commonwealth by the said John Preston, on the books of the treasury department. And the said Jerman Baker

further proved, that the said John Preston, so being treasurer for the time being, received, on the day of March, 1816, the further sum of $510, for interest on other treasury notes of the U. States, belonging to the commonwealth; but the same was never audited, nor credited to the commonwealth, on the books of the treasury department. And thereupon the said Jerman Baker, the now treasurer, claimed on his said motion and action against the said defendants, the said deficit of $83,099,30; and
243 the said sums of *$4,488,08, $39,000, $5,431,57, and $510, amounting in all to the sum of $132,528,95."

"Then the said defendants, to support the issues joined on their part, proved, That the said John Preston, so being treasurer for the time being, on the 17th day of August, 1818, received of John Chew, a check on the bank of the United States at Philadelphia, for $146,500 for so much money due by the U. States to the commonwealth, which sum had been duly audited, and was passed by the said John Preston on the same day to the credit of the commonwealth, on the books of the treasury department; but the said Preston on the same day, did not deposit the same at the bank to his credit, as treasurer, on official account, but did deposit the same to his own individual credit at the bank of Virginia, on his individual private account, blending the same with his private funds at his credit at the said bank; and the same was thereafter checked for by him, in his own name, in like manner as for his own money, so as to exhaust the whole amount thereof; but whether the same when so checked for, was applied to his own use, or to that of the commonwealth, or when it was so checked for as to be exhausted, did not appear; nor was any evidence adduced on the part of the said Jerman Baker, to shew that the said John Preston ever applied any part of the said $146,500 to the use of the commonwealth, or returned any part of the same in any wise into the treasury, other than what may be collected from the facts and proofs herein stated."

"That on the 1st October, 1818, (being the end of that fiscal year) when according to the annual reports of the said John Preston, then treasurer, and of the joint committee of both houses of Assembly of the 13th day of January 1819, and the books of the treasury department, and other evidence adduced on the part of the said Jerman Baker: (as above stated,) there ought to have been in the treasury to the credit of the commonwealth, the sum of
244 *$440,132,60;(c) there was in the two banks of Virginia, to the credit of the said John Preston as treasurer of the commonwealth, on his official account there, only the sum of $147,919,17, shewing a difference between the sum which ought then to have been in the treasury, according to the said evidence adduced on the part of the said Jerman Baker, and the money at the banks to the credit of the treasury, of 292,213,53. That on the 18th day of January, 1819, when according to the same evidence adduced on the part of the said Jerman Baker, there ought to have been in the treasury the sum of $697,841,88(d) to the credit of the commonwealth; there was in the two banks of Virginia, to the credit of the said John Preston, as treasurer of the commonwealth, on his official account there, only the sum of $406,150,73; shewing a difference between the said sum which ought then to have been in the treasury, according to the same evidence adduced on the part of the said Jerman Baker, and the money at the banks to the credit of the treasury, of $291,691,15. And the defendants proved, by a clerk in the treasury department, employed there during all the years 1818, and 1819, and until the 17th January, 1820, (inclusive;) that there was not usually kept in the public coffers in the treasury office, during the period aforesaid, more than $5,000, very seldom as much as $10,000, and never, within the recollection of the witness, as much as $50,000 for one whole day at a time. And by the evidence of the same clerk of the treasury department, and
245 *the official accounts of the said John Preston, as treasurer of the commonwealth, with the two banks of Virginia, compared with the books of the treasury department, and the other evidence aforesaid adduced on the part of the said Jerman Baker, it appeared that there was continually, and every day from the said 17th day of August, 1818, to the said 18th day of January, 1819, inclusive, the difference of $250,000, at the least, between the balance stated on the books of the department, and by the other evidence adduced on the part of the said Jerman Baker, as the balances due to the commonwealth, and the amount of the actual sums in the public coffers in the treasury office, added to the balances at bank, to the credit of the treasury.

"Whereupon the said Jerman Baker by his counsel moved the court, to exclude the evidence so as aforesaid adduced by the defendants from the consideration of the jury, as being inadmissible evidence, so far as the same was offered to exonerate the said defendants from responsibility for the balance of $83,099,30, appearing from the said reports of the said John Preston, as treasurer, and of the joint committees of both houses of Assembly, and the books of the treasury department, to be due at the time of the said Preston's said resignation, as above stated. But the court was of opinion, that the said motion should be overruled, and admitted the said evidence of the defendants as proper for the consideration of the jury."

And then the said Jerman Baker by counsel insisted, that the balance due by the said Preston as treasurer for the year 1818, and the preceding years, at the time of the execution of the bond on which this motion and action is founded, must be intended to have afterwards come to his hands in

(c) Per the Reports and Treasury Books, $390 702 95
Per the other evidence, [$4,488,08, $39,000—$5,431,57 $510]. 49 429 65
$440 132 60

(d) $648 412 23
49 429 65
$697 841 88

virtue of his office so as to charge the said defendants as his sureties for his last term of office aforesaid; and that the fact of his keeping the treasury books, as if the amount called for by the said books
246 was on hand, *amounted to an admission, by him, that he held the whole sum so called for by the books in his official character, and was an election by him, to hold the said sum so previously due by him, in his official character, as treasurer for the year 1819. And the said Jerman Baker by his counsel also insisted, that the said sum of $250,197,77, so turned over by the said John Preston upon his said resignation in manner aforesaid, being so turned over by the said Preston, without any specific direction as to the application thereof, was a payment by the said Preston to the commonwealth, which the said Jerman Baker, as treasurer of the commonwealth, had a right to apply to the extinguishment of any balance due by the said Preston, as treasurer to the commonwealth, prior to the commencement of his last term of service, and the date of the bond on which the present motion and action was founded. Whereupon the said Jerman Baker by his counsel moved the court to instruct the jury, that notwithstanding the facts proved by the said defendants, (supposing them fully pro ed) he is entitled in law to recover of the said defendants the sum of $83,099,30 (the deficit appearing on the treasury books as kept for the year 1819, in manner before stated;) and also the amount of the said several sums of $4,488,08, $39,000, $5,431,57, and $510, herein before mentioned and explained. But the court was of opinion, that the said defendants, in this motion and action, are only liable for due application by the said John Preston, of the sum actually in the treasury, at the commencement of the said John Preston's last term of office, and at the date when the said defendants executed the bond aforesaid, as the said Preston's sureties; and of the sums received by him during his last term of office aforesaid; and that the said Baker is not entitled to recover the said deficit of $83,099,30, of the said defendants in this motion and action, on the issues joined, on the ground that the keeping of the said
247 books *of the treasury department, by the said John Preston, during his said last term of office, in the manner herein before stated, was an election by the said John Preston, to hold the money so appearing by the books to be due to the commonwealth, in his official character of treasurer for his said last term of office, (as contended by the said Baker's counsel,) if it was in fact eloigned from the treasury during the year 1818; unless it appeared, that the said money was actually applied to public use, or actually returned by the said Preston to the treasury during his said last term of office; and by him again eloigned and withdrawn from the treasury, and to his own use converted, during his last term of office aforesaid. And the court was further of opinion, as to the amount of the said several sums of $4,488,08, $39,000, $5,431,57, and $510, that it was not the right of the said Jerman Baker to apply the said sum of $250,197,77, [so as aforesaid turned over by the said Preston, on his said resignation, to the said Baker as his successor,] to the extinguishment of the said debt due by the said Preston to the commonwealth, on account of the several sums so withdrawn from the treasury, and applied to his own use previous to the commencement of his said last term of office, in the manner herein before stated and explained; because the said sum of $250,197,77 was in fact the commonwealth's own money, and not a payment of so much by the said Preston to the said Baker, his successor. And the court instructed the jury accordingly, and overruled the said motion for an instruction to the jury, made by the said Baker's counsel. To all which opinions of the court, herein above stated, the said Baker by his counsel excepted, and prayed the court to sign and seal this his Bill of Exceptions; which is done accordingly."

The jury found for the plaintiff, on the writ of inquiry awarded against John Preston, and assessed the damages at one cent: and as to the issues joined between
248 the *plaintiff and the other defendants [the sureties,] there was a verdict for the defendants. The judgment as to John Preston was, that the plaintiff take nothing non obstante veredicto; and that the plaintiff take nothing by his motion against the other defendants, but that they go hence without day.

The appeal was from this judgment, and now the cause was opened by

Nicholas for the appellant.

The 2d plea ought not to have been admitted by the general court, because it was a repetition of the matter of the first plea in another form. The first was a general plea of conditions performed; and the condition of the bond was, that John Preston should "faithfully account for all monies and other things which should come to his hands in virtue of his office, &c." The 2d plea avers, that only a given sum came to the hands of Preston in virtue of his office, and that he had faithfully accounted for it; and had performed all other articles, &c. It is true the statute allows defendants, to plead as many several matters as they may think necessary for their defence. (e) But these are not several matters, they are the same matter. And it has never been held under the statute, that a defendant shall be allowed to plead specially, a matter put in issue by the plea of the general issue.

2d. Should the certified copy of the deed have been admitted in evidence?

It is objected to this deed that it is a copy; and the reason for disallowing copies generally is, that offering them in evidence raises a presumption, that there is something in the original unfavorable to the party offering the copy. But even a copy is evidence when there is no fair presumption from the circumstances, that
249 there is *any better evidence of the facts to be proved. [For this he cited Phil. Evid. (f)] It has moreover long been the usage of the country, to admit certified

(e) 1 Rev. 510.
(f) 167.

office copies of deeds as equivalent to the original.

We proved that the original deed was delivered to Francis Preston, a defendant, and notice was given him to produce it. The late law requiring conveyances of lands, to be recorded in each county in which any part of the lands lie, has made it difficult for parties to know, where to apply for the original; we traced the deed to the possession of F. Preston, a party to the cause; and notice to him to produce it, should let in the secondary proof, even if the copy was inadmissible as primary evidence, which he contended it was. For it is said, one cannot plead non est factum to an enrolled deed. (g) And in the case of Whitacre v. M'Ilhaney, (h) this court held, that a copy of a copy was inadmissible; strongly implying, that a copy of an original was good evidence.

This deed was very important evidence, because it was made to indemnify against loss, the defendants to this motion; and recited, that a default of the treasurer had recently happened, which recital stops the Treasurer from denying either the fact of the default, or the date at which it happened. (i)

If it be said the sureties are no parties to this deed; I answer, that it is made, for their benefit, and to a considerable extent has been carried into effect to their exoneration. But if they were not parties, they are at least privies, and bound by the deed as if they had executed it: and if neither parties nor privies, the admissions of Preston are binding on his sureties. The deed then should have been admitted in evidence, and the purpose for which it was to have been used being
250 important to the appellant, *the judgment of the court rejecting the deed, should be reversed.

The principal questions still remain to be discussed, namely, whether any parol evidence should be received to falsify the treasury books; and whether the manner of keeping those books did not amount to an admission by the Treasurer, that he held the sum called for by the books in his official character; and was an election to hold the sum previously due in his official character, as Treasurer for the year 1819.

It is admitted on all sides, that the books of the treasury for several years shewed the balances claimed ought to have been in the hands of the Treasurer; the annual reports of the Treasurer founded on the books reiterated the same assertion. If the Treasurer be now permitted to contradict the books, and shew that for whole years they were altogether false, and fraudulently kept, there is no security for the safe keeping of the finances of the country.

Public books of every description are of very high authority. Entries in the books of corporations, banking, and turnpike companies, are received as of the greatest weight; and public documents like these, are conclusive of the facts contained in them. (k) That it was the intention of the legislature that these books should preclude all inquiry aliunde as to the transactions in the treasury, is manifest from the particular provisions of the act organizing the financial department of the government. (l) By a statute of the British parliament, commissioners are appointed for stating debts due between officers of the army, &c., and it has been decided, that the acts of the commissioners are conclusive upon the parties; and no evidence can be received to contradict their certificate. (m) Here
251 the counsel cited the case *of the Commonwealth v. Baynton (n) as applicable to the present.

Preston then cannot deny, that he held the balances which from the books it appeared ought to have been on hand; and if he cannot, neither can his sureties who are bound by all his acts, and concluded by whatever estops him. Even in criminal cases, the admission of one person often binds another; (o) and in civil proceedings the cases in which the admissions of one party bind another are numerous. (p) These defendants had or ought to have had from their principal, information of the actual state of the treasury when they executed the bond; and it is too late now to object the want of such information.

The misapplication of the $146,000 in 1818, relied on by the defendants to shew the default occurred before they signed the bond, cannot help them; for though Preston deposited this sum in bank to his individual credit, it was thoughout part of the public treasure; the manner of the deposit could not divest the Commonwealth of its title to the property. Besides, it no where appears when this sum so deposited was exhausted; it may have been in fact applied by Preston to his individual purposes in 1819, and if so, it was a default in that year, and the case is made out against the defendants even on their own principles. His admission by the books, and the report that the balance claimed was on hand in January 1819, is proof that this sum was not in fact diverted from the public treasure in 1818. Though this sum was deposited to his individual credit, he may have applied it to public uses, and if he did, it must be considered as public money throughout; the place where he kept
252 it, and the mode of *the deposit cannot alter the character in which he held it. (q)

The same objections apply to the evidence adduced to shew, that there had been constant defaults to a greater amount than the sum claimed, for several previous years.

Treasurer Baker had certainly a right to apply the sum paid over by Preston, to the extinguishment of the debt due by Preston's default, whenever it happened, and thus leave the deficiency to be paid at the time of Preston's resignation. If it be said that the money belonged to the Commonwealth and not to Preston; I reply, that Preston

(g) 3 Com. Dig. 269 "Estoppel A."
(h) 4 Munf. 310.
(i) Com. Dig. 270, A. 2; Shelly v. Wright, Willes, 9.
(k) Phil. Evid. 302; Peake's Evid. 87, 91.

(l) 2 Rev. c. 174, § 12, 14, 15.
(m) Moody v. Thruston, 1 Stran. 481.
(n) 4 Dall. 282.
(o) 1 Chit. Crim. Law 571; 5 Esp. Rep. 125.
(p) 1 Esp. Rep. 141; 2 Esp. N. P. 518; 2 Doug. 651; Peake 17, 72-8.
(q) 13 Mass. Rep. 288.

shows his intention that the money shall be so applied by his deed.

Stanard for the appellees,

Considered the point of the admission of the second plea as renounced by the counsel who had preceded him; he having offered neither argument nor authority against its propriety. It is the common case of a brief plea stating the general defence, with another plea setting forth the matter of defence specifically. It will be observed too, that the pleas were not addressed to the favor of the court; it was the first time the parties had an opportunity to plead; they appeared promptly, and offered without delay these matters in their defence. Had there been any thing in either plea unusual or inadmissible, the Commonwealth should have demurred; it would have been without precedent to have rejected a plea in itself proper, in this early stage of the proceeding, on a mere motion. But these pleas would have been proper, and should have been received by the court, whenever, and however offered. The court will never reject a plea on motion, unless it be an insufficient plea, and addressed to its favor; or the plea itself be unnecessarily
253 prolix. As to *this last objection, it surely will not be made to the present plea, after the case mentioned in Chitty's Pleadings, of a declaration containing 480 counts, which was objected to for prolixity, and the objection was overruled by the court

2d. The copy of the deed could have been admitted only on the ground of its being receivable as primary evidence; or as secondary evidence, after notice to produce the original. By notice, is always understood, reasonable notice; and if the deed be in the hands of a third person, its production can be coerced in no other manner than by a subpœna duces tecum. Even if this deed had been in F. Preston's possession, it must have been at his house in Washington county, for he proves he had it not with him: and the reasonableness of notice to produce a paper three hundred miles distant, after the Jury is sworn, is not to be debated. Indeed the offer of counsel to continue the cause, to give time for the production of the deed, is a concession, that there is not sufficient time to produce it on the trial. They ask for time to prepare their case, but surely this concession that they are not prepared, cannot stand in the place of preparation; their acknowledgment that they have given an insufficient notice, cannot cure the defect. Allow counsel this latitude, and they will dispense with the necessity of notice in every case. They have only to give notice after the Jury is sworn, and insist that the party shall produce the paper, or go to trial on the copy.

But the counsel failed in the first step toward making this notice of any avail; they did not prove that F. Preston had possession of the deed, and he proves explicitly that he had it not. The notice therefore, was wholly insufficient to let in the copy as secondary evidence.

Was it allowable as equivalent to the original?

This mode of authenticating deeds does not make the copy evidence of the contents of the deed. The counsel who has opened the case, has urged
254 no reason for such an *opinion, nor has he shewn it by authority. He has relied on the usage of the country, but no practice short of a uniform and unquestioned course of adjudications, can alter the laws; and there is no such usage on this subject. In the case of Tompkies v. Downman (r) the practice of fining Sheriff's toties quoties for failing to return executions, had been uniformly acquiesced in for thirty years; and this court, so far from respecting the usage, made its very universality the ground for the interference of a court of equity, and decided against the legality of the practice. The case of the Commonwealth v. Fairfax, (s) was also decided against the practice of the country, which was insisted on in argument. And the only authority which has been referred to, (t) went upon the ground of the deed being ancient, and accompanied by possession; a principle which was never controverted. Every case decided in England prior to the statute of 10th Anne, which expressly makes enrolled copies evidence, was either on notice, or the deed was ancient and accompanied by possession.

There is a large class of cases very liable to produce confusion on this subject, in which it has been held, that the enrolment may be received to prove the execution of the deed in place of the subscribing witnesses; but in none of them has the enrolled copy been held to prove the contents of the deed, except under the statute. One cannot plead non est factum to an enrolled bond, because the enrolment proves the execution; but that will not let in the copy to prove the contents: the original must be produced, and if this were a bond, there would be no doubt that the copy would be rejected: and our statute has no provision for receiving the copy in evidence, it stands then on the same ground with a bond.
255 *The leading case in the English books on the subject, is Smartle v. Williams. (u) That case is erroneously reported, as is shewn by Judge Buller; (v) and in fact it was decided altogether on the antiquity of the deed. (w) For the memorial of a recent deed is clearly inadmissible testimony. (x)

The only purpose of an enrolment at common law, was to dispense with proof of the execution. And so impossible was it for a party to prove the contents of a deed by an enrolled copy, that if one lost the original, all right to the subject was gone, for he could not declare on a lost deed, and aver that fact to excuse the profert. (y) And the passages referred to, in Philips' Evidence, prove nothing more, than that the enrolment dispenses with proof of the execution by the subscribing witnesses.

But however authenticated, this deed cannot be evidence against these defendants, because they are no parties to it; the

(r) 6 Munf. 557.
(s) 4 Hen. & Munf. 208.
(t) Rowletts v. Daniel, 4 Munf. 473.
(u) Salk. 280; 3 Lev. 287; Comber. 247.
(v) Bull. N. P. 256.
(w) 14 East. 231.
(x) 2 Esp. Rep. 549.
(y) Viner "Inrolment" pl. 3.

Commonwealth is the third party; it is for her benefit, and surely she cannot make evidence to operate to the prejudice of the sureties. All privity, all connection between Preston and his sureties ceased, on the expiration of the bond, which, and which alone had united them. This court has repeatedly decided, that the declarations and acknowledgments of the partner of a mercantile firm cannot bind other partners, when made after the partnership is dissolved. (z)

The deed if admitted could have had no possible effect on the Jury. For the bill of exceptions admits the fact of the default in the treasurer, and the date at which it happened can only be vaguely inferred from the deed; *while the very time at which it took place, is expressly admitted to have been proved by the bill of exceptions. And it has often been determined in this court, that a judgment should not be reversed, for an error which could not have altered the result of the case. (a)

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3d. It has been said, that the money in the treasury at the time of Treasurer Baker's election passed to him in virtue of his office; and he had a right to apply it as a payment by John Preston, to the extinguishment of any sums due by Preston to the Commonwealth. But the sureties were bound only by the wrongful diversion of the public money. It cannot be pretended, that the sums fairly delivered over to his successor were wrongfully diverted. This was not Preston's money but that of the Commonwealth; how then, could Baker apply this particular money to the extinguishment of Preston's debt more than any other monies of the Commonwealth? If it was Preston's money, it would have been assets in the hands of his executor, and what would be thought of an execution levied on money in the public fisc, to pay his private debt?

If this be the law, the Commonwealth has an easy method of making good the defaults of all her officers: only appoint them treasurers, or to some office where large sums of money are received; wait until great public payments have been made, and then seize the treasure, to extinguish past delinquencies, and proceed against the sureties, for all the sums thus forcibly and treacherously laid hold of.

4th. I come now to the last question, and the only one of real importance in the case, the conclusiveness of the treasury books. In discussing it, I shall advert to the plea alleging that the first bond was the only one authorized by law to be taken, only for the purpose, of drawing *from the other side consequences and principles which necessarily follow, from denying that the first bond is the only one which is binding. To prove their case in this part of the argument, they are compelled to maintain, that every bond of the Treasurer is limited in its operation to the year in which it is given: that the liability of the sureties is the same, as if a different man, was elected Treasurer and different persons became sureties every year. We must too, consider this case as if a sufficient bond, with ample security had been taken every year, for the omission of the commonwealth to take bonds in other years, cannot operate to the disadvantage of these defendants. Then the question on which set of sureties the loss shall fall, is one between the sureties of different years only; to the commonwealth it is immaterial, for she is supposed to be amply secured against the loss, happen when it may; to Preston it is of no importance, for he is equally liable whenever the default occurred.

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The issues between the parties were, what was the amount of money actually in the treasury when the bond of January 1819 was executed; what sums came to Preston's hands as Treasurer between that date, and his resignation; and what was disbursed in public expenditures. And the objection in the court below, was to the evidence by which the defendants sustained their defence. This was admitted to be the matter in issue, while it was held that the defendants were precluded from giving any evidence on the subject; precluded, because the treasury books are conclusive to shew what sum was in fact in the treasury; and being conclusive, no evidence shall be received to contradict them. Agreed; let the books be conclusive to shew what money was in fact in the treasury; then if they are conclusive in January 1819, they must be equally so in January 1820, and if they be, there is no default in the Treasurer to this day; his books *shewed the money was in the treasury at the day of his resignation, as clearly as they could shew it, when he and the sureties executed the bond. They must be taken as conclusive throughout or not at all; always, or never. Counsel on the other side make them true or false to suit their convenience.

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I say that before a Jury there is no evidence in itself necessarily conclusive; there is no evidence known to the law which you may not contradict, except in the case of estoppel: In every such case, the estoppel must be pleaded, even if it be matter of record. Even a judgment between the same parties on the matter in controversy must be pleaded by way of estoppel; and if they go to trial on the general issue, the judgment is not conclusive, but only evidence to be weighed by the jury, and they may find against the former verdict and judgment. (b) In the case before us, the very matter in issue was, were the accounts kept by the Treasurer correct? to say that these defendants cannot prove them to be incorrect, is directly to deny them the right of being heard in their defence: they have a right to plead matter which discharges them, but no right to prove it.

The bond is prospective in its terms, and its obligation, as understood by all parties at the time. Yet the construction on the other side, makes one bond extinguish all the preceding bonds; and imposes on sureties who bound themselves to make good any deficiency happening in the year dur-

(z) Rootes v. Wellford & Co. 4 Munf. 215; Shelton v. Cocke, Crawford & Co. 3 Munf. 191.

(a) Preston v. Harvie, 2 H. and M. 55; Faulcon v. Harris, 2 H. and M. 550.

(b) Vooght v. Winch, 2 Barne. & Ald. 662; Chew v. Moffet, 6 Munf. 120.

ing which they were sureties, the burthen of all deficiencies past, present, and to come, until another bond should be executed. Suppose this issue had been made up between the sureties of 1818 and 1819, could the sureties of 1818 rely on the subsequent bond as an extinguishment, and thus discharge themselves from a *deficiency admitted to have happened in 1818? or suppose the commonwealth had made this motion on the bond of 1818, could the sureties have urged in their defence, that a bond was taken for the subsequent year, and therefore they were discharged? Yet the sureties of both years cannot be liable for the same default, and if a motion could be sustained against the sureties in the year in which the wrong was done, it is clear that it could not against those of a subsequent year, who undertook to indemnify against future losses only. If these defendants be liable at all, they were on the instant they executed the bond, before the ink with which they signed it was dry; before the key of the treasury was delivered to John Preston, the commonwealth might have recovered from these defendants the whole amount of his past peculation; thousands of dollars which he had plundered before they ever saw him, would thus be made to come to his hands in virtue of his office, after their execution of this fatal bond. Little has been offered by way of argument to support this doctrine at once novel, and repugnant to every sense of justice, and every principle of reason. And as to authority, after a winter's search through the volumes of law without number, only two cases have been mentioned as bearing at all upon the question. And truly one would think that those two cases had been cited rather in anticipation of their being used as authorities for us, than from any expectation they can avail the counsel on the other side. In the case of Ingraham v. Maine Bank, (c) Chief Justice Parker expressly limits the right of the bank to recover against the sureties, to misconduct happening after the execution of the bond, a principal which we have never controverted. In that case, the money was misapplied by the Cashier for whose good conduct the bond was conditioned, after the execution of the bond, and before the removal of the Cashier: The case might *be an authority on a motion against the sureties of 1818, and so far is a case, against the counsel who has used it on this motion. The commonwealth v. Baynton, (d) was the other case referred to by the counsel who has opened the cause: and the court expressly directed the jury, to confine the responsibility of the sureties to the deficit occurring during the year ensuing the date of the bond, a case directly in point against every position urged on the other side

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Robertson, Attorney General, for the appellant.

The admission of the 2d plea was contrary to the usual practice, for whatever could have been proved under the second, would have been equally available under the first plea. Pleading the same matter over, tends to prolixity and confusion.

2d. The certified copy of the deed recorded on the acknowledgment of the party, was admissible evidence. This was the law of England prior to the statute of Anne. (e) Lord Holt says in the case referred to in Comberback, that the enrolment being on the acknowledgment of the party cannot be denied. The statute of Anne was enacted, to obviate a technical objection in pleading. Before its passage, whenever a deed was used to defeat an estate set up, the deed was pleaded with a profert, (f) and the original was necessary. The statute dispensed with the profert of the original, and allowed the copy in its stead.

Generally, where an officer is charged by law with the safe keeping of public papers and documents, copies certified by him are evidence: thus in cases of the poll at an election. (g) In Rowletts v. Daniel, already cited, a copy was admitted without proving the original lost. *There are many analogous cases in support of the principle. (h)

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This copy should have been admitted on the circumstances under which it was offered. It is a sworn copy, recorded on the acknowledgment of the grantor, and the original was traced to F. Preston, who acted under it, who had notice to produce it, who was offered time for its production, and who would give no explicit answer as to what course he would pursue. His conduct was calculated to ensnare his adversary, and courts of justice will not sanction such proceedings: it waived the necessity of notice. Then he could not say whether the original was in existence, and the copy was admissible on the ground that the original was lost.

It is urged that the deed could be of no avail because executed after the privity between Preston and his sureties ceased, and the cases of acknowledgments by partners after the connection is dissolved have been cited. The principle even as to partners has been ruled differently in Massachusetts. (i)

It is also said that the deed if admitted could not have altered the result of the case. The argument requires that the court should weigh the effect of evidence which is the province of the jury.

3d. Treasurer Baker had a right to apply the money paid over by Preston to the extinguishment of any previous debt due by Preston. I admit that the money in the treasury vaults passed to Baker in virtue of his office, but that in the banks was Preston's money; it would have passed to his personal representatives on his death. If not, the commonwealth might follow the specific money into whatever hands it might come. On general principles, Preston and these sureties must pay *up the deficiency as it stood when he was called to account and failed. (k) And Pres-

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(c) 13 Mass. Rep. 208.

(d) 4 Dall. 282.

(e) Viner, "Inrolment" B. Pl. 4, 1 Vern. 228; Viner, "Evidence," A. b. 43, pl. 3, 4; Phil. Ev. 352; Gilb. 86.

(f) Co. Lit. B. 3, § 365.

(g) 1 Stran. 307.

(h) 1 Call. 117; 2 Dall. 372; 1 Taunt. 104.

(i) 1 Gall. 631. See also, 1 Taunt. 104.

(k) The King v. Taylor, 2 Leach, 974; 1 Cranch, 117.

ton having taken a receipt from his successor for the money on hand, without directing the manner of applying it, Baker may apply it to the discharge of any debt due by Preston to the commonwealth.

4th. Preston and his sureties cannot falsify the books, and annual reports of the treasurer; they are conclusive to shew that when made, the sums they allege to be on hand, are so in fact. We are told that there is no evidence in itself conclusive of any thing; that there is no estoppel in law, without its being pleaded. I had supposed the contrary: one cannot allege his own turpitude; a tenant cannot deny his lessor's title; one cohabiting with a woman in an action for necessaries furnished her, cannot deny that she is his wife. The cases cited to prove that there can be no estoppel without being pleaded, shew only, that one may waive an estoppel, as he may any other advantage. Shelton v. Barbour, (l) and Pegram v. Isabell, (m) were cases in which the party was held to be stopped from denying a particular fact, because particular evidence offered of it, was conclusive, and yet the estoppel was not pleaded. How could the treasury books be pleaded as an estoppel? it was impossible.

That our argument would make each bond extinguish all given in the preceding years, is not a fair deduction from our principle; for we hold the proof shews the default happened in the year the bond was executed on which this motion was made. And the case I have cited from each proves, that in law the default is considered to have happened when the party fails to account. And whenever the default happened, Preston when he rendered his accounts in January 1819 and executed this
263 *bond, made his election to abide by the books and his report; and his sureties are equally bound with him to stand to the election. He cannot now allege that they are false, and that he practised a fraud; if he cannot, neither can his sureties: no evidence is admissible as to one, which would not be for the other. That his reports, and books conclude him, the case of Moody v. Thruston, (n) unequivocally proves: there it was not allowed to contradict the certificate of the army commissioners.

Leigh, for the appellees.

Before I enter on the consideration of the admissibilty of the office copy of the deed, I beg to recall to the attention of the court, the circumstances under which it was offered. It was a deed executed by John Preston after the expiration of his office: it does not recite when the default in the treasurer occurred, but only that it was apprehended, that loss might accrue to the sureties by some default recently incurred: the commonwealth itself, and not the sureties, is the immediate cestui que trust; it is executed by Preston and wife only, not by the sureties; recorded on acknowledgment, before Justices, by Preston and wife; never as to the sureties recorded any where, and not one of them is proved ever to have claimed any benefit under it. Under these circumstances I say, that the original itself would have been no evidence against these defendants, on the issue joined. For all privity had ceased between Preston and his sureties; and Rootes v. Wellford, (o) and Shelton v. Cocke, Crawford & Co. (p) prove, that the privity may cease even between principals; and that when once dissolved, no act of one party can be of any force as to the other. I shall not stop to in-
264 quire whether this principle *so often recognised and reiterated by this court, be contradicted by the cases referred to by the Attorney General in Gallison and Taunton. It is not in the power of the courts whose decisions are relied on, to reverse principles so well established, and on the best reasons by this court.

This deed contains no recital which could possibly prejudice the sureties, and if it had, it could not be used against them, for the recital in a deed can be used only against the party makig it. (q) It is the sealing and delivery which constitute the deed, and it was not in the power of Preston or the commonweath, to make these defendants parties or privies to any transactions between them, without their concurrence. If Preston had confessed a judgment for the whole amount claimed, will any one pretend his sureties would have been bound by his confession of judgment? No, they are bound by the bond alone, and for acts within the penalty of the bond, done while its condition was in force.

We are reminded that the trustees acted under this deed. Be it so; they were not trustees of these defendants, but of Preston; and if he could not prejudice his sureties by acts done after the privity ceased, neither can his trustees or agents. The money which it is said one of the defendants has received from the trust fund, does not appear on this record to have been so received, nor that he knew from whence it came; and if all this had appeared, a surety who got the money would have been morally justifiable, and legally entitled to hold it: a chancellor would have protected his possession. The deed shews, that the sureties did not know in what year the default happened; alarmed at the unexpected detection of the dishonesty of their principal, they endeavoured to make themselves safe, by securing to the commonwealth the payment of the deficiency whenever it
265 *might have happened; and this precaution of common prudence is converted into evidence of their knowledge of the time when the peculation was committed. They have attempted to protect themselves from ruin, and that very act shall destroy them.

If the original would have been admissible evidence, it then becomes a question, whether this copy was. The general rule is admitted to be, that the best evidence of the fact to be proved, shall alone be received. (r) And the copy is the best, because the original was lost, says the attorney. What proof is there of this fact? F. Preston was not entitled to the custody of

(l) 2 Wash. 64.
(m) 2 H. & M. 193.
(n) 1 Stran. 481.

(o) 4 Munf. 215.
(p) 3 Munf. 191.
(q) Burleigh v. Stibbs, 5 Term Rep. 465
(r) Peake, 97.

this paper; he had received it but for a moment, with the very purpose of delivering it to another; he had not possession of it, when the notice was given, he had no reason to believe it was lost, he does not assert it, but the contrary; and yet the copy is to be received because the original no longer existed, or could not be procured. Before a deed is presumed to be lost, some inquiry must be made after it, of those entitled to the possession. In this case, the clerks of the counties where the land lay, were the proper persons to whom to apply; and a subpœna duces tecum to whoever of them had it, would have produced it. Suppose however, F. Preston had possession of the deed, the notice to produce it must be reasonable. Was notice after the jury was sworn, requiring the production of a paper three hundred miles off reasonable? The counsel however offered to continue the cause, and wait for its production; offered to whom? to the opposite counsel. If they were unprepared in their case, they should have asked a continuance as matter of right and justice; they cannot complain in this court, that either the parties or the counsel below, would not accept a proposition disadvantageous to them. They could not require of F. Preston the concession of any legal right.

266 *I know that in England, the inspeximus of the clerk makes the copy of equal validity, even in evidence with the original. But it is by the express provision of the statute of Anne. The cases to which we have been referred in Gilbert(s) and Coke,(t) are only illustrations of the different kinds of inrolment, they do not prove that the copy of an inrolled deed was admissible evidence of its contents. And those in Styles,(u) and Keble were of ancient deeds, which is altogether on a different principle from that now under discussion. The case of Smartle v. Williams so much relied on, was also an ancient deed; one recorded on the acknowledgment of the grantor, which could not therefore be altered as this might, between the acknowledgment and inrolment; and Judge Buller doubts the authority of that case, as will be seen by the passage in his Nisi Prius already referred to. The deed in question, was acknowledged before justices in the country, and may have been altered after it was acknowledged, and before it was recorded; the clerk therefore cannot certify that it is a true copy of the deed, as it was acknowledged. Suppose on the production of the original, all the material part was interlined, or interpolated, in another hand, and it could be proved, that it was added after the certificate of acknowledgment; could it be pretended that the certified copy would prove the execution of a deed, which is expressly shewn never to have been executed? What is as good evidence as another matter, is a subject of sound reason and discretion; and it is clear, that the original is better evidence than the certified copy, because it shews any alteration made upon its face.

I have said Smartle v. Williams, was the case of an ancient deed; the case as reported in Levinz(v) shews it was 35 or 6 years old, and Justice Bayley mentions,

267 *that circumstance in the case of Tinkler v. Walpole.(w) That ancient deeds are admitted on a wholly different principle is proved by the cases cited in Bacon's abridgment.(x) The case in Styles was decided on this principle: so was that of Rowletts v. Daniel in this court; and Lee v. Tapscott(y) long before. But taking the law to be as laid down by Gilbert, the copy is still inadmissible in Virginia, because the deed does not derive its efficacy from the inrolment. In England by the statute of Hen. VIII., the estate does not pass without inrolment; and Gilbert says, "where the deed needs inrolment &c." By our laws though deeds not recorded, are void as to creditors and subsequent purchasers without notice, they are valid between the parties and pass the whole estate on delivery, whether recorded or not. Gilbert says too, that an officer being appointed to take care of deeds, to preserve and authenticate them, his certified copies are admissible evidence. Our law gives no power to the clerk to certify copies, nor has it attached any weight to his certificate. The word "record" in our act, means no more than that the clerk shall register the deed; it does not when registered make it matter of record, in the sense in which records are spoken of as conclusive. The case from Vernon mentioned by the Attorney General, as cited in Viner, was of a lost deed, which has no bearing on this case. The act of Anne under which copies are admitted in England, has never been incorporated into our code. Nor have we any analogous acts, but those allowing copies of patents certified by the Register, and of wills certified by the clerks (who cannot deliver out the original,) to be given in evidence, and to be used for every purpose as of equal validity with the original.

268 *The practice of the country which has been urged for admitting the copy, is nothing but a rule of convenience adopted by counsel, the dispute in almost every case, not being as to the genuineness of the deed, but its legal effect. The practice wherever the question has been made within my knowledge, has been to reject the copy. But if it was otherwise, one of the important duties of this court, is to correct and reform illegal and erroneous practices. Tompkies v. Downman was a decision made for the very purpose of correcting a universal error in practice. And practice can no more abrogate the laws of evidence than any other part of our jurisprudence.

This deed is certified by but one clerk, and to make the case analogous to the doctrine of Gilbert as expounded on the other side, the copy is not admissible until the original has been recorded by the clerk of each county in which any portion of the land lies.

The argument on the propriety of admitting the 2d plea is not given, because the point seemed virtually abandoned by

(s) Gilb. ev. 16.
(t) 5 Coke, Rep. 54.
(u) Styles, 445; Keble, 117.
(v) 387.
(w) 14 East. 230; 2 Taunt. 5.
(x) 2 Bac. abr. 646; "Evidence," F.
(y) 2 Wash. 276.

the opposite counsel, as the 3d plea was surrendered by the appellee's counsel, who cited Stuart v. Lee (z) as the precedent on which it was framed.

2d. I come now to the principal point on the merits of the cause: are the books and reports of the late Treasurer conclusive, to shew the default occurred in 1819? The decision of this question, will affect only the $83,000 claimed to be due on the books, and not the other sums which are charged to Preston and his sureties on other evidence. The case stated shews, that there was on every day for many months preceding the execution of this bond, a greater deficiency in the treasury, than the whole amount claimed on this motion.

First, are Preston's books prior to the execution of this bond, conclusive against these defendants to prove any thing whatever? The books do not profess to
269 shew what *was in the treasury, or what ought to have been in it, at the time of the execution of the bond, but on the 1st day of October preceding it. The books then could not shew any embezzlement made between October 1818, and Jan. 1819. The doctrine maintained on the other side might establish a privity between Preston and these sureties before they ever saw or heard of him, and had he been many years in office, even before they were born.

The reports of the committees of the legislature are known by the rules of legislative bodies never to be concurred in by either house. And if they were, there is no principle of evidence on which they could be held conclusive. It is said they are part of the res gestæ; but between whom? not between these defendants and any body. In all the passages referred to in Philips, and Gilbert, on the conclusiveness of public documents, there is but one case in which any of them are held to be conclusive of any thing. That is the registry of a ship, which by Act of Parliament, as in this country by Act of Congress, are conclusive of want of title, in all persons not named in the register. Even there, it is not conclusive of title. The resolution of a legislative body, is conclusive when properly authenticated, that such a resolution has passed; but it is not conclusive of any fact asserted in it. If it were conclusive, the resolution in this case would prove beyond contradiction, that there was no default in Preston, and he would be discharged. It is not conclusive as to Preston himself, for it is not a record, neither is it under seal. It is only parol evidence, and there is no parol evidence which may not be contradicted. (a)

Admit for the sake of argument, that the books and reports are conclusive: they can be so only of what they assert, and not of that which they do not assert. They acknowledge then, that there ought to
270 have been a given *balance in the hands of the Treasurer when the bond was executed. They no where profess that the balance was in fact in his hands. Against Preston, they might be conclusive of the fact to the Jury; but that would be for the Jury to decide.

The question is not between Baker and Preston, but Preston's sureties, who stand on quite different ground from him: he has made default, but his failure to defend himself, cannot prejudice them. Whether Preston knew his default or not, cannot injure the defendants. He had every motive of interest, of honour, and of shame, to conceal the fact, of the embezzlement. Whatever efforts he might make to do so, could not change the liabilities of the sureties, nor alter the date at which the default actually occurred.

We are told, that the law has prescribed the method of keeping these books, and that we ought not to be allowed to falsify them. We do not falsify them; they do not purport to shew the money actually in the treasury, but only the balance which ought to have been there. We wish to prove that the balance which ought to have been there, in fact was not. The books then may be true, and our evidence true also: there is then no falsification. The mode of keeping the books prescribed by the act, renders it impossible that the embezzlement should appear on their face. The Treasurer can neither enter a debit, nor a credit, without the auditor's warrant, or a special act of assembly.

I repeat, that there is no evidence conclusive of any thing, unless it be pleaded as an estoppel: and estoppels are odious in law. Yes, we are told that there are estoppel in pais. True. But they must be pleaded; and if they be offered as evidence without being pleaded as estoppels, not only may they be contradicted, but Juries may find against them. But if Preston had entered on these books "so much money em-
271 bezzled in 1819" either *the Commonwealth, or he, or his sureties might shew it was an untrue entry, on this issue. For an estoppel must be pleaded, and must conclude with demanding judgment whether the party shall be permitted to deny the matter pleaded. (b) The cases of cohabitation, &c., mentioned by the Attorney General, prove nothing more than that when a party has fully made out his case in a court of justice, the other side shall not deny the law applicable to the facts. We learn from Lord Coke, that every estoppel must be reciprocal, (c) and here it is not pretended that the Commonwealth is estopped from contradicting these books.

The case principally relied on by the other side, to prove the conclusiveness of the treasury books, is Moody v. Thruston. (d) That was a settlement of claims by the army commissioners appointed under a statute for the purpose of adjusting such disputes, and stands in every respect, on the same foundation with the judgment of a court; as the certificate of our commissioners on preemption rights, does under our land law. And this court has held such certificate to be conclusive even on infants, from the provisions of the statute. But are Preston's entries the records of a court?

The law of evidence consists of a number of rules founded in reason, and designed to ascertain the truth. This is the first

(z) 3 Call 422.
(a) Peake 24; Note v. Phil. 74, a 80.
(b) 1 Saund. 325. n 4.
(c) Co. Lit. 352, b.
(d) 1 Sran. 481.

attempt that ever was made, to set up title to property on the single ground of a rule of evidence, and it is in effect done, by the Commonwealth: for the Commonwealth admits, these sureties are not bound for this money by the letter or tenor of the bond, but in virtue of the nature of these books as matter of evidence, taken in conjunction with the bond. That Preston's manner of keeping these books was an election by him to hold the money which had been
272 misapplied, in *his character of Treasurer. But an election to hold, what was already gone, and what it was impossible he could hold, is to my mind unintelligible. The consequences of this doctrine are too preposterous to be law. If by intendment of law the money shall be held to be in fact in the treasury when the bond was executed, when it certainly is not there, then these sureties were bound for all past transgressions on the moment of signing the bond, before Preston had done a single act in virtue of his office. The express obligation of the bond is altered and inverted, and "monies which shall come to his hands" means, monies which came to his hands and have been passed away years ago.

The idea that the embezzlement is complete only when the Treasurer fails to account, converts the Treasurer of Virginia into a farmer general of the revenue, and exposes the finances of the country to the casualties of individual solvency. The definition of embezzlement is derived from the Roman law,(e) and includes every case of a fraudulent or illegal withdrawal of the public treasure, by the officer to whose custody it is confided. Our statute of 1819 making it a felony, has defined it in the same manner. If the banks had totally failed, can it be pretended that the loss would have fallen on Preston? when he is expressly directed by law to deposit the public treasure in the banks.

The doctrine of application is clearly laid down in Hill v. Southerland's Executor,(f) and is too well settled to need argument. The plaintiff cannot make the application at the trial, so as to affect the liability of the several sureties.

273 *Wickham for the appellees.

The first reason assigned for reversing the judgment is, that the 2d plea is the same with the first. Grant for the sake of the argument, that they are identical; this court will not reverse a judgment because the same plea is twice copied into the record. It may have been error to admit it, but it was an error which prejudiced no one, and this court will not take notice of it.

2. The office copy of the deed should have been received in evidence, because it is the common usage of the country, we are told. I do not know who can better judge of the usages of our courts of justice, than the Judges of the general court; they have decided against this pretended usage. We all know how many usages are common in practice for the convenience of the profession, which are not in conformity to law. Gentlemen waive the law, but that by no means proves what the law is, for others who insist on their strict legal rights. It is every day's practice to allow Executors who have qualified in other states to sue and to recover judgment in Virginia, without producing their letters testamentary. Yet if any gentleman chose to call for them by oyer, they must be produced. Letters of Attorney are never called for, though they too may be demanded, and if demanded must be produced.

I repeat, that the original deed would not have been admissible on the issue joined. The general court very properly rejected the deed without giving reasons for the judgment; it may have been because it was a copy, or because it was not legal evidence from some other principle. All privity had ceased between Preston and his sureties, and the cases already cited shew, that no act done by him could prejudice them. The doctrine was very fully discussed in the case of Shelton v. Cocke, Crawford & Co.; was settled by this court on the soundest principles, and cannot now be disturbed.

This deed would not conclude John
274 Preston himself; every thing in *it pertinent to this issue is the recital, and Lord Coke(g) tells us "neither doth a recital conclude, because no direct affirmation." This court has decided, that a declaration reciting the fact, without a positive averment is vicious: and surely this recital in a deed to which the defendants are not parties, cannot conclude them.

It is said the defendants claim under this deed. It is shewn that F. Preston had once possession of the deed, and that B. Peyton had received part of the money raised by the sale of some of the property. Neither of these acts can affect the other defendants, who have not delegated a power either to John Preston or his suretes, to bind them. Nothing is evidence as to one of the defendants, which is not against them all. The judgment must be against all or none of the defendants. The original deed therefore could not have been admitted. I will not argue the point as to the copy, because it is a fortiori inadmissible, for the reasons given, and because the notice was wholly insufficient, to entitle the party to use it as secondary evidence.

In all the cases cited, to shew that a certified office copy is of equal validity with the original, the question was as to the title of the land, and the execution of the deed. This on the contrary is the mere recital of collateral matter, not necessary to the validity of the deed.

It is urged on the other side, that the evidence contained in the deed was of great moment. Any argument on the weight of evidence addressed to a court is irregular. To weigh evidence is the peculiar province of the jury, to the court it is coram non judice.

2d. The argument of the Commonwealth's counsel shews, that there is no treasury in

(e) Peculatus eos punit, qui publicam pecuniam furati fuerint. Sed siquidem ipsi Judices tempore administrationis publicas pecunias subtraxerint, &c. Inst. 4, tit. 18, § 9. See also 9 Cod. tit. 28.—Edition 1821.

(f) 1 Wash. 133.

(g) Co. Lit. 352 b, where the whole doctrine of Estoppel will be found.—Edition 1821.

Virginia; the treasurer may keep the public money where he pleases; he 275 *may lend it out; or speculate with it, without being guilty of a default. The act directing him peremptorily to deposit it in bank, is merely directory; and what is more, he is at liberty to disobey the direction. But this is not the law. The Treasurer must deposit the treasure in bank; and to appropriate any portion of it to his own use, is at once a conversion. It is a mistake in law to suppose the public treasure in bank would go to the Treasurer's executor, were he to die: it would pass to his successor in virtue of his office. 3d. The point most insisted on is, that we shall not be heard to contradict the treasury books, and annual reports. We only ask gentlemen to take the books as true or false. They may have them which they will, if they only stand to their election: we only pray that they may not be considered both true and false, according to the pleasure of the counsel. If they be false, surely we may be allowed to assert the truth in opposition to what is admitted to be false. If they be true, there is no default now; for they assert the money to have been in the treasury when Preston resigned his office, as positively as they had asserted it, at any prior time. But from the very nature of these books nothing can appear on their face, but legal credits, and charges; there is no entry on them, there can be none, of monies embezzled, or when, or how, or by whom converted.

Something is said of Preston's not being allowed to allege his own turpitude. This is a very vague and undefined doctrine, the application of which to the present case I do not precisely understand.* But I 276 am sure, *there is no principle of law which can authorise the Commonwealth to select on which of half a dozen sets of sureties this loss shall fall. It is clear, a recovery may be had on the bond in force when the default occurred. Once depart from that plain principle, and we are at sea; once leave the bond on which 277 the legal remedy is clear, *and we cannot tell on whom the loss may be fixed. But Preston proves that when he is charged with this default, he was innocent; and this is called alleging his turpitude.

These sureties were misled by the culpable supineness of the officers of government. Had the committees of the executive done their duty, this default could never have happened; had the committee of the legislature, as it ought to have done, insisted on a count, these sureties would never have executed this bond. Instead of doing this, the committee went aside from the ordinary path of its duty, to pay a compliment to the zeal and integrity of the Treasurer; and relying on the faith of government these sureties have been deceived, betrayed, and should the doctrine contended for by the Commonwealth be sustained, will be ruined.

Barbour concluded for the appellant.

The question of the admissibility of the deed has been argued both on the ground of its being primary, and secondary evidence. I shall also consider it in those two aspects.

1. The copy of a deed recorded on the acknowledgment of the grantor is admissible per se, against him and all claiming under him.(h) There was an enrolment at common law for safe keeping; which created an estoppel, and after it, the party could not plead non est factum: and the reasons which in ordinary cases require the production of the original, cease to exist in a case like this. In ordinary cases non est factum might be pleaded; and when pleaded, the subscribing witness is called to prove the execution, because it is supposed he knows more of the facts than any other person. But if non est factum could not be pleaded at common law to an inrolled 278 deed, *why should the office copy be inadmissible evidence? what purpose can the refusal serve, when the party himself cannot deny by a plea, that it is his deed? The inrolment then not only proves he made a deed; but that this is the very deed.

The other ground for refusing a copy in ordinary cases is, that the failure to offer the original implies, that there is a difference between the copy and the original, unfavorable to the party offering the copy. But is there any ground in this case for such a presumption? If the evidence of the officer could prove the original it produced, why not that the copy is true? This doctrine was established in the case of Smartle

*The words quoted by LORD MANSFIELD as from the civil law, in the case of Walton v. Shelly, 1 Term Rep. 300. "nemo allegans suam turpitudinem est audiendus," were frequently repeated in different stages of this cause: and there is no maxim of law which I have heard more often mentioned. They have been much insisted on by the English Judges in all the cases subsequent to Walton v. Shelly on the same subject; and are mainly relied on, by the courts both of Massachusetts, and New-York, in adopting the rule laid down in the case of Walton v. Shelly, rather than that of Jordaine v. Lashbrooke, 7 Term Rep. 601, by which the former decision has been overruled. The profession will be surprised to learn, after 35 years of universal acquiescence in the existence of the principle as a maxim of the Roman law, that there is no such rule in the whole Roman Code. It is true, that by the civil law, as by ours, a contract tainted with turpitude could not be asserted in a court of justice, "ex maleficio non oritur contractus;" this principle however, established nothing, as to the evidence on which such contract depended. The only rule of the civil law applicable to testimony, which has the least analogy to that cited by LORD MANSFIELD, will be found under the head "De Testibus," Dig. 22; tit. 5, l 2. "In testimoniis autem dignitas, fides, mores, gravitas, examinanda est: et ideo testes qui adversus fidem suam testationis vacillant, audiendi non sunt."

The words "audiendi non sunt," do not mean, that the witness shall not be heard; but that he shall not be regarded or credited; for the word "vacillant" implies that he is heard, and that all faith in his testimony is destroyed by the manner of his giving evidence, (vacillare a nonnullis dicitur qui hæsitat in dicendo testimonio. Not. 19; Gothof. Corp. I. C) The contradiction or hesitation, of a witness who says nothing, is a solecism in language.

This mistake of LORD MANSFIELD is the more remarkable, because twelve years before, in the case of Clarke v. Slee, Cowp. 199, he cited Bush v. Rawlins to prove, that one who had taken a bribe, was a competent witness in an action qui tam, to prove the bribery. And in the case then before the court, he held, that the witness (a clerk) was competent to prove, he had embezzled his employers' money, and had staked it on the chance of certain lottery tickets coming up prizes, contrary to the lottery act. Buller who was counsel said, "no one shall be admitted to prove his own turpitude," he cited no maxim or case however, and LORD MANSFIELD decided against his argument.—Note by the Reporter.

(h) 14 Viner 444, B. pl. 2; Com. Dig. "Evidence" B. 2; Jacobs L. D. "Inrolment."

v. Williams; (i) and the bargainor and those claiming under him were estopped. This case was adjudged before the statute of Anne; and the antiquity of the deed, now used to distinguish that case from this, was not relied on by the court, which proceeded on the ground of its being an inrolled deed. Peake(k) in laying down the law as to ancient deeds, observes that if the deed be erased or interlined, the ordinary evidence in such cases will be required. Plainly shewing, that the original itself is produced in such cases. Besides, you must learn even the antiquity by the copy, which presupposes the copy to be admissible. (The counsel on the other side said, "no, the antiquity appears from the date of the clerk's certificate.") It is urged that this doctrine is questioned by Buller; but he does not question, that the deed inrolled on the acknowledgment of the bargainor, is evidence against him.

In England, the officer for the safe keeping of deeds is not appointed to do it by the express words of the statute, but by its legal operation; so it is in Virginia. In England too it is said, the estate passes by virtue of the inrolment, and cannot 279 pass without it. So it does *here, as to creditors and subsequent purchasers without notice. There is the same confidence reposed in the officer charged with the safe custody, here as in England; and that is the ground for admitting the copy in both countries. It is objected that in England the deed is inrolled only on acknowledgment in court; and here it is on the certificate of acknowledgment before justices. The statute of 27 Hen. VIII. c. 16, provides for the inrolment of deeds on acknowledgment before two justices, and the custos rotuorum. In Virginia, magistrates are supposed to deliver the deed and certificate under seal, which is a sufficient precaution to prevent forgeries after execution. But there are many cases in England in which the copy was admitted, where no inrolment was required by the statute.(l) And where the deed does need inrolment (as this does as to creditors and subsequent purchasers without notice,) it is when inrolled, a record: and if a record, there is an end of the dispute. The language of our statute is that "deeds shall be admitted to record" &c., and the expression to be "entered of record" makes the entry when made a record.(m) And generally the copy of any original document of a public nature is admissible evidence:(n) as the sworn copy of a church register: and a copy certified by a sworn officer charged with the custody, is better evidence than an ordinary sworn copy. The case cited from 14 East, is a mere dictum of the Judge, and not an adjudication.

The statute of Anne made no other alteration of the common law, than to dispense with the production of the original when it was pleaded with a profert. The commonwealth is a stranger to the deed, and was not obliged to make profert. And since the case of Read v. Brookman,(o) a deed may be declared on without profert: 280 *still if profert be made, the deed must be produced. The dictum of Sir James Mansfield in the case cited in 5 Taunton, is directly contrary to the statute of Anne. But surely as much faith is due to copies certified by our clerks to be true, as to transcripts from the books of the India company in England; and they are admitted in evidence.

2. The deed should have been received as secondary evidence. This court will control the practice of all inferior courts.(p) And giving notice to produce originals to let in secondary proof, is of modern date. Morgan states the practice with a quære whether it be necessary. Philips(q) lays down the law to be, that a counterpart may be given in evidence without notice; yet he places counterparts under the head of secondary evidence. And where the deed is in court, notice for its production is not necessary.(r) The inconvenience of the course it is said we should have taken, would be great. To send subpœnas duces tecum to many clerks of the remotest counties in the state, could never be intended by the statute, to be required. In the case of Maxwell v. Light(s) the court would have allowed the copy in evidence, if the original had been duly recorded.

Preston v. Harvie and Falcon v. Harris, are cited to shew, that this court will not reverse a judgment for an immaterial error. But in both cases, the error committed in the inferior court, if there was any, was to the advantage of the appellant. That is not the case here. The error was injurious to the appellant. The recital of the deed would have operated to the disadvantage of Preston, and neither he nor his sureties could have contradicted the recital.(t) It is said that if all the defendants were not bound by the recital, and the 281 acts done, *none were. To support the contrary position I refer to Geddy v. Butler,(u) and Nelson v. Burwell.(v) A bill of exceptions is not a demurrer to evidence. There was in this case other evidence than that spread upon the record, and we may presume any thing to have been proved, which might have been proved. It may have been shewn that the deed was made at the instance of all the defendants and that all of them acted under it. The defendants cannot claim under the deed, and evade the operation of any part of it; they have elected to abide by it, and they must take it, throughout.

3. We insist that whenever the default occurred, treasurer Baker had a right to apply the monies received by him of J. Preston, to its extinguishment. The general court said no, it was the commonwealth's money; and it could not be applied

(i) 1 Salk. 208.
(k) Peake's Ev. 110.
(l) 5 T. R. 465; 7 East, 363; 1 L'd. Raym. 746.
(m) Dougl. 593. The copy of a manifest is admitted; the act of Congress directing it to be "recorded." 4 Dall. 415.—Edition 1821.
(n) 3 Salk. 154; 1 M'Nal. Ev. 355.

(o) 3 T. Rep. 151.
(p) 1 Wash. 322; 4 Call 447.
(q) Phil. Ev. 339-40.
(r) 4 Burr. 2484.
(s) 1 Call 117.
(t) Comyn's "Evidence" B. 5; 1 Salk. 285; Willes, 911, 25.
(u) 3 Munf. 345.
(v) 4 Munf. 332. Both were cases of several executors, some of whom refused to act.—Edition 1821.

to the payment of a debt due by Preston. There is however no particular date fixed, at which it is said this money came to hand. If it was received in 1818, it is conceded that it may be applied to extinguish the default of that year. But suppose it to be the commonwealth's money. Had it not a right to apply its own money as it pleased? And if it applied the money to the discharge of the last bond, the presumption would arise that the first was paid.(w) In common prudence then, she ought to apply the money to extinguish the debt first due.

4. I come now to the main question on the merits, and insist that no evidence can be received to contradict the treasury books. If they be conclusive of what money shall be considered to be on hand at the time the bond was executed, I care not, as to the manner in which they are so; whether by estoppel, or because of such weight, that no counter evidence shall be heard. It 282 is *alleged on the other side, that matter of estoppel must be pleaded; and that there is no evidence in itself conclusive before a jury, as evidence.(x) But I hold, that whatever may be given in evidence on the general issue need not be pleaded; and that there are many matters conclusive on such issue, without being pleaded; I will only refer to the authorities.(y) There are cases in which certain matters are conclusive before the jury on the general issue: judgment in ejectment is conclusive in an action for mesne profits: so an acquittance for rent due at a subsequent time to that now demanded, is conclusive to shew, that the prior rent had been paid; and no proof shall be admitted to the contrary.(z) In Chew v. Moffet,(a) the defendant pleaded, that the bond was obtained by false suggestions, misrepresentations &c., the plaintiff rejoined, that there was no fraud in obtaining it; and this court held, that the plaintiff having joined issue, instead of demurring to the plea, had let in the proof of fraud, and was concluded by the verdict: but fraud in obtaining the document used as estoppel, is a fair question for a jury to decide.

If we have a right to rely on the conclusive character of these books, I hold that they are conclusive. The statute requires that the treasurer shall in "books provided at public expense," keep his accounts &c., the treasurer is not only a high public officer, but he is a sworn officer. Now in the case of a record, it is allowed to be used as estoppel from the confidence reposed in the court in which it is recorded. In matter in pais the naked fact itself is an estoppel; in matter of deed it is because of the solemnity of the instrument; and it is a general rule of law, that no one shall 283 be allowed to allege *contraries. The legislature in this case could never have intended that the finances of government should depend on parol evidence, in its nature frail, perishable, and uncertain. It gave to these books the dignity and character of records, or quasi records. Then the treasurer is a sworn officer; what he has once asserted on oath, he should never be allowed to deny. A sheriff cannot deny the truth of his return. If Preston be concluded by these books, so are his sureties; for whatever binds him, is obligatory on them.(b)

Preston should have made up his annual report before he resigned; his failure to do so, is itself a default. He should not place his sureties in a better situation by making no report; which would be to amend one fault by another.

Counsel tell us that Preston does not falsify the books; that the books do not shew the money actually on hand. But our argument is, that the books shewing the money ought to be in the treasury, it is not for Preston to aver, it was not there. It ought to have been there, and if it was not, he and they must take the consequences.

It is argued too, that the books are true throughout or not at all; and if true there is no default to this day. That would be to allow Preston to discharge himself and sureties, by keeping the books falsely throughout. We do not object to its being shewn what is the actual default of Preston, but to the mode by which he seeks to prove it.

The defence is that there was a greater default in 1818 than that now claimed. But the mere deposit of any portion of the public treasure in the individual name of John Preston, was no embezzlement. Nor does it any where appear, when or how this money was exhausted; he may after depositing it to his private credit, have disbursed it in public expenditures. The 284 period at *which this default is said notoriously to have happened; has become notorious by admitting illegal testimony. The consequences of the error, cannot cure it. And the actual count which is urged as the last and only security for the public treasure, may be rendered utterly unavailing by withdrawing the money after it is counted. Upon the whole, these sureties have embarked in the same vessel with their principal, and however hard their fortune, they must abide his destiny.

The following opinion of the court was delivered June 28th, by

ROANE, Judge.

The court is of opinion that the copy of the deed of bargain and sale of the 8th of February 1820, mentioned in the first bill of exceptions, ought not to have been excluded by the general court from going in evidence to the Jury.—According to numerous and well established English decisions, that copy was good evidence; and this upon the true construction of the statute of 27th H. 8th chap. 16, and in exclusion of the statute of Anne. It is so evidence, because where a deed of bargain and sale is inrolled pursuant to the first mentioned statute, that inrolment is a record so that a copy of it may be read in evidence. (14 Vin. 445 and other cases.) It ought also to be read in evidence, for the

(w) Phil. Ev. 113; 3 Bl. Com. 171.
(x) For this was cited 2 Barnew. & Ald. 682; 6 Munf. 120.
(y) Phil. Ev. 224; 2 Burr. 666; 5 Esp. 57; 3 Burr. 1353; 1 Salk. 276; 7 Cranch. 565.
(z) 3 Blac. Com. 371.
(a) 6 Munf. 120.

(b) 1 Wash. 31.

further reason, that as the law has appointed them to be public acts, and reposed a confidence in the recording officer, the copies of such public acts, shall be like other public acts, good evidence. (Gilb. L. Evidence 99 and other authorities.) This which is the established law of England holds a fortiori in relation to this country. By the English statute, the acknowledgment by the grantor might be before two Justices in the country: whereas until lately, our deeds were required to be acknowledged or proved in open court. The distinction is not unimportant: and has been sanctioned by the most respectable
285 judicial *opinions in this country.

In the case of Lee v. Tapscott, 2 Wash. 281, President Pendleton emphatically allowed a copy of a patent recorded in a county court to be evidence, and preferred it to a simple registration; for the important reason, that the clerk acts under the superintendance of a court of justice; which court would prevent erased or improper deeds from being thrown into the public records. Under our laws, having this important provision and check existing in them, this usage (if you please,) as to the receipt of copies, in evidence, grew up, and came to maturity. And although that system has been lately changed, so as to admit deeds to record, on the certificate of two Justices only, that usage ought not to be considered as affected. The system is, even now, on as good a footing as to the confidence due to the officers receiving the acknowledgment, as is that in England. The systems are now in this respect precisely the same. If therefore the decisions of the English courts legalized copies as evidence under their statute, those decisions equally apply, even to our modern system on this subject. At the same time, that construction more forcibly applies to the stronger case of deeds acknowledged or proved before a court of Justice, under which our rule was established: and it was the intention of the legislature, in making the alteration, not to change the rule in relation to the point of evidence, but merely to substitute a more convenient mode, for the accommodation of the people.

These decisions of the English courts, although never brought directly before the supreme court have received the countenance of that court in sundry instances. There are several decisions in that court which cannot be reconciled to any other idea. As cases of this character, we will mention those of Maxwell v. Light, 1st Call 120; Whitaker v. M'Ilhany, 4th Munford 310; Turner v. Stip, 1st Wash. 319, and the before mentioned case of Lee v. Tapscott.

286 *Owing to the English decisions before mentioned and to these corroborations of them by our own courts, the position that a copy of a recorded deed may be given in evidence, has grown into a general usage in this country. But this point does not rest upon mere usage. It is as much established as a principle of evidence, as any other to be found in the books. If, however, it rested only on mere usage, and had not this last and greatest sanction, this court would be disposed to respect that usage.—While it would hold itself at liberty, as was done in the case of Tompkies v. Downman, to depart from a usage, which was in conflict with the actual expressions of a statute, and perhaps in opposition to great principles; it would respect an usage which was not confronted by such powerful objections. It would respect it, as the court of appeals did, among others, in the cases of Hudson v. Johnson, 1st Wash. 10, —Jones v. Logwood, 1st Wash. 42, and Branch v. Burnley, 1st Call 147. It would, especially, hesitate to repeal an usage, which has been so general and universal, as that its reversal would inundate this country with litigation, and lay the foundation of innumerable appeals and law suits. The court sees but little danger in adhering to this usage.—While, on the one hand, there is but little utility in exhibiting original papers which a court or confidential commissioners have already passed on as genuine, and which the party is concluded from denying to be his deed, by the acknowledgment and recording thereof. A copy is not without it preference, in some sense over the original. It lays a veto upon the grantee, as to altering or erasing that deed, from and after the time of the acknowledgment. Such a subsequent alteration or erasure would be controlled and corrected by the attested copy, previously taken, by a sworn officer. Nothing however now said by the court, is to be construed to impair the right of a party, whatever it may be, to call for the introduction of an original deed, instead of a copy.

287 *The counsel for the appellees, foreseeing that this point might be decided against them, have taken the ground, that the original deed itself, if before the court, could not be read against their clients: nay, they have taken the yet bolder and stronger ground of saying, that the deed could not have been read even against John Preston. As against John Preston himself, it was properly answered, that the deed was signed, sealed and acknowledged, by him. It is therefore emphatically his deed. It relates also to the subject now in controversy. It admits that the penalty of the bond now sued on, may have been incurred, which carries with it an admission that the defalcation happened in the year 1819, and it provides for the indemnification of these appellees, therefor. As this deed binds John Preston, and acknowledges the material matters in controversy in this motion, it is of no account, that there are other books and evidence going to prove the same facts. It is the right of suitors in courts of justice to exhibit as many evidences on the same point, if legal and relevant, as they please. The court cannot cut them out of this privilege. It cannot compel them, at its pleasure, to rely upon a single document or witness. Had this deed been received in evidence, the Jury might still have rendered a verdict for the appellant, by virtue of its provisions, notwithstanding the opinion given against him by the general court, touching the conclusiveness of the books, offered as evidence; and thus this appeal would have been prevented. It might have been evidence, both to out-

weigh the appellees' parol evidence, then sanctioned by the opinion of the general court, and to confirm or supply the statements in the books of the treasury. It might have had that effect, because it speaks, pretty explicitly as to the time of the defalcation, and might thus, as to him, have worked an estoppel.

It does this, by admitting that the penalty of the bond before us, may have been incurred, which cannot be, unless
288 *the embezzlement happened in the year 1819. Again, it is of no account, at least as against John Preston, that the acknowledgments in this deed were made after the expiration of his office. Parties may bind themselves by their confessions even up to the time of trial.

As for the sureties, (the appellees,) it will be seen, in an after part of this opinion, that they must stand on a common ground with their principal. Yet the deed is also binding as to them. It is so binding, because it is made, emphatically, for their benefit, and must be considered as made at their instance. The case is not altered by the mere intervention of trustees. The sureties themselves are the real grantees; and, besides, the deed has been accepted by them, and acted under for their benefit. For any thing known to the court, the proceeds of the property conveyed, may have been already, in part, paid by the trustees, in their exoneration. They are, therefore, estopped from disclaiming to be bound by this deed. They cannot claim under it, and yet disclaim it. If it is their deed for one purpose, it is also for the other. We are also of opinion that the answers given to the other objections to this deed, equally apply in relation to the securities. Considering them, therefore, independently of their principal, which, however, the court is not bound to do, we are clearly of opinion, that there is no objection to the copy of the deed being given in evidence, and that the judgment of the general court in this particular is erroneous.

With respect to the character of the books of the treasury department, the court is of opinion, that as to the treasurer himself they are conclusive to charge him. In relation to very numerous transactions, between even private parties, mutually confided in by each other, it may be a matter of primary convenience and accommodation, that their books should, by consent, afford conclusive evidence. It may be vastly inconvenient at least that every particular item should be the subject of particular
289 *litigation, and be open to parol, conflicting and contradictory testimony. It must, at least, be admitted, that such individuals may by common agreement, adopt those books as a standard in exclusion of all other evidence. The convenience, if not necessity, of such a criterion, in the case before us, is entirely manifest. If would be of vast inconvenience to open all of the innumerable items existing on the books of the treasury, to a particular litigation and scrutiny. Of this criterion, the officer himself, at least, has no reason to complain. If he does the business himself or has faithful agents, he cannot possibly be injured. In addition to the considerations arising from mutual convenience, as aforesaid, it is also, in the opinion of the court, of great weight, that the treasurer is a sworn officer: that his books are provided at public expense; that that officer is required to state his accounts frequently and distinctly to the General Assembly; and that his office, and consequently his books, are under the control of the executive council—Do all these precautions amount to nothing? Do they not speak the legislative sense, upon this subject, as strongly as positive words could do? Are not books taken under all these solemnities, more to be regarded than the mere private accounts of private and unsworn individuals? If in the case of Moody v. Thrustou, 1 Stra. 481, a statement of balances made by commissioners under an act of parliament, was held to be conclusive evidence, even although one of the parties litigant had had no time allowed him to prove his accounts, much more ought the treasurer, under all the provisions and precautions of our laws, to be permitted to bind himself. If in the case of Stevens v. Coburn, 2 Call, 440, the certificate of the land commissioners was held to be final, and that even against an infant, much more ought Preston's own certificate (if we may so express ourselves) to be held to be final, against himself. It is of no account
290 *that, in that case, the land law declared that the certificate should be final: There is no difference between an act containing such a declaration, and one affected by principles, and containing provisions, which irresistibly compel us to come to a similar conclusion.—The establishment of these books as conclusive evidence, in such cases, while it deprives that officer of a great advantage he would have over the commonwealth, if he were permitted by his clerks, or others, to falsify, in after times, his own items, solemnly entered by him in his books, is further called for by the necessity of acting by general rules, in such cases; and that policy is supported by several analogies in our laws. Under the provisions of the act for registering deeds, no man is permitted to aver an ignorance of a deed, which is duly recorded. So under the caveat law, no man is allowed to aver his ignorance, that another had entered for the land in dispute, upon the books of the surveyor of the county; as was decided by the court of appeals, in the case of Noland v. Cromwell. Both these provisions go upon the ground of the general utility, if not necessity, of establishing general rules, in these cases; and of referring to public documents, which are accessible to all, instead of leaving every case in respect of evidence to stand on its own bottom. They are both wisely calculated to prevent frauds and perjuries, and to cut up and prevent infinite disputes and litigation. In these last cases particular mischiefs may, perchance, happen, but they are submitted to as the lesser of evils, and in favor of the general provisions of acts of great public convenience and utility. In relation to the treasurer, in the case before us, no possible inconvenience can result to him, but from his own negligence

or the corruption of his clerks. In the last case he must have his remedy over against them, or against those who are responsible for them. If in the case of an ordinary deed or bond, a man is estopped to deny matters contained in such deed or bond, from
291 the mere circumstance *of having annexed a scroll thereto, much more ought the treasurer to be concluded in the case before us. Being a sworn officer he ought to be bound by books rendered under that sanction; he ought to be bound by books solemnly kept by him, under all the checks and precautions too, established by the wisdom of our laws. While there is no necessity for it, neither is the commonwealth in any condition, to defend herself, against innumerable claimants bringing perhaps, suspicious witnesses to invalidate the solemn entries made upon the books of the treasury. No conceivable degree of diligence on the part of the officers of the commonwealth could protect her interests, if these general criteria were to be departed from, and, an infinitude of litigation opened upon her.

These books thus conclusive against the treasurer, are also conclusive against his sureties. If a judgment against him is to bind them, so also is the evidence on which that judgment is rendered.—In the case of Braxton executor of Claiborn v. Winslow and others, (1 Wash. 31, and Call's manuscript reports more at large,) it was decided, that to fix the amount of an executor's liability, the action must be brought against him, and that the recovery against him will bind his sureties.—It is also said in that case, that if A. agrees to pay B. what C. owes him, he cannot call upon A. until he establishes his demand in a suit against C. the proper party to defend the suit. So it was decided in the case of Greensides v. Benson, 3 Atkins, 248, that sureties are bound, as to the amount, by a judgment rendered against the principal: that it is immaterial if that judgment were even rendered without defence on the part of the principal, for that shews rather a consciousness that the principal had no defence to make. The court also decided in that case, that it would not take the whole account over again at the instance of the sureties and that the case of the sureties is not at all better; "for as the verdict
292 *was found against the principal, who was the proper person to try it, it would be hard to have the same matter tried over again, in as many actions as the sureties please." We entirely concur in this reasoning. Sureties are not to be permitted to try over again, cases already decided against the principal: nor, when tried against them in the first instance, to avail themselves of evidence which the principal himself would be inhibited from using.—These authorities are conclusive to shew that the sureties stand on a common foundation with the principal.

The counsel for the appellees have repeatedly told us, that as the amount of the defalcation was in issue between the parties, they ought to be allowed to prove that issue on their part. They ought not to be allowed to prove it, by any thing but legal testimony. Their position, in the latitude in which it is taken, would equally go to let in hearsay testimony, or depositions not upon oath. The Judges ought not to surrender their province of inhibiting the introduction of illegal testimony. In the opinion of this court, the parol evidence offered by those who stand in the shoes of the Treasurer, to invalidate and set aside his books, is as inadmissible as the hearsay or unsworn testimony just mentioned.

The books of the treasury being thus held to be conclusive evidence, both as to the principal and the sureties, we come to apply them to the case before us. We readily admit that there ought to be separate bonds for each and every year, and that the Treasurer of every year, although, in fact, he be the same person, ought to be considered as if he were a different person.—When, in the case before us, the present Treasurer succeeded the late Treasurer in his office, and at the same time the latter had handed over his books to the former, shewing that a stated sum of money was in the public treasury, the former, however, was not bound by that state-
293 ment. *His proper course was, to go into the treasury, with the late Treasurer, as in fact he did; to count the money, and see that the sum stated was there, and grant his receipt therefor. He might do this, or he might waive a count, and thus give his confidence, to his predecessor as to the amount of the money actually in the treasury. In the last case he would be estopped by this confidence, to say, that that money was not there. So also the present Treasurer might equally bind himself by his acts. His entering into the office, and omitting to make a count, would be held as a waiver thereof, an acknowledgment that the money stated, was actually in the treasury. This, also, was precisely the case with John Preston, at the commencement of his term of 1819, and considering his predecessor of the former year, as a different person. At that time, also, John Preston either counted the money and as it were gave his receipt for it, or gave his confidence that it was there. In neither case can he object, that the money stated was not in the treasury, at the commencement of his term of 1819. This doctrine holds a fortiori as to him, as he was also the former Treasurer. A man may, more readily give confidence to himself than to another, and there is less hardship in holding him to the consequences of it. John Preston might by calling a count of the money, at the commencement of his term of 1819, and finding a deficiency, have charged himself as for the year 1818, and discharged himself and his sureties for the year 1819; failing to do this, however, he has admitted himself to have the money in 1819, and he and his sureties for that year are consequently liable. The conclusion resulting from these principles is, that all the money stated in the books to be in the treasury in January 1819, is admitted to have been there, and that no parol evidence can be received to shew the contrary.

The foregoing opinion of the court in relation to the copy of the deed offered
294 in evidence and rejected, makes *it

unnecessary for us to decide, conclusively, upon the judgment of the General court, objected to in the first bill of exceptions. As however the original deed was proved by the appellant to have been in the hands of one of the appellees, as it was not known by the appellant to be elsewhere, and as the appellee, Francis Preston, no otherwise discharged himself from the custody thereof, than by his own verbal and unsworn statement; our present impressions are, that he ought to have been considered in the possession thereof, so as to let in the reading of the copy by the appellant, or at least to procure a continuance of the trial. Had such a continuance been moved for and rejected, that rejection would, in our opinion, have been clearly erroneous. We repeat, however, that we do not decide this question. It is unnecessary in this case to be decided.

The court is of opinion, that there is no error in so much of the opinion of the General court as sustained the demurrer to the third plea, and overruled the same; nor in overruling the motion of the appellants, to reject the second plea. The reasons in favor of these opinions of the court are so manifest that they need not be assigned.

The court coming more particularly to the judgments complained of in the 2d bill of exceptions tendered by the appellant, and bearing in mind the principles and reasons herein more particularly detailed in relation thereto, is of opinion, that the motion made by the appellant to exclude the evidence so as aforesaid adduced by the appellees from going to the Jury, as being inadmissible evidence, so far as the same was offered to exonerate the said appellees from responsibility for the balance of $83,099 30 appearing from the books and reports of John Preston, as Treasurer, to be due to the commonwealth at the time of his resignation, ought to have been sustained; and that the judgment of the General court overruling the said motion, and admitting the
295 *said evidence to go to the Jury, is erroneous. The court is also of opinion, that the second motion of the appellant for the court to instruct the jury, that notwithstanding the facts proved by the appellees as aforesaid, the commonwealth was entitled to recover against them the said sum of $83,099 30 cents, (the deficit appearing on the Treasurer's books as kept for the year 1819,) and also the several sums of $4,488 08 cents, $39,000, $5,481 57, and $510, as is in the said bill of exceptions more particularly explained, ought to have been sustained—Because the said several sums last mentioned, although not received in 1819, nor properly audited or entered on the Treasurer's books, at the time when received, yet were entered in the bank to the credit of the said John Preston, as Treasurer of the commonwealth, and were reasonably to be regarded, as constituting a part of the $248,086 62 cents, turned over in bank by him to the appellant, upon his resigning his office.—The court is consequently of opinion that the judgment of the General court overruling the same, and declaring that the appellees were only liable for the due application by the said John Preston for the sum actually in the treasury, at the commencement of his last term of office, and of the sums received by him during his said term, is erroneous. The reasons operating with the court, for coming to this conclusion, have been already sufficiently detailed. The court is also of opinion, that the money received in the bank by the present Treasurer from his predecessor, was a payment by the latter to the former for the use of the commonwealth, and having been made without any specific direction as to the application thereof, the present Treasurer had a right to apply the same to the extinguishment of any balance due by him to the commonwealth which became due by consequence of not crediting the commonwealth with the same money on the treasury books; which money he had received as Treasurer, and
296 *had passed to his credit as treasurer in bank, the payment being made with the same money in bank, which should have appeared to the credit of the commonwealth on the treasury books;—and that the judgment and instruction given to the jury, contrary to this position, is erroneous.—It is, therefore, the unanimous opinion of the court, that the said judgment of the General court is erroneous, and should be reversed. All the Judges concur not only in this conclusion, but also in all the points and principles now laid down—except that one Judge dissents from his brethren upon one point; and on that point will be pleased to express his own opinions. Therefore it is considered, that the said judgment be reversed and annulled, and that the appellant recover against the appellees the costs expended in the prosecution of the appeal aforesaid here. And it is ordered, that the Jury's verdict be set aside, and the cause remanded to the said General court for further proceedings to be had; and on a further trial, that court will give the instructions now approved by this court, if required, and conform to the other principles laid down by the court, which is ordered to be certified to the General court.

WHITE, Judge, dissented on one point, and delivered the following opinion.

This is a motion against John Preston the late treasurer, and his sureties, upon his bond as treasurer. This bond is dated on the 18th January 1819, and conditioned, for his faithful performance of the duties of his office, during the ensuing year. The words of the condition are, "now if the said John Preston shall faithfully account for all monies and other things which shall come to his hands in virtue of his office, and perform all other articles thereof according to law, then this obligation to be void, otherwise to remain in full force and virtue."

297 *The notice given to the defendants of this motion, recites the bond, and the condition; and concludes by averring, that the condition has not been complied with.

John Preston did not appear to defend the motion, and judgment by default was entered on a writ of inquiry awarded against him. The other defendants, his sureties, appeared, and pleaded three pleas. The third of these pleas, was properly overruled on a general demurrer. The appel-

lant's counsel, then moved the court, to reject the second plea; which motion was perhaps properly overruled; at least it was not an error which ought to be available in an appellate court. The parties then came to issue on the 1st and 2d pleas, which though different in form, in substance presented the same issue: which issue was this; the defendants said that a sum of money, viz: $1,200,251 36 and no more, came to the hands of John Preston as treasurer, between the 18th January 1819, and the 17th January 1820, the period for which they were bound; and that he did faithfully account for all the said monies which came to his hands in virtue of his office during the term thereof. The plaintiff on the other hand avers, that a sum larger than $1,200,251 36 came to the hands of the said Preston in virtue of his office between the said 18th January 1819 and 17th January 1820; and that he did not account for, or pay the aforesaid sums of money, &c.; but the same did divert, misapply, and convert to his own use; and so had violated the condition of the bond.

By these pleadings two facts were presented for the decision of the jury. 1st, whether between the 18th January 1819 and 17th January 1820, more money than $1,200,251 36 did come to the hands of the said Preston in virtue of his office; and 2d, whether the sums actually so received, were faithfully accounted for.

The plaintiff to support the issues on his part, offered in evidence, the books of account of the treasury department, which were proper evidence, and were not 298 objected *to. From these books it appeared among other things, that there had been paid into the treasury before and during the year 1819, and up to the 17th January 1820, the sum of $333,297 7 more than had been disbursed for the public services; which money ought to have been in the public coffers, and the fair presumption from the face of the books was, that it was there. But upon a count, it was found that $83,099 30 of the money was not to be found. When did this eloignment take place? now became the important question between the parties. If it was eloigned before the 18th January 1819, it was not within the condition of the bond on which the motion was made; and the verdict should have been for the defendants on the issues made up. If it was after that day, the plaintiff was entitled to a verdict.

The plaintiff rested his case on the treasury books alone, and insisted, that as they shewed this money had been received, and did not show that it had been disbursed for the commonwealth, it must be taken to have been in the treasury on the day of the date of the said bond, and of necessity, to have come to John Preston's hands in virtue of his said office, after that date, to the exclusion of all evidence to the contrary. The defendants on their part introduced evidence, calculated to satisfy the jury, (if proper to be submitted to them) that in fact this eloignment took place in the year 1818, and before the date of the defendant's bond, on which the motion was made; which was the very fact in issue before the jury. And this evidence being submitted to the jury, did satisfy them, that the eloignment in dispute took place before the execution of the bond, and they found a verdict for the defendants.

The counsel for the appellant had however moved the court, to exclude this testimony on behalf of the defendants from the jury; and excepted to the opinion of the court, overruling his motion. The question now to be decided is, whether the 299 testimony offered by the *defendants ought to have been heard by the jury upon these issues? I had supposed it could not be questioned, if this had been a private transaction; if Preston had been the factor of a foreign merchant, and had given bond and security every year, for faithfully discharging his duties, and such a case as the present had arisen between the employer, and Preston and his sureties for different years, (this is in effect a contest between the sureties, to Preston it is immaterial on what bond he is made responsible) that both Preston and his sureties would be let in, to shew by evidence, the truth of the case. If this be not the law, not only I, but every lawyer with whom I have practised, or who has appeared before me for thirty-seven years, has laboured under a strange delusion. I am aware that the confession of a party may be given in evidence against him, and is not evidence for him; but when it is so given although it be strong, it is not so conclusive, as to prostrate his rights against the truth of the case; but he is at liberty, to shew by other testimony that he made the statement under a mistake, through misunderstanding, or inadvertence. The rules of law, and the demands of justice, ever searching for the real truth, absolutely require, that such evidence should be heard. Even against the principal you cannot recover for a default, not within the condition of the bond; much more should this be the case, when there is another bond, to indemnify the obligee against that very default. Is it more consistent with law and justice, that the obligor and his sureties, should be made liable upon a bond which does not covenant against the act complained of, when there is another bond which does covenant against that act, in the case of the treasurer, than it would be in any other? If this be so, it must be, because the law has ordained it, from principles of public policy; and that is the ground taken. It is said, that the defendants are concluded, that 300 is estopped, from *proving by any evidence other than these books, that there is any mistake or error in them.

An estoppel is that which prevents one from shewing the truth and defence of his rights: call it by what name we will, it is that which shuts out the evidence of the actual truth of the case. For this reason, estoppels have ever been held to be "repugnant to reason, and odious in law." They are tolerated in a very few cases, and only from absolute necessity. Even in these cases, Judges have for ages been astute, to unshackle the estopped, by every means in their power. If these books do work an estoppel, it is not by the operation of the statute, for that does not pretend to alter their nature as matter of evidence. Neither

is it by the general principles of the common law, which holds estoppels to be odious. No case has been adduced, to shew they work an estoppel; no dictum of any judge, lawyer, or writer has been referred to, as even intimating such a doctrine; and I undertake to say, that there is none. In England there is a treasury, a treasurer, and treasury books: those books no doubt are kept by an officer under the solemnity of an oath; suits, and prosecutions must have arisen in which the evidence furnished by the books became necessary [as in Lord Melville's case;] there are in England too, many great public corporations, in which books are kept as those now in question; the law treatises and reports, contain many cases as to the manner of giving them in evidence, and their effect when offered; but not a word is any where said, of their working an estoppel: such an idea was never conceived in any of the numerous cases decided. That they operate by way of estoppel is attempted to be shewn, by analogies drawn from reasoning adopted by this court. The argument does not convince my understanding. The cases referred to, [except that of Noland v. Cromwell,] depend on statutes constituting judicial tribunals, and expressly declaring that their decisions shall be final. And Noland
301 v. Cromwell, *was decided on the long established principle, that a party having a good defence at law, shall not be relieved in equity, for failing to make it; and that the entry in the surveyor's books, was sufficient notice, and that the party should not aver an ignorance of the entry or a want of notice in this case, any more than of a recorded deed, to which the statute has assimilated it.

Nor does it alter the case, that the treasurer is a sworn officer. His swearing to do his duty, does not make entries in the treasury books true, which are in fact false. In the case of Goode v. Galt (c) lately decided by the court of appeals, a judgment was reversed for an error which grew out of the false return of a sheriff (though made upon oath,) and the cause was sent back with orders, that the sheriff should be permitted to amend the return.

I admit that these are public books, brought with public money, kept for public purposes under the sanction of an oath. They are evidence of a high and solemn nature, and should only be outweighed by direct and decisive testimony. But that they are to shut out, or were ever intended to shut out the daylight of truth, I do not, and cannot believe. Notwithstanding the guards which are provided, these books like all others, may contain errors. Can it be believed, the legislature intended, that even if evidence should be offered proving erroneous entries, as clearly as any thing can be proved, still such evidence must be rejected and the Jury compelled to find a verdict against the very truth and justice of the case? and this under the old, and odious doctrine of estoppel; for odious I must call it, since it is so held in every book in which it is mentioned: an estoppel too, applied to a new subject, in an entirely new way. Had the legislature intended this innovation on the best established principles
302 *of evidence, it would have declared its will, in express terms.

It is said, that the case ought to be considered, as if a different individual had been chosen Treasurer, and had given a new bond, every year. That in such a case, if the books transferred to the succeeding Treasurer, shewed a certain balance ought to be in the treasury, but in fact the money had been eloigned, and the successor through false confidence or any other motive, received the books without counting the money, and reporting the deficit, that he and his sureties would be precluded from shewing, that he was not the actual embezzler, and that the money had been converted by his predecessor, before he came into office; that such conduct would be a breach of official duty, and that a suit might be prosecuted against the succeeding Treasurer and his sureties; that the Commonwealth might recover on assigning the fact as a breach of the condition to the full extent of the loss actually sustained, I do not deny; but that on a suit charging the succeeding Treasurer with being the actual embezzler, during the year in which he was Treasurer, at once destroying his character, and charging his sureties to the exoneration of the real culprit and his sureties; on an issue too, made up to try the precise fact; whether the default and embezzlement occurred in one year or the other, the party should be estopped from proving his innocence and the guilt of his predecessor, and thus charge the sureties who are really bound, I cannot admit.

If these books work an estoppel, why were they not pleaded in the replication? Why was issue joined, upon the facts set forth in the plea? Why did the attorney go to trial before the country? By going before the Jury on the issue tendered, he has loosed the estoppel, and let in the evidence of the truth. I cannot perceive the force of the reasoning, by which this estoppel
303 is maintained. *If the fact be, that the embezzlement took place in 1818, and is not within the condition of the bond for 1819, can the estoppel change the actual fact, and make that true which is false? Will it make that which was done in 1818, to have been done in 1819? Will it alter the eternal principles of justice, and make that right, which is in itself wrong? If on the other hand, the whole evidence be laid before the Jury, will not the Jury under the direction of the court, in this case as in the more lawful ones of life and death often presented to its deliberation, be competent to weigh the evidence, and determine what is true? and even if the Jury should err in its decision, that error may be corrected, by granting a new trial. I do not see that the monstrous evils anticipated, will result from suffering the facts in cases affecting the public revenue to be given in evidence to the Jury. When the commonwealth arraigns a citizen at her bar for treason or murder, (the highest crimes known to our jurisprudence,) she submits the case both on the law and the facts to a Jury. If she cannot in proceedings against the Treasurer, submit the law of the case to a

(c) Ante 152.

Jury, surely it is a stronger reason why the Jury should at least pass judgment, on the facts affecting the case.

This is an estoppel of a new character. It is said, the books work no estoppel as to the commonwealth; she may contradict the books. The old fashioned estoppels, even in the sternest periods of the English law, were reciprocal: both parties were estopped, or neither.

It has been remarked, that this case ought to be decided on great principles. Controversies in courts of justice, ought to be decided on correct principles always; on great ones when they apply. I know of no principles of law great or small, which can convert these books into an estoppel on either party. There is however one great and fundamental principle, which runs through the bill of rights, the constitution, 304 and the laws of the *land; it ought to exist in the laws of every nation upon earth; the principle, that every free citizen whether in a civil or a criminal proceeding, has a right to be heard in his defence; to produce his witnesses, and to have a fair and impartial trial on the merits of his cause. The commonwealth can claim no exemption from the operation of this equal rule, in a controversy with the meanest of her citizens. However bound to her by allegiance and by reverence, when she appears in the character of a suitor, her tribunals of justice can recognise in her, no claim to superiority in rights, over the vilest of mankind. From this great principle I would deduce the inference, not that the defendants were estopped, and the commonwealth, abroad, and at large; but that neither party was estopped: that both might prove by evidence competent in ordinary cases, the whole truth of the case; and that the defendants had a right to prove the only material fact which the Jury was sworn to try. I say the only material fact, because that the money was once in the treasury, and was embezzled, is admitted on all sides: the time when it was embezzled, is the only fact in dispute, and that was the point to be settled by the Jury.

But granting that these books operate as an estoppel, and such an one as was never before heard of, an estoppel to one party only, what do they estop the defendants from proving? That the facts stated in those books are not true. But do the books also estop the defendants from shewing, that the inferences drawn by the appellant's counsel from the books are false? The books no where shew that the money was in the treasury when this bond was executed, or at what time it was eloigned.—Facts are stated, from whence it is inferred by logical deduction, that the money was in the treasury when the bond was executed, and therefore must have been eloigned thereafter. Are the defendants estopped from shewing by express and undeniable proof, that the money was taken from the treasury, and embezzled, before they 305 executed *the bond? Suppose that fact made to appear beyond the possibility of doubt, what will become of these inferences of logic? They vanish like mist before the sun. Even if the proof adduced in this case was not sufficient to outweigh the evidence furnished by the books, other cases may occur in which it would be sufficient. The precedent now to be fixed, will operate in all future cases, between the commonwealth, the treasurer and his sureties. I cannot consent to the establishment of such a rule. For these reasons, and others, which I would have stated, had the very short time I have had to arrange my ideas, permitted, I am of opinion, that the judgment of the general court on this point was correct.

Bennett v. Maule's Adm'x.

West v. Same.

Alcocke v. Same.

June, 1821.

Negotiable Note—Extension of Time—Discharge of Indorser.*—Giving farther time, or entering into a new contract with the drawer of a negotiable note, does not discharge the indorser.

The cases are fully stated, in the opinions which follow, and need not be repeated.

Daniel, for the appellant insisted, that the facts shewed the appellant was a surety, and was absolved from all liability by the conduct of the appellee's intestate, and by that of the appellee herself.

306 *He said, that the suretyship might be established by evidence dehors the notes, even at law; and if not in a court of law, clearly in equity. (a)

Maule never protested the note on which Campbell was indorser; his failure to do so, released Campbell, and threw the whole responsibility on the sureties. And the agreement entered into by Maule's administratrix with Campbell, was a new contract, and discharged the sureties. (b)

W. Wickham, contra. The failure to protest a note does not discharge the indorser at law; and a court of equity cannot alter the contract. To make the failure to protest discharge an indorser, either actual injury must be shewn from the failure, or that injury might probably result from it. If the note had been protested, the drawer could not sue the indorser; unless it was an accommodation note, and the drawer had paid the money; in that case, an action would lie for money laid out and expended &c., without a protest.

But Campbell was not a debtor at the time it is alleged indulgence was given him; and the principle of giving farther time cannot apply, to discharge the sureties.

Call, for the appellant. The extension of the time of payment destroyed the recourse of the appellee to the sureties. The order

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***Negotiable Notes—Extension of Time—Discharge of Indorser.**—See monographic *note* on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 622, where it is said that Dey v. Martin, 78 Va. 1, and Merchants', etc., Bank v. Evans, 9 W. Va. 373, overrule the principal case.

Principal and Surety—Extension of Time—Discharge of Surety.—On this subject, the principal case was cited in Norris v. Crummey, 2 Rand. 337; Chichester v. Mason, 7 Leigh 262; *note* to Hopkirk v. McConico, 12 Fed. Cas. 503, Cas. No 6,696. For further authority in point, see cases and notes cited in *foot-note* to Hill v. Bull, Gilm. 149.

(a) Harrison Ex. of Minge v. Field's Ex., 2 Wash. 141.

(b) Ward v. Webber, 1 Wash. 274; Croughton v. Duval, 3 Call 69; Rees v. Berrington, 2 Ves. jr. 540; Ward v. Johnson, 6 Munf. 6.

in which the parties stand on the notes, is of no importance in a court of equity; for it will fix the loss where it ought to be. (c) The evidence proves, that though Campbell indorsed the notes, he was in fact the drawer, and the administra-
307 trix of Maule *knew it; she indulged him without apprising the sureties and they are discharged.

COALTER* delivered the opinion of the court.

These cases, with slight variations, present the same question, as to some parts of the controversy, and have therefore been considered, and will now be decided together. As to some of the notes, the circumstances vary, and where that is the case, they will be considered separately. So far as they agree, they present the following case, according to the statements in the bills.

That filed by Alcocke states, that in November and December 1816, Robert Campbell applied to him to sign, in blank, two notes, negotiable at bank, which he stated were to be made payable to himself; that they would be of essential service to him for some very important purpose; that if he used them he would pay them off when due; and that having confidence in him, he did accordingly sign the notes, without value, so that in fact he was merely his surety. That after this, it appears, that Joshua West, (who is plaintiff in the 2d suit, and seeks relief also as to this note and two others,) signed one of these notes in addition to the signature of the plaintiff, which was filled up, with the sum of $210 and made payable to Campbell, and it appears was transferred to Thomas Maule. As to the other note, the circumstances varying from those in regard to that just now stated, it will be noticed hereafter.

These notes it is stated, were neither deposited in bank, nor protested, and that on enquiry of Campbell, he told him they were discharged to the satisfaction of the holders. He charges, that they were so discharged at least as to him, because although they fell due in December 1816, no proceeding was taken by the holders to force payment until March 1817, when Maule brought
308 *suits on them, and he dying, they were revived by the appellee his administratrix: and judgment was obtained on the said note against himself alone, process not having been served on West: and in the other case against himself and Campbell, who as will be hereafter more particularly stated, was a joint maker of the note with him. That after the judgments, the administratrix well knowing, as he believes, that Campbell alone was her debtor, entered into an arrangement with him separately, for the payment of the said claims; gave him further credit for said debts; took a deed of trust on real property dated in July 1818, giving day of payment until February 1819, and when that day arrived, gave a farther indulgence until March, and then till April, when the property was sold; and not selling for enough to pay the debts, she had resorted to executions on the judgments. That these indulgences on the deed had produced a loss, real property in Richmond having greatly depreciated &c.; and in consequence of all these acts, he, being merely a surety, was exonerated; these latter transactions being all without his knowledge or consent.

The bill of West charges—That in December 1816, in order to secure certain sums alleged to be due from Campbell to Maule, he, Campbell, agreed to give him several negotiable notes, to wit, one for $210, executed by Alcocke and the plaintiff, and indorsed by Campbell; another made by the plaintiff payable to Campbell for $130; and a third made by the plaintiff and Bennett for $300 payable to Campbell. That in these transactions, he had no interest except as surety for Campbell, for debts due to Maule, who he charges well knew the situation in which all parties stood; that these notes were neither put in bank nor protested, and consequently Maule sued the makers only. He then states the abatement of these suits by Maule's death, their revival, and judgments by the administratrix. That Maule having failed to protest &c., had discharged Campbell, and by
309 *thus lessening the liability of any of the parties, he thereby absolved any one who stood, in reality, as surety. That his administratrix, after the judgments, and knowing in reality that Campbell was her principal debtor, entered into an arrangement with him, by taking a deed of trust, &c., giving day of payment &c., as stated in Alcocke's bill, and this without his knowledge or consent. This for the reasons alleged by Alcocke, he also contends discharged him.

The bill of Bennett, which relates to the $300 note, mentioned in West's bill, as made by those two parties to Campbell, makes the same allegations, almost verbatim, with those made in West's bill, and why he did not join in that suit, I cannot well understand; his alleged ground for relief being precisely the same.

Although in Alcocke's bill, there is no allegation, that Thomas Maule, when he discounted the notes mentioned in that bill, knew the situation of the parties, yet as the $210 note, is one subject of controversy in West's case, in which that charge is made, if that case is thereby made stronger than Alcocke's, and he should be discharged in consequence thereof, that decree might possibly avail Alcocke also in some way or other, and therefore it will be proper perhaps, to consider that allegation as extending to both cases.

The questions presented by the bills then are:

That Alcocke as maker, and having confidence in Campbell, was to execute notes to him, in blank, to be filled up at pleasure and for important purposes to Campbell, not made known to Alcocke; and, that in the other cases, notes, for specific sums, were to be made by the parties to Campbell, who was to indorse the same to Maule, to secure certain debts alleged to be due from the former to the latter; and consequently this was the important purpose unknown to Alcocke, for which the $210 note was to be used. That Maule knowing that he was

(c) Chalmers & Co. v. M'Murdo, 5 Munf. 252.

*BROOKE absent.

not receiving these notes to secure a
310 debt due to *Campbell, and not from the makers, was to consider them merely as sureties, in the same manner as if Campbell had united in ordinary notes or bonds with them as his sureties; that though these notes were negotiable in bank, and consequently stood upon the footing of foreign bills of exchange, this will not vary the nature of the liability of the alleged sureties; and that therefore, 1st those sureties were discharged by a failure to protest the notes: 2d if this does not discharge them, yet the administratrix, although it was voluntarily offered, could not take collateral security from a man, thus absolved, without their consent, she also knowing their situation; and that having done so, they were thereby discharged.

These propositions will be considered as on a demurrer to the bills. I prefer this course, because in my opinion, the greater part of the only testimony in the cause is not pertinent to the issue. If these bills had been filed against Thomas Maule himself, the testimony in relation to all the notes previous to those spoken of in the bills, which were taken in, and are now filed with that deposition, would probably not be within the issue; at least so as to make any better case than that stated in the bills, though he was privy to that transaction; because no opportunity was given him to answer to, and explain them; a fortiori they cannot operate against an administratrix, who, though the wife of the party and possibly acquainted with some of the transactions, ought to have been apprised of the whole ground of complaint. The most that the parties can claim, is, that their bill shall be taken as true.

They have no claim to relief on the first point, because the failure of Thomas Maule to have the notes protested is not alleged to have taken place, in consequence of any contract, by which he received any other security from Campbell. This discharge of Campbell arose from the lapse of time, the negligence of Maule, or his inability to procure the proper protest and notice.
311 Had he *placed the notes in bank, the complainants must either have paid them, or have been themselves protested, and their credit impaired; and then, on notice to Campbell, he would have been bound; but no negligence of a creditor, which, according to the law of the contract, may operate a discharge of the principal, as in case of a joint bond, before the statute on that subject, where the principal dies, leaving no personal assets, can discharge the security. He must do some act, make some new contract, or must fail to sue, after notice, under the act, which is substituted for the bill quia timet, or to sue after decree to that effect on such bill, in order to discharge such security. Had a bill been filed or even notice given requiring Maule to have these notes put in bank and protested, if not paid, there might be some ground for the first proposition.

As to the second.—The bills themselves admit the law of the contract, and the nature of the respective liabilities of the parties to be, that the maker of a note of this kind is, at all events, bound to pay; the indorsee only, in case due diligence is used, and notice given, &c. and that for want of this, Campbell is discharged.

In taking a note of this kind, there can be no difference between taking it in discharge of a pre-existing security for a debt, due from the indorser to the holder; and discounting it in the first instance, by advancing money to the indorsee upon it, the person discounting it, knowing at the time, that the note was made merely for the accommodation of the indorser: The extinguishment of the prior security, and taking this in discharge of a prior debt, is equal to a new advance of money, or full value given in discount for the note. If this be true, the case perhaps will be simplified by considering these notes to have been discounted by Maule, by advancing the money to Campbell when he received them. What then is the nature of the liability of the maker of a note of this kind, or of the acceptor of a bill of exchange? An
312 *acceptance is an engagement to pay the bill according to the terms of the acceptance, and the making of a note is equivalent to the acceptance of a bill.(d) The effect of the acceptance is to give credit to the bill, and to render the acceptor liable as above; it implies an acknowledgment that he has effects of the drawer in his hands; as the making of a note implies, that money was lent by the payee to the maker,(e) this may not be the fact in either case, and therefore as between the drawer and acceptor, the maker and payee, their remedies against each other, will depend on the fact as it exists between them; but with regard to every body else, the acceptor of the bill, and maker of the note, are regarded as the original debtors, and an acceptance once made cannot be revoked;(f) and it is of no consequence whether it is known to the party, at the time he took the bill or not, that there were no effects in the hands of the acceptor, or value given by the payee of the note. The holder is not to be affected by these circumstances, for by making himself a party to the instrument, he contributed to its currency, and that perhaps was one reason, on which the holder parted with his money.

The design of the law of merchants in thus distinguishing these from all other contracts, was for the convenience of commerce; that they might pass from hand to hand in the way of trade, in the same manner as if they were specie.(g)

This being the law of the contract, and the nature of the liability, I can find neither law nor reason to satisfy me, that this court can change it.

The agreement of the party if fairly entered into, and for valuable consideration may change it; may substitute a new contract for that which originally existed, but no such new contract or agreement is
313 charged. The proposition *contended for is, that the creditor, by procuring part of the debt to be paid by Campbell, who was discharged, instead of forcing the

(d) Kid. 68.
(e) Ib. 156 and 197.
(f) Ib 74. 89. 109. 10. 476.
(g) Ib. 167 and Str. 441.

whole from the plaintiffs, discharged the surety.

How can this court say, that these notes in the hands of Maule shall be of less value than in the hands of his indorsee, and be clogged with difficulties which would not exist as to the latter? Or are we prepared to say, that the circumstances existing between the makers and payee are to pursue these notes wherever they go? A party discounts a note, knowing it to be an accommodation note. It is drawn by A. and indorsed by B.; he is satisfied that A. is good, he knows that B. will be discharged, if, by any accident, the note is not protested, &c. He is willing to risk this, because he does not rely on B., but he would not have discounted a note made by B. and indorsed by A., because A. might, by accident, or mistake, be discharged. To whom then does he, in reality, advance his money? To A., who has given B. this letter of credit. An indorsement made in blank, with authority to fill up a note, is a letter of credit to any amount;(h) and it is immaterial whether the person, taking the note, on the credit of the indorsement, knew whether it was made before drawing the note or not; a fortiori, is the making of a note for a definite sum, a letter of credit to that amount. The former was disputed, but settled as above, the latter never has been.

The law, as to discounting paper, is the same in regard to banks, and individuals. They discount accommodation paper, every day, knowing it to be such. They know that the indorser really gets the money and that the maker has received no value. The indorser attends to the renewal of the paper in bank. If he fails to take it up, his credit is gone unless he can satisfy the banks that the maker is his debtor, 314 and ought to take *it in, and that he wishes to proceed to a protest, in order to compel him to do him justice. But suppose this is not the fact, and the maker prefers that the bank shall proceed to a protest rather than renew his note; but by some accident there is no protest; will this discharge the maker? It will if the first proposition contended for be true. But it will not. The indorser though desirous still to do justice to the maker, and to restore his own credit in the bank, although he has been discharged for want of a protest, offers to give the bank collateral security on land: the bank is fearful that both maker and indorser may fail; are they restrained from taking this collateral security from the indorser even if he had been protested, and still liable, because it will operate a discharge of the maker? I think not. But if the indorser is discharged, for want of protest, there can be no doubt, even if the maker was so unjust to himself as to forewarn them from doing so, except on that condition. But suppose such security was offered and the bank refused, and the maker by a bill quia timet should call on the bank to take the security at least for his benefit, and the readiness to execute it was admitted in the answer of the indorser, would a court of equity hesitate to give relief? Can it be wrong then to do it voluntarily?

But it may be said that the indorser, although discharged for want of a protest, may still be made liable in equity to the holder, because he received the money on a note for which no value was given by him, and as the maker is insolvent so that the holder cannot get it of him, the indorser ought to pay. But to this he may reply, that the maker having become solely responsible, he had left funds in his hands, or they were retained by him to the amount of the note, so that, in reality, he has paid value for it. He would therefore in no way be liable. This shews the wisdom of the law in determining, that the circumstances which may exist between the maker and payee, which may be one thing to day 315 and *another to-morrow, are not to affect the note or bill. The maker and acceptor are to be considered to all intents and purposes, the original debtors, the persons to whom the credit was mainly extended, and who are bound at all events to pay. If this is not to continue the law, the free negotiability of these papers is to cease.

Suppose this case—A. as principal and B. as his surety, enter into a joint bond, before the act concerning joint rights and obligations. A. has a large real, but no personal estate. He dies, so that B. as survivor must pay the debt. The heirs of A. though, agree to give as collateral security, a deed of trust on lands, to secure the debt, and procure indulgence to B. their ancestor's surety; the lands are sold and pay half the debt; all this is done without the knowledge of B. Is he discharged from paying the other half of the debt?

I can find no case where because a note or acceptance on a bill has been made for the accommodation of the payee, or for the honor of the drawer, that the party has resorted to equity for relief, on the ground that he was merely surety, and that the holder had negotiated without his consent or knowledge; with the payee or drawer; had taken other notes, given time &c. Indeed, it was some time disputed whether if he had received the money from the drawer, the acceptor was not still liable; but it was settled he was entitled to credit for any thing the drawer had paid.(i)

Numerous such cases as this doubtless have occurred, and if the principles above stated did not directly oppose such relief—if it would not go to destroy the whole system of bills of exchange, which depend on the law merchant—a law co-extensive with the mercantile world, such cases would doubtless be found. Those cases are applicable to bonds and other instruments whereby the principal and surety are bound by 316 equal bands, and subject *to like remedies. There is no case that I can find, where a party has made himself principally subject for the debt of another, in which merely because that is the fact, the court has undertaken to change the nature of such liability. As if A. gives his bond for a debt due by B. this discharges B., he then owes A., but he may discharge

(h) Kid. 89; 1 H. Bl. 88, 89; Day 496.

(i) 1 H. Bl. 88.

this debt, in part, by paying so much for A. in discharge of this bond. And this in any way and at any time, which he and the creditor may agree upon. and this without affecting the liability of A. for the balance.

An indorser and a fortiori a maker or acceptor, is not discharged from his engagement, except by the absolute payment of the money.(k) A judgment by the holder against the drawer, even if he is taken in execution, and let out on a letter of licence, will not discharge an indorser, much less the acceptor.(l) But the acceptor may be discharged by express agreement, or something equivalent thereto. The case of Dingwall v. Dunster, in Douglas(m) is of this kind, but there the party did not come into equity upon the principle contended for here; but defended himself at law upon the ground, that he was an acceptor of an accommodation bill; and the plaintiff knowing this, had for a series of years, and without calling on him, been receiving payments from the drawer; and had not replied to a letter of his, thanking him therefor, and stating that he had heard the drawer had taken in the bill, so that he was thrown off his guard; and yet he was not held to be discharged. In that case, the drawer whose liability is of the same nature with that of the payee who indorses a note, had not been discharged as in this case Campbell was. Buller says, nothing but an express agreement can discharge the acceptor.

317 *The case of Ellis v. Galindo, found in a note to this case, strongly supports the same doctrine. In that case, the acceptance was probably for the accommodation of the drawer who was a brother. When the bill fell due, the plaintiff received of the drawer 31. 15. 4, and this indorsement was then made on the bill: "Received on account of this bill 31. 15. 4, balance remaining 261. 4. 8. I promise to pay to Mr. T. Ellis, within three months from the date of this." Signed by the drawer. The balance was never paid, and after three years, suit was brought against the acceptor Lord Mansfield thought the acceptor discharged, and nonsuited the plaintiff. On motion for a new trial it was contended for the plaintiff, that the indulgence for three months could no more be held a discharge, than the payment of a part by the drawer &c. Lord Mansfield said, the doubt is, whether the question ought not to have been left to the jury, it being a question of intention arising out of the circumstances, that is, whether the party, by this new note giving time, and a delay of three years &c., intended to look to the drawer only; not whether he was bound to do so, in consequence of these acts, if he could clearly have shewn there was no such intention. As if he had given notice to the acceptor, that he would still look to him if the drawer failed to pay.

WILLES J. thought it ought to have been left to the Jury.

BULLER J. "There is no doubt as to the law. It is as has been stated by the counsel for the plaintiff. I rather think the case should have gone to the Jury. This indorsement could not have been meant as an additional security, for the drawer was equally liable before, (i. e. he had not been discharged by laches, &c.) I should have left the case to the Jury, but with very strong observations." But if in that case as in this, the party had been discharged for want of diligence, and the in-

318 dorsement *had been taken as additional security, as in that state of things would necessarily have been the case, there would have been no ground to suppose, that the intention was to discharge the acceptor, except the lapse of three years before the demand, which does not exist in this case. But no agreement of this kind is in issue, and the case is only referred to, to shew, that no acts which do not amount to an agreement to discharge the party, will operate that discharge, under the principles contended for in these bills.

The case as to these notes is not made better for the appellants by the answer and testimony.

The answer denies knowledge in herself, and, as far as she knows and believes, in her testator, of the alleged situation, in regard to each other, of the makers and indorser of these notes. In further response to the bills it denies any communication with Campbell respecting the deed of trust, &c. until after its execution. That his willingness to enter into that arrangement was stated to her by the sergeant of the city, in whose hands the executions against the appellants were, and she believes it was made with their knowledge, who stated there would be some difficulty in making the money; and that she agreed thereto, and to suspend the executions for a short time, upon the express proviso, that her remedy on the judgment was not to be affected; and if that was to be the case by the indulgence, she denies that she was bound to give any. She admits the subsequent indulgence was at Campbell's request, but without any consideration, and therefore not obligatory on her. As to the suit's being against the makers only, she knows nothing; that being directed by her counsel whom she supposes did what was legal and proper. She refers to the deed of trust as part of her answer. It bears date the 1st July 1818, and recites that the grantor Campbell, being indebted to Margaret Maule, administratrix, &c., in the

319 *sum of $1222 79 being the aggregate of principal and interest of certain judgments recovered against said Campbell, John Alcocke and Chas. Bennett; and whereas she has thought proper to extend the time of payment on taking this indenture as collateral security, and hath agreed to suspend the executions until the 1st of January 1819, &c. in the usual form.

Campbell is the only witness examined in the cause. He goes back to the year 1814 for the origin of these notes, and among other things states, that very heavy usury was practised by Thos. Maule on him, &c.

This statement, I suppose, was intended to have some effect in this cause, either to support his credit as a witness, or to excuse him for the effort he has made, and is mak-

(k) Kid. 112, 116.
(l) Bl. Rep. 1235.
(m) Doug. 247.

ing, to throw the loss of this debt on this administratrix and her sureties, rather than on his own sureties. It can have no operation in the case, except so far as it may affect his own credit as a witness. It may affect that, and seriously too, in the following way. As it regards the debts due by the notes under consideration, if the makers are discharged, he can only be subjected to pay their amount by a suit in Chancery, on the ground that he received the money and has never paid it to any one; or by a suit on the note given at the time he executed the deed of trust; in either event, he can plead usury, and the makers, being discharged, may be important witnesses for him; but if the makers are not discharged, but are obliged to pay the money, he cannot avail himself of the usury as to them. It subjects the credit of a witness so situated, to scrutiny, in consequence of any bias arising from his wish that one or the other party might prevail; and he states himself, that he considered it his duty, to save his own sureties; and surely these circumstances will take not a few grains from the weight of his testimony. But the most creditable, unimpeached, and positive testimony of one witness, will not overthrow the answer. I am therefore bound to 320 believe the answer *against the witness, even when he positively says, that he had frequent communications with the appellee before entering into the deed of trust.

Again—I am bound to believe the answer which denies knowledge, because there is only a single witness, and he is not positive. He says from various conversations with the administratrix in the life time of Maule, without detailing those conversations, he believes she knew, &c. This part of his deposition is no evidence at all; and would be struck out, if the deposition was to be read to a Jury as to the other matters. It is surely not necessary to prove this position. The deed of trust referred to in the answer, does not prove knowledge. It speaks of judgments against all the parties, and she did not know but Campbell was sued as indorser. Besides, he had been indorser, and if all the parties had received the money, each would have been principal and each a debtor for the whole; so that the statement that he was debtor for the whole, does not necessarily imply, that he received all the money, and that she knew it. A deed is prepared to secure part of the debt, at least; this deed has reference to all the parties; stipulates immunities or indulgences to all; is offered by an officer who is pressing all with executions, in a way to induce belief, that he acted for all. It is not made to her individually, so as to shew and apprise her, that she was changing the nature of the debt, taking it upon herself, and probably subjecting herself and sureties, to a devastavit, but in her character of administratrix; and because under these circumstances she grants a short indulgence to all the parties, she and her sureties are to be answerable for the insolvency of Campbell, under a concealment of the real situation of the parties. Why did not Campbell tell her, that he was really the principal and wished to exonerate his sureties? He could then have sworn positively to her knowledge. That might have put her on her guard, and 321 *defeated his object. Why does not Campbell swear, that at the time the deed was made, the property was worth the debt? That he intended to save his sureties by giving a full pledge for the debt. If this was not the way he intended to save them, but yet intended to save them, and in consequence of which he told them he had saved them, how did he intend to do it? He says that he considered himself bound to save his sureties. And for that reason, he made the agreement with Mrs. Maule, without consulting, or giving any information thereof to them. He was bound by his oath, and could not rest on his pillow, when sworn to tell the whole truth, without disclosing this important secret. If he intended to save men who were harrassed with executions on his account, by paying the debt, or giving ample security for the payment of it, would he have concealed such intention, and such ability for a moment, from men, whom he was meeting every day in the street, and whose property or persons were in jeopardy on his account? Is there a tittle of proof to shew, that this property fell one cent in its value after the deed of trust was executed? If not, what kind of security was it? only worth on a fair sale not quite $300.

Although a court of equity will not set up an obligation against a security which has been fairly extinguished at law; but will leave the creditor to his legal remedies; it will do so if it has been unfairly extinguished by the principal.(n) They shall not avail themselves of his improper acts: a fortiori, if they come into equity, when they are bound at law, they will not be permitted to avail themselves of his improper conduct.

This argument, if it applies to these notes, applies with equal force to the one for $315 in which Campbell was a joint maker with Alcocke. But Mrs. Maule 322 had a *right to apply the proceeds of this sale to that debt, and although she had agreed in her answer to distribute it among all pro rata, yet as that is not accepted, before I would subject her to a devastavit for this debt, I would, under the whole circumstances of this case, so apply it. But at farthest a pro rata credit should be given, and the injunction only perpetuated for the residue, making her loss only equal to that residue.

But there is another ground as to this note, which I think puts it beyond doubt, and which equally applies to the other notes, if I am wrong on every ground I have taken as to them.

The only principle on which a surety can get relief, agreeable to the case made in the bills is, that he has been deprived of his bill quia timet, by a contract between the creditor and principal, by which the creditor has tied his hands. By that bill, the surety calls on his principal to pay up the debt and exonerate him, and on the creditor to sue both, or issue executions according to judgments obtained, and, in that

(n) 3 Atkins, 93.

way, as far as possible, to force the principal to pay. Had such bill been filed by these parties what would have been the effect? As to all the debts except that due on the note now particularly under consideration, Mrs. Maule would have directed the executions to proceed against the plaintiffs only. She could not have been compelled to sue Campbell as indorser, because there was no remedy at law against him; and as this bill would bring him before a court of equity, that court would at once decree against him, according to the circumstances as they might exist between the makers and him. She would also have directed the execution to issue, or to be proceeded in, against Alcocke and Campbell, on the note now under particular consideration. Should Campbell file a cross bill to set up this agreement by the deed of trust to grant indulgences, she would say, that by the very terms of that deed, it was not 323 *to be the sole surety for these debts, so as to discharge all the parties but him; it was taken only as collateral security, and under a belief, that all parties so understood it, and was expressly so understood by her; as the deed of trust shews. It is to operate so as to give her this as her only security; and so as not to suspend merely, but extinguish her executions: she made no such agreement. Would a court of equity, under the case now made out, compel her to suspend them, and thereby produce that effect, even if there had been no concealment or design on the part of Campbell to produce that effect? I think surely they could not. The parties then would not have been deprived of their bill quia timet, certainly not as to the notes from which Campbell, as indorser, was discharged.

But in West's bill, there is a note drawn by himself alone, indorsed by Campbell, as to which there is no ground for relief of any kind. The answer states, that that note was not embraced in the deed of trust; and Campbell admits in his deposition, that it was not. He says indeed, that all the debts for which either Alcocke, West, or Bennett were bound, were intended to be covered; but that this was left out by mistake. The deed only provides for those cases, in which there were judgments against Alcocke and Bennett. Then as to this debt, there is not only no agreement, no collateral security, but the bill does not even mention that it was intended to be embraced.

There may be other notes in this situation; for Campbell admits that judgments were not obtained on all the notes, at the time the deed of trust was given; but what were the existing judgments, and what obtained afterwards, does not appear. It shews however the looseness of this transaction; and affords a farther proof, that no one considered the debts secured by this deed. That it was a mere effort to 324 save as much as possible *from Campbell, by taking security on such real estate as he chose to offer.

On every ground, therefore, I am for affirming the decree.

CABELL, Judge, concurred with COALTER, and JUDGE BROOKE not sitting in the cause, the decree was affirmed.

ROANE, Judge, dissented and delivered the following opinion.

These three cases come on for discussion together. They depend, entirely, upon the same principle, and form, as it were, but one case. There are no material variations between them. I shall apply my remarks more particularly to the first mentioned case; but they equally apply to the others. The deed of trust referred to, and relied on in the appellee's answer, forms a part of the proceedings, and is I understand, brought into all the records by consent of counsel.

In considering the first case, more particularly, I will say, it is a bill brought by the appellant Alcocke, against Mrs. Maule, Campbell, West, and Bacchus. It states, that the appellant lent his name to Campbell, on two notes, for which he has never received any compensation, and in which he is entirely a surety: that in one of them, Campbell joined him as a drawer, and that this note is indorsed by West. In the other notes, Alcocke and West appear as the drawers, and Campbell as the indorser. The bill states, that in May 1818; a judgment was obtained on the first note against Alcocke and Campbell, and on the second against Alcocke only. It further states, that the appellee well knowing, that whatever might be the forms of these notes, Campbell was the real debtor, entered into a separate arrangement with him; gave him further time of credit, and took 325 *from him a note, together with a deed of trust, upon a lot in Richmond to secure the payment. That the deed is dated 1st July 1818, is duly recorded, and respited the payment till February 1819; and that the time of payment was further extended until April 1819, at which time the lot was sold; and that all this was done without the knowledge or consent of the appellant. It also states, that the price obtained for the lot aforesaid, being insufficient to pay this and the other debts for which it was bound; which inadequacy arose as is averred, from the intermediate fall of real property, executions are now out against the appellant, for the balance. The object of the bill is, to enjoin those executions, on the ground of the new arrangement which was thus made between the principal and his creditor, the appellee, which it is contended wholly discharged the surety.

On the proofs of the cause, it unquestionably appears, that Campbell was the principal debtor, and Alcocke only a surety; and this was known to the appellee Mrs. Maule, at least at the time of entering into the arrangement. It so appears from the testimony of Campbell, duly taken in the cause, and is corroborated by the answer of the appellee. I see no valid objection to Campbell's deposition; but if it were even thrown out of the cause, I should deduce the same result from the answer. Although the first part of that answer in terms, denies a knowledge of the suretyship, yet that denial must be restricted to a point of time anterior to the date of the new arrangement. The deed of trust by which that arrangement was consummated, and which is made by the appellee a part of her answer,

shews, that at that time, at least, she must have known Campbell to be the real debtor. In addition to its being an entire anomaly, for a surety to bind his property to pay the debt of his principal, that deed recites, that Campbell is justly indebted to her in the sum secured by it, and that the appellee had agreed to suspend the executions,
326 on his (Campbell's,) *giving his note, and deed of trust, for the amount &c., paying the costs of suit, and commissions. These are indicia, and amount to admissions which clearly import, that Campbell was the real debtor; and they must control the broad denial on this subject, which is found in the first part of her answer. She did know at this time, that Campbell was the real debtor. He must either come to that conclusion, or wholly expel the deed of trust from the record; and this conclusion is also entirely confirmed by the evidence of Campbell.

Whatever may be the forms of the promissory notes, or the order in which the parties have signed them, and however all the makers and indorsers of them are to be considered as principals, in relation to their bona fide owners; any party, thereto, may shew himself to be a mere surety, in relation to the principal. This position which is sufficiently clear on general principles, is established by several decisions in this court. This may also be shewn as against the creditor himself, in relation to any contract, in which the creditor bore a part, which has changed the liability of the surety, and deprived him of his rights antecedently existing. As to such contract, the creditor appears in a new character, and is liable for the consequences of his own acts. In ascertaining this fact, it is of no account how the parties may have been considered, in this particular at any bank or elsewhere, as to the identical notes in question; and much less as to any antecedent notes evidencing the existence of the same debt. The enquiry is confined to the point of time at which the change was made; and is limited to the question, whether the party claiming the release was then in fact only a surety.

The appellee sensible of the truth of this position, and admitting the general effect resulting from a change of the contract to the injury of the surety, seeks to withdraw herself from its operation in the case before us. She alleges in her answer,
327 in the first part thereof, that *it was also understood and agreed, that the force of her judgment was not to be impaired by this new arrangement. Without stopping to inquire how far it is competent for her to set up this new matter in her answer, and by her own oath, that answer is a felo de se in this particular. The conversation she relies on to shew this, was held with the sergeant, and not with the principal debtor, Campbell; and if that officer could be considered as representing Campbell, in consequence of the overture made to him by Campbell, there is no such pretension in relation to the appellant. As to him, the sergeant had no pretence of authority to bind him. He was an entire stranger to the interest of the present appellant; and nothing done by this agent, or said to him by the appellee, had the power to bind him: so that conversation with the sergeant was anterior to the date of the new arrangement. If before that conversation, it could have related to, or affected the appellant, that idea was explicitly abandoned in, and by the terms of that posterior agreement. The deed of trust which is in the record, and made a part of the answer, is full up to the point of abandoning such a pretension. It suspends the executions on the judgments; quoad all the defendants, the appellant included; which is entirely incompatible with the idea, that the appellant was not intended to be released. Nay, the deed of trust seems to have lost sight of even the judgments themselves, by stipulating, that in default of payment of the note given by Campbell, a sale of the lot should be made.

It evidently appears therefore, that in this case, the appellant was a surety only; that this was known to the appellee, if not before (as is clearly proved by Campbell) at least at the time when the new agreement was consummated; and that that compact extended the time of payment in favour of the principal debtor. Such extension, changed the liability of the surety without his consent. It made him guaranty
328 the solvency of his principal up *to a future and a distant day; insure against a fall in the value of his property; and opposed an impediment to his obtaining relief by means of a bill of quia timet. A prudent man may well undertake that another shall pay a debt by a short day, who might yet hesitate as to a distant one, on account of the risks of insolvency, &c. to which all men are liable.

It has been said or might be said, that the lot conveyed was inadequate to cover all the debts embraced thereby, and that Campbell's object was to commit a fraud on the appellee in favor of his sureties. There is not a tittle of evidence in the cause to warrant either of these suggestions. Not admitting that the inadequacy of the fund substituted, can change the force of the principles which decide this case, the deficient price afterwards got for the lot in question, most probably arose from the intermediate fall in the value of town property: so, on the other hand it would be wrong to impute a fraud to Campbell in favour of his sureties, when he had a sufficient inducement to the arrangement in question, considered merely in relation to himself. By it, he obtained a further time to pay the money, and thus relieved his body and goods from an execution, in addition to the satisfaction he derived from relieving his sureties. The principles of equity which apply to and decide this case, were settled by the unanimous opinions of this court in the case of Croughton and Duval. In that case it was unanimously admitted, that where a creditor agrees with his principal to stay execution or forbear the recovery of his debt, without the consent of the surety, whereby he may be injured and deprived of his remedy by a bill of quia timet, it is considered as a new contract, and compromise with the principal, by which the surety is discharged. This

principle was again admitted and recognised by this court in the case of Ward v. Johnson (6 Mun. 6) and is entirely and emphatically decisive of the case before us.

329 *There is not a scintilla of difference, in point of principle, between these cases and the one before us. My opinion therefore is, to reverse the decrees and perpetually injoin the judgments. That however is not the opinion of the other two Judges. Their opinion is to affirm the said decrees and they are to be affirmed accordingly.

Tayloe v. Adams.

June, 1821.

Sale of Land—Mortgage for Purchase Money—Waiver of General Lien.*—A mortgage of land by a vendee, to secure the payment of the purchase money due by his vendor to the prior vendor, by agreement between all the parties, is a waiver of the general lien, which but for such mortgage, the intermediate vendor would have on the land, to secure to him the payment of the purchase money.

A bill was brought in equity by Adams, against Peter and Carter Beverley, to compel a specific performance of an agreement entered into with Peter Beverley; or to subject the Cloverdale furnace and some adjoining lands to sale, for the purpose of raising the purchase money agreed to be paid by Beverley to Adams.

It appeared, that Peter Beverley had not executed the bonds which he had covenanted to execute jointly with Carter Beverley, and that a considerable portion of the purchase money was due for the Cloverdale furnace. And the Chancellor decreed a sale of as much of the land, &c., as should be necessary to raise the money due.

In this state of the case, Taylor filed a petition, praying an injunction to arrest the execution of the decree. He stated, that the furnace, &c. was originally

330 sold to *Adams by Breckenridge; and that Breckenridge took a mortgage on the land, &c. which was not recorded. That Adams afterwards with the knowledge and consent of Breckenridge, sold the land thus purchased of Breckenridge, and another small tract not mortgaged to Breckenridge to Peter Beverley. The conveyance to Beverley was immediately from Breckenridge, who then took a mortgage from Beverley to secure the payment of the purchase money, which he had not received of Adams. Peter Beverley then, with the knowledge and consent of Breckenridge, sold the land, &c., to his brother Carter Beverley; and with the consent and privity of Breckenridge whose money was yet unpaid, the land was now mortgaged to him by Carter Beverley, to secure the original purchase money and interest. Tayloe bought of Carter Beverley with the knowledge and consent of Breckenridge, and had paid to Breckenridge the whole amount due him for the purchase. Carter Beverley it was alleged was insolvent, so that Tayloe had no effectual recourse against him; and that Adams' lien was lost by his transactions with Beverley and Breckenridge. The Chancellor granted the petition.

Adams on the contrary insisted in his answer, that Tayloe was a purchaser pendente lite, and that the original decree bound him.

At a subsequent term the petitioner Tayloe was permitted to come in as a defendant, and to answer the original bill. Depositions were taken; among others that of Breckenridge, which was excepted to for his incompetence, on the ground of interest. This objection was overruled; and the Chancellor considering Tayloe as a purchase pendente lite, and so bound by the former decree; and that he must be taken to have had notice, because his agent in making the purchase, Breckenridge, had actual notice of the debt due to Adams by Beverley, and that it was for the purchase of the land, &c. in dispute; that against Peter

331 Beverley, Adams had a lien *on the land, which followed it when it came to Tayloe's hands; dissolved the injunction, dismissed the petition, and Tayloe appealed.

ROANE, Judge.

The court is of opinion that as it is alleged by the appellant, is not denied by the appellee, and is moreover proved by the testimony, that a mortgage was given by Peter Beverley to Breckenridge a creditor of the appellees, for a part of the debt due by the said Beverley to the appellee; that mortgage amounted to a waiver of the general lien existing upon the land under the sale of the same by the appellee to the said Beverley, on the authority of Bond v. Kent (a) and other cases on the same subject. The decree therefore is reversed for want of equity; except so far, as it prays for personal relief against Peter and Carter Beverley.

Lee v. Cooke's Ex'or.

June, 1821.

Trespass for Mesne Profits—Executors.*—Trespass for the mesne profits of land recovered in ejectment against A. lies against his executor.

Trespass—Executors—Statute.†—The 64 § ch. 104, Rev. Code, is an extension of the 4th Edw. III. ch. 7, de bonis asportatis.

Lee brought trespass to recover from Cooke the mesne profits of a tenement which he had recovered in ejectment. After the issue was made up, Cooke died; at a subsequent term, his executors

332 appeared by attorney, *and the cause was continued. And at the term next ensuing, the cause was directed to be struck off the docket; the court thinking the action

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*Sale of Land—Mortgage for Purchase Money—Waiver of General Lien.—When a vendor takes a mortgage for the purchase money, his implied equitable lien for the purchase money is superseded. Buchanan v. Clark, 10 Gratt. 176, citing the principal case, and Little v. Brown, 2 Leigh 353.

(a) 2 Vern. 280, see the note to Chapman v. Turner, 1 Vern. 267.—Reporter.

*Trespass for Mesne Profits—Executors.—See monographic *note* on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

†Trespass—Executors—Statute.—1 Rev. Code 1819, p. 890, sec. 64, which declares that "actions of trespass may be maintained by or against executors or administrators for any goods taken or carried away in the lifetime of the testator or intestate," is an extension of the statute, 4 Edw. 3, ch. 7, *de bonis asportatis*, so as to embrace actions brought against, as well as by, executors and administrators. Boyles v. Overby, 11 Gratt. 207, citing the principal case, and Vaughan v. Winckler, 4 Munf. 136.

abated by the death of the original defendant. A supersedeas was obtained from the court of Appeals.

The authorities which were relied on in argument, are so fully stated in the note (1) 1 Saund. 216, by Williams, that I shall only refer to that book.

ROANE, Judge. The court is of opinion that the action in this case being brought for the profits of the appellant's land, converted by the testator of the appellee to his own use in his life time, as well as for the trespass by which the property was so converted; and being within the equity of the 64th section of the statute ch. 104, 1 Rev. 390, which section is an extension of the statute of 4 Edw. III. ch. 7, de bonis asportatis, to embrace actions brought against, as well as those brought by executors and administrators; the said action so far at least as regards the profits, did not die with the testator; but survived against his executors; and there is error in the judgment abating the action; the judgment is therefore reversed with costs, and the cause remanded for farther proceedings.

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333 ***Dempsey v. Lawrence.**

June, 1821.

Chancery Jurisdiction—Suits for Freedom.*—The chancery as well as the common law courts have jurisdiction in suits of paupers for freedom; and will on a case proper for a court of equity, appoint counsel to prosecute for the pauper &c.

Dempsey was born the slave of one David Wallace, and descended to his son William. He hired himself of his master William Wallace, and having accumulated the sum of $100, agreed to pay it, and $200 more at a future day to his master, provided he would emancipate him. The proposal was accepted. After it was accepted, Walace insisted that Dempsey should find some one to be surety, for the payment of the $200; one Bacon agreed to become bound for the payment, and executed his bond to Wallace. In this state of things, one Lawrence took the place of Bacon, agreed to pay the $200, and Dempsey was to be bound to him for it. This arrangement was made in concert between Bacon, Wallace, and Lawrence. Dempsey paid the money to Lawrence by instalments. Lawrence then went to North Carolina, and promised Dempsey if he would go with him he would emancipate him. Dempsey went and remained two years: returned and lived on a piece of land abjoining Lawrence, always acting as a free man. Lawrence died, and his widow claimed Dempsey as a slave. The bill prayed, that all persons be injoined from molesting or selling the plaintiff as a slave; and that the widow of Lawrence, be decreed to execute a deed of emancipation.

The defendant (the widow of Lawrence) never answered the bill, and Dempsey's counsel asked a final decree. Chancellor Nelson was willing to continue the in-
334 junction, *until Dempsey could assert his freedom in a regular manner, in a court of law; but it being insisted that he should make a final decree, he dissolved the injunction and dismissed the bill: and an appeal was taken.

M. Robinson for the appellant; no counsel for the appellee.

It is unnecessary to enquire whether a court of equity would or would not enforce the agreement between Dempsey and his master, though great and unusual merit, and money besides were the consideration. In England, such a contract by the rules of the common law would have insured to a villain his freedom. 1 Inst. Lib. 2 sect. 204.

It is sufficient to observe, that this agreement was soon changed into another, more effectual in law for Dempsey, by which Wallace transferred Dempsey to Bacon, in trust, to be emancipated in a certain event. After this, Bacon having the legal right to Dempsey transferred him to Lawrence in trust, also, for the same purpose.

There appears to have been no writing to this effect: but the fact appears, by oral evidence, and slaves may, like other chattels, be transferred by delivery.

But admitting that there had been no trust, and that D. had been absolutely the slave of Lawrence, Dempsey is nevertheless entitled to freedom, in consequence of being brought by Lawrence from North-Carolina to Virginia, contrary to the act of 1792. Vid. Vir. L. Edition, 1803, Vol. I. p. 191, sec. 36. (a)

The right of freedom, prima facie acquired by a slave, brought into this state, contrary to the act, can only be obviated, by evidence shewing, that the oath, prescribed by it, had been taken, or by
335 circumstances authorizing a *presumption, that it had. Vid. 5 Munf. 542. Garnett v. Sam and Phillis.

The cause was certainly in a situation enabling and requiring the court below to decide the only important point in it, to wit, Dempsey's right to freedom.

1st. Because the only adversary right was that set up by the appellee.

2dly. Because, if any other right existed, in any other person that person not being a party to this suit would not be bound by a decision in it.

3dly. Because, in suits for freedom, where essential justice can be done, the court ought not to adhere to strict form. 2 Cal. 350; Pleasants v. Pleasants, 1 Hen. & Munf. 134; Hudgins v. Wrights.

An account, as prayed for, ought to have been directed. A person, illegally holden as a slave, ought, upon recovering his freedom, to recover the profits of his labor. This seems to be a legal consequence.

The case of Pleasants v. Pleasants does not decide, that a person, held as a slave shall not upon recovering his freedom recover the profits of his labor while so detained. It only decides, that, under the

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***Chancery Jurisdiction—Suits for Freedom.**—To the point that chancery as well as common law courts have jurisdiction in suits of paupers for freedom, the principal case is cited in Talbert v. Jenny, 6 Rand. 160; Dunn v. Amey, 1 Leigh 471; Nicholas v. Burruss, 4 Leigh 298; Reid v. Blackstone, 14 Gratt. 366; *foot-note* to Peter v. Hargrave, 5 Gratt. 12; *foot-note* to Ellis v. Jenny, 2 Rob. 597. The principal case is also cited in Sawney v. Carter, 6 Rand. 173; Manns v. Givens, 7 Leigh 715.

(a) This ground is overruled as to the present case by the authority of Murray v. M'Carty, and Barnett v. Sam. See ante, p. 282.—Rep.

circumstances of that case, such profits were not recoverable.*

By the COURT. The court of Chancery had jurisdiction of the case, and might have proceeded to a final decree. after the proper preliminary steps; it might have assigned counsel, to the appellant, and have conformed to the other provisions of the act, prescribing the mode of conducting suits for freedom.(b) The decree is therefore reversed, and the cause is to be sent 336 back to the *Chancery court of Williamsburg, with directions to the court, to appoint counsel for the appellant, and to proceed to a final decree on the merits.

Overseers of the Poor, of Richmond County v. Tayloe's Adm'r.†

June. 1821.

Charitable Donations—Trustees—Recovery.—A charity for the benefit of the poor of a parish given in trust to the minister and vestry: when there ceased to be either, was vested in the overseers of the poor for the parish, by the act of 1805, (a) and they may recover the charity in equity.

Same—Mode of Investment.—The testator leaving the mode of investing the fund to the discretion of the trustees, a court of equity should not interfere by directing the manner of investment.

John Tayloe, by a will recorded in July 1779, gave a charity to the poor of Richmond county in these words, "I gave to the minister and vestry of the parish of Lunenburg, and their successors the ministry and vestry of the said parish, 500l. sterling; in trust, for the use of the poorest inhabitants of the said parish, being honest people; to be let to interest on good land security, or otherwise, so laid out, that the interest or better profits thereof, be distributed with equity and justice by the minister and vestry aforesaid, among the poor aforesaid, every year, at the lower church of the said parish on restoration day, &c., this legacy to continue for ever." The trustees continued to distribute the charity until the year 1799, after which there was neither minister nor vestry in the parish. The bill recited the several acts of Assembly on the subject of the Protestant 337 *Episcopal church, and relied particularly on that of 1805, by which all donations for charitable purposes made to vestries in parishes in which there had ceased to be vestries, should devolve on the overseers of the poor of the said parishes; and should be managed by them for the objects of the original trust.

The Chancellor on bill and answers shewing this case, decreed the administrator de bonis non of Tayloe, to pay 500l. sterling at an exchange of 36 per cent. advance, in current money, with interest at 5 per cent. from the 29th May 1799, to the plaintiffs: and directed the overseers, to vest it in stock of the bank of the U. States, or in one of the banks of Virginia, as they thought best; and to apply the annual proceeds, to the relief of the poorest inhabitants of the parish, being honest people.*

ROANE, Judge. The decree is erroneous in directing the appellees to vest the sum in bank stock, instead of leaving them at liberty to let it out on good landed security, or otherwise at their discretion, pursuant to the will of the testator. It is therefore reversed, and remanded to be reformed pursuant to these principles; with costs to the appellees, as the party substantially prevailing.

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338 *Miller v. M'Luer.

October, 1820.

Demurrer†—Assigning Special Causes—Effect.—Assigning special causes for demurrer does not make a demurrer special, which is in its nature general.

Same†—No Joinder—Effect in Appellate Court.‡—Not adding the joinder in demurrer, is not an available error in an appellate court, after argument, and a decision on the demurrer in the court below.

Appeal Bonds§—Actions on—Judicial Errors—Practice of Court of Appeals.—In actions on appeal bonds, this court will not consider either judicial errors, or clerical misprisions, in the court below, occurring in the original suit, and in which there has been an acquiescence, by the parties not appealing to correct them.

Miller brought debt against Beverley, M'Luer, and Hiort, in the Superior court of law for Rockbridge county, on a supersedeas bond, given by them jointly, to Miller, for the successful prosecution of the supersedeas to a judgment, given in the county court of Rockbridge &c. with the usual condition annexed.

The suit abated as to Beverley and Hiort, on a return of their being no inhabitants.

The breach assigned was, that the Superior court was of opinion there was no error in the judgment of the county court; and on the 15th April 1812 "adjudged" that it should be affirmed: and that Miller should recover of Beverley his damages, at 10 per cent. and his costs. The clerk by mistake omitted to record the judgment as to the 10 per cent. damages; and at a subsequent term the court permitted the entry to be amended.

At the September term 1813, the defendant pleaded that he had not broken the covenant: in 1816 the defendant had leave to withdraw this plea; he then craved oyer of the appeal bond, and of the record of the court in which the judgment was examined, pleaded no such record, and demurred to the declaration. There were five 339 *causes of demurrer specifically assigned: one was, that the Superior court in entering judgment on the supersedeas, used the words "therefore it is adjudged," instead of "therefore it is considered." There was no joinder in demurrer. The court nevertheless proceeded to give judgment on the demurrer, against

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*The Reporter is indebted for this argument, to the counsel who delivered it: who obligingly drew it up as it is now printed.—Edition 1821.

(b) Ch. 124, 1 Rev. Code.

†See monographic *note* on "Charities" appended to Kelly v. Love, 20 Gratt. 124.

(a) 2 Rev. 268.

*This like many other cases reported, was argued before a reporter was appointed, and no notes of the arguments were taken.—Edition 1821.

†**Demurrer.**—See monographic *note* on "Demurrers" appended to Com. v. Jackson, 2 Va. Cas. 501.

‡**Same—No Joinder — Effect in Appellate Court.**—The joinder in demurrer not being added is not an available error in an appellate court when the demurrer has been argued and decided on its merits below without objection being made. Hart v. B. & O. R. Co., 6 W. Va. 346; Crump's Case, 98 Va. 834, 23 S. E. Rep. 760, both citing the principal case as authority.

§**Appeal Bonds.**—On this subject, see monographic *note* on "Appeal and Error" appended to Hill v. Salem, etc., Turnpike Co., 1 Rob. 263.

the plaintiff; who appealed.*

By the COURT.† This case was decided in the Superior court, on a demurrer to the declaration, which was sustained. Although causes of demurrer were assigned, yet it was, in fact, and in its nature, a general demurrer. The declaration, which was on an appeal bond, set out the condition, the judgment of affirmance, with ten per cent. damages; and makes profert of the bond. It goes on further to state, that though the judgment of affirmance gave ten per cent. damages, according to law, yet the clerk, omitted, by mistake, to enter up the judgment accordingly: and that this omission was afterwards corrected by the court. Oyer was craved and granted of this record; and of course it became a part of the declaration: and the question on the demurrer was, whether the plaintiff could sustain his action, on such amended judgment?

Considering it a general demurrer, therefore, it was properly received. Another objection, however, was taken, that there was no joinder in demurrer. This objection comes too late. The demurrer was argued by both parties, and the reason of amending this defect is at least as strong, if not stronger, than in the case of the want of a similiter to a plea. By amending in that case it is said, "the court only make that right, which the defendant himself understood to be so, by going down to trial."

340 *As to the merits. Objections are taken as to want of technical form in the original judgment of affirmance: the word, "adjudged," instead of the word, "considered" by the court, is objected to. So too as to the form of the amending judgment. That judgment is also objected to as a nullity, because the error complained of was not a clerical error, amendable on motion, as the judge decided; but an error which could only be corrected in an appellate court. I am not prepared to say whether either of these objections would have availed Beverley, who was the surety to those proceedings, and the principal in the appeal bond in this case, had those proceedings been brought before us for correction; but I have no hesitation in saying, that we cannot reverse or nullify them in this suit.

Until reversed by proper authority, the Superior court of law, and this court when revising its judgment, must consider those proceedings as regular, and as obligatory on the parties, as if they had been affirmed in this court. Had they been so affirmed, the amending judgment would have relation to, and be in law considered as part of the original judgment of affirmance; and the plaintiff consequently entitled to maintain his action.

For these reasons I think the Superior court of law erred, in sustaining the demurrer in this case, which ought to have been overruled. That judgment must, therefore be reversed with costs; the demurrer overruled, and the cause remanded for further proceedings to be had.

*The Reporter not being present at the argument cannot unfortunately give even a sketch of the course it took.—Edition 1821.

†CABELL absent.

341 *Austin's Ex'or v. Jones.

June, 1821.

Detinue—Death of Slave after Suit Brought—Judgment.*—In detinue, the jury having found for the plaintiff the slave mentioned &c.: but that she had died since the suit was brought, the court must nevertheless give judgment for the slave or for her value: the death not being put in issue by plea puis darrein continuance.

Austin's executor brought detinue against Jones, for several negro slaves by name, and of specified value; among them was one called Beck; the defendant pleaded non detinet. There was a verdict for the plaintiff; but the jury found also, that Beck who was included in the first part of the verdict, died after suit brought and no damages were given. The court gave judgment for all the slaves but Beck; of her, no mention was made in the judgment. The plaintiff appealed.

Daniel, for the appellant.

The fact and legality of the detention constitute the essence of this action. If the defendant wrongfully withhold the property when the action is brought, nothing will discharge him from the necessity of delivering it, or the alternative value. The death of the slave dispensed with the delivery of the specific thing, because it had become impossible; but surely not with paying the value, which was as practicable as before; and which the defendant made himself liable to do by the unlawful detention.

If A. take goods of C., and B. take them of A., C. shall have his action against either at his election; because both have damnified C. by the taking.(a) Also,

342 *in detinue for charters, if it be found that the defendant has burnt the charters, judgment shall not be given for the charters, because they cannot be delivered, but for the value of the land.(b) In the first case cited, the party lost the power of delivery involuntarily; and in the second, the destruction of the property, is no excuse for not paying the alternative value. The case before us is the stronger, from its being that of an executor; who is required to have the property of the testator appraised, and to sell or distribute it according to the condition of the estate: he could do no one of these things while the property was detained in the possession of another: and he who wrongfully detains, must take all the consequences of his illegal act.

Stevenson, contra. The position of the counsel as to burnt charters is not law; and it is said in Rolle, to whom we are referred for its support, that the contrary was ruled

***Detinue—Death of Property after Suit Brought—Judgment.**—In an action of detinue, where the sole plea interposed is *non detinet*, and the property sued for dies during the pendency of the suit without fault of the defendant, the plaintiff may recover the alternate value of the property, unless the matter is brought to the attention of the court by a plea of *puis darrein* continuance. Arthur v. Ingels, 34 W. Va. 639, 12 S. E. Rep. 872, citing, among others, the principal case.

The principal case was also cited in Cloud v. Catlett, 4 Leigh 472; Brugh v. Shanks, 5 Leigh 601; Catlett v. Russell, 6 Leigh 363, 364; Martin v. Martin, 12 Leigh 502, 507. See generally, monographic *note* on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

(a) 1 Sid. 438; Bac. abr. "Detinue" A.

(b) Bac. abr. "Detinue" B.; Rol. abr. 607.

17 Edw. III. 45, b.(c) But if it were law, it would be inapplicable to this case, because detinue for charters is a mixed action, savouring of the real, and in such cases, there must be damages found where the charters are lost;(d) but not in this form of action; in trespass for burnt deeds, damages may be recovered, while in detinue there can be no recovery but of the specific thing.(e)

There could not be judgment for the dead slave on the general principles of the action. The distinction between detinue and trover, is, that the foundation of detinue is to recover the thing individuo, and the gist of the action is the detainer: trover is for the conversion, or destruction of the thing; if detinue can be sustained 343 *where there is a destruction after suit brought, why not where there is one before suit? and then the action will be superseded by trover and trespass. In detinue, the value must be assessed at the time of trial, (f) not when the suit is brought; but at the time of this trial the slave was dead; and was consequently of no value.

If it be said that the slave might have come to her death by the misconduct of the defendant, the answer is, that he would in that case be answerable in another form of action. That there may be verdict and judgment for property which accidentally perished after suit brought, is rendered more questionable by the fact that there never was a pretence to such a right before this case, numerous as the actions of detinue have been in Virginia.

COALTER, Judge.* The appellant brought an action of detinue, in the Superior court of law for Hanover county, against the appellee, for a negro woman slave, named Beck, of the value of $400, and for her two sons, Paul, of the value of $400, and John of the value of $300.—The Jury found for the plaintiff the negro Beck, of the value of $475, Paul of the value of $375, and John of the value of $300. They then proceed in these words: "We further find the said negro woman Beck, has departed this life, since the institution of this suit, to wit, during the present year." They do not find any damages for the detention of either of the slaves.

The court gave a judgment in the usual form, for the negroes Paul and John, at the bottom of which judgment is this entry: "No judgment being given for the negro woman named Beck in the declaration mentioned, or her value, the Jury having found in their said verdict that she has departed this life, since the institution of this suit, to wit, during the present year." To this judgment a supersedeas was awarded. 344 *I, at first, was inclined to be of opinion, that the Jury had a right to find the slave Beck for the plaintiff; and to fix a nominal value at least; and although they had fixed a real value in their verdict, yet there being no motion for a new trial, on the ground that the value was too high, this court might presume it was well ascertained, because the defendant may have sold her for $475; although dead, she might be considered, as between these parties, to be of that value, and consequently that the court could give judgment for her, so that the plaintiff might recover her value so ascertained. Had I been confirmed in this opinion, then I should have been for reversing the judgment; and would either have concurred in entering a judgment for Beck, of the value fixed by the Jury, or I would have sent the cause back, with liberty to the appellee to move the court for a new trial, in order that it might be seen whether there was any such reason, as above supposed, for valuing a dead slave at $475. If I could have so sent it back, justice I think would have required me to do so; not only because this is a new case, unsettled by any of the courts; but because the Jury, in the first part of the verdict, having found this slave for the plaintiff as though she was alive, may have thought it was their duty to value her, as if alive; and I think it but right to presume, that no such reason, as above supposed, for assessing the value even higher than that laid in the declaration existed, because the court refuse to give judgment for that value, or to say any thing in relation to it which could induce such a supposition.

I had at first doubted, whether it was not error for the Jury to find a greater value than that laid in the declaration; but I find it otherwise settled in Bigger's adm'r v. Alderson,(g) in which case the court also expressly says, the value is to be fixed at the time of the verdict. Why? 345 *because the value may have increased, even beyond the plaintiff's own estimate when he sued; in fact the court there say, it is not important that the value should be laid in the declaration (I presume this is intended after verdict) because the Jury are to fix the real value at the time of the verdict. But if they are to give the plaintiff the increased value at that time, they cannot take an anterior date, so as to fix a greater value on the defendant, when he cannot go back to an anterior date so as to establish a less value. On further reflection and consideration however, I have come to the conclusion, that in the case of the death or destruction of the property, there can be no verdict or judgment for the specific thing; but that the regular course would be, for the Jury, in responding to the whole issue, to find property in the plaintiff, and damages, if any, for the detention, and the death or destruction of the property, since the suit, in order to shew why the value was not assessed; and the judgment will be for those damages only, and the costs. If great protest had been received either by a sale, great hires, or otherwise, by the defendant, I incline to think the Jury might give damages for the detention, according to what the defendant had actually received; but as to the value, the time of ascertaining it, is correctly laid down in the case in this court above referred to; and that nothing could

(c) 2 Rol. abr. 607.
(d) 5 Comyns dig. 666; Saville 29; Viners abr. "Detinue."
(e) Brook's abr. "Chartres de terre."
(f) 1 Hen. & M. 54.
*CABELL absent.

(g) 1 H. & M. 54.

justify finding any value as to property dead or destroyed by act of God. Even in case of destruction by act of the party, the Jury can only give redress by way of damages for detention, or privation of property; for they cannot say that property dead or destroyed is of any value.

Suppose the slave had died five years before the verdict found, the suit having depended a long time, and the Jury were asked to assess hires, or damages, for the detention to the date of the verdict. Could not the defendant shew that no such 346 hires had been received; for that *the negro was dead? But say she was not dead, but that five years before the verdict she had, by the visitation of God, become, and had remained ever since a confirmed maniac, and a perpetual expense; would full hires according to her anterior value be given, down to the date of the verdict? Could he not shew this also as to her value? or must the Jury find her value as before that visitation? We are not at liberty nor are the Jury, to speculate on the chances that she would not have died, or been thus visited, had she not been detained from the plaintiff, or that he might have sold her and laid his money out in other slaves, or lottery tickets, and thereby gained great profits. The whole injury which the law supposes the party to have sustained, down to the verdict, is the reasonable profits to that time: he is to be retributed that far, by way of damages for detention, and to recover back the property or its value at that time; if the slave has grown up and become very valuable at that time, then farther to detain, is doing an injury to that amount; and if the property is not delivered up, the party is retributed for that value or injury by the judgment; if she has become old and infirm, her hires have been diminishing from year to year, and her value now is $10, though it was an hundred when the suit was brought. Their hires down to the verdict retribute the party for the injury of detention, and the slave or her then value compensates the whole injury. This is the injury complained of. The slave or her value is asked in the declaration and given by the judgment, and damages for the detention are also to be settled at the trial. The plea puts these matters as well as the title of the plaintiff in issue. If the title only is found for him the verdict is not sufficient to authorise a judgment in the case, unless it also appears by the verdict that the value could not be assessed. It is as necessary so to assess the value, and damages for detention, as to assess damages in assumpsit, where the plea of non assumpsit denies as 347 well *the whole debt, as the particular amount or damages claimed. The value and damages are equally within the issue in this case; and evidence is as necessary to ascertain them to the Jury, as to prove the same due in assumpsit; and the defendant is equally entitled to shew that they are less than claimed, in this case as in that. The plaintiff proves the value of the slave, or the value of her labour at one time; does this preclude the defendant from shewing she was not worth so much at that time? Surely not. Will he be denied the right of proving that she was worth less at a subsequent time, and before the verdict? Surely not: unless the plaintiff has the privilege of fixing the time when she shall be valued: but the law correctly fixes that time at the date of the verdict. Suppose she had not been dead at the time of the verdict, but both her arms had been amputated, could not the defendant give this in evidence on the enquiry as to her value?

But it may be said, the jury cannot find that she is dead, for if so they could give no value, and this would be to abate the suit; for if a plaintiff was to sue for a slave, and state in his declaration that she was dead, a demurrer would lie. Admit the last proposition to be true, yet the death of the slave after the suit could not be pleaded in abatement or bar, any more than payment of an account of any part of it, after an action of assumpsit brought, or the delivery of property after detinue. The plaintiff will recover his costs, and also any damages the jury may assess, and such matter will come out on the general issue, which general issue involves, as before said, the just retribution to which the plaintiff is then entitled, under the claim in his declaration. But the verdict is for Beck, of the value of $475. If this value has been ascertained, as the law says it should be, at the time of the verdict, on what principle could the jury find that though she was dead, she was worth 348 that *sum? Is not such verdict upon its face manifestly repugnant and void?

The action of detinue is little used in England, and we must be governed by general principles, and by analogy to the redress given for similar injuries; and also by considering the rights of the defendant after judgment in this particular action.

It is laid down in one case, that in detinue for charters, if the issue be upon the detinue, and it be found that the defendant hath burnt the charters; the judgment shall not be for the charters, for it appears he cannot have them, but he shall recover the value of the land in damages.(h) But the jury found the non-existence of the thing sued for. Regularly the judgment must be for the thing sued for, if to be had; if not for the value; but as the verdict shewed the thing was not in existence, though by the act of the party which might have done injury to the value of the land, yet no judgment could be entered for it; the law will not do a vain thing. Here also, and that too by the act of God which prejudices no man, the thing no longer exists, and yet I am asked to enter judgment for it.

But the defendant has a right to deliver the property, and is not bound to pay the value.(i) If then, we have a right to enter a judgment for a dead negro, he must have a right to deliver the corpse, otherwise he is deprived of the power thus to discharge himself. Surely he could not deliver the corpse; and yet that is the thing for which we must give judgment on this verdict. We cannot expunge that part of the verdict, though we may set it aside as

(h) Rol. ab. 607; Ba. ab. title "Detinue," letter B.
(i) 1st Morg. Vad. Mecum, 416; Kelw. 646.

repugnant, and grant a new trial. But trover will lie, although the property be dead, because the time of the conversion gives the date to which the action relates; and the very conversion may cause the
349 *death of the property.(k) The recovery in that action amounts to a sale of the property at the time of the conversion, and vests the property in the defendant,(l) from that time, so that if he has sold it even pending the suit, or before, and the plaintiff never gets his damages, he cannot bring detinue against the purchaser. But in case of detinue, the property is never transferred, until the alternative value is received. It continues the property of the plaintiff at the time, and after judgment, and therefore, in this case, if we can suppose property in a dead slave, she was the plaintiff's property at and after the judgment. She was certainly his property when she died. How then can she have died the property of the defendant? If she died the plaintiff's property can the defendant be compelled to pay for her, as though she were in full life, and thereby acquire title to her? Will the law compel him to purchase a dead slave at 475, when it will not compel him to purchase her, at that price, if alive, but would allow him to continue the property still in the plaintiff by delivering her to him?

So too in trover, if the conversion consists altogether in a refusal to deliver on demand, and the thing is then dead, or had been forcibly taken away from the defendant, no action will lie.(m) And even in trover, the party may discharge himself by the delivery of the property, and damages will be assessed accordingly; but this must be done at, or before trial, and by the assent of the court; if he cannot do this, he must stand to the loss, as the conversion is the gist of the action.(n)

The most I could do in this case, would be to set aside the verdict as imperfect and repugnant on its face, because it assesses a high value for a slave who is found to be dead: with instruction to the court to direct the jury, that if they find property in
350 the plaintiff, but that *the slave is dead, they must find this last fact specially, and in that case, only find such damages for the detention, as the plaintiff may be entitled to, according to the evidence.

BROOKE, Judge. The question, in this case is, whether the finding of the Jury, that the slave Beck died after the institution of the suit, is to deprive the plaintiff of his judgment for her value. A correct decision of it will depend on an accurate view of the nature of the action, and the pleadings. The object of the action of detinue, is, to recover the specific property detained, or its value, and damages for detention; it is like trover, an entire action; judgment for the defendant is a good bar, in an action of trover, for the same thing. So, a judgment in trover gives the property to the defendant, and is a bar to an action of detinue.

(k) Ba. abr. Trover. D. E.
(l) Ib. A. Str. 1078.
(m) Ba. abr. Trover. B. G. 8.
(n) Esp. N. P. 596.

It is not denied, that the destruction of the property, before trial, is no defence in the latter action; in that action, the question is, to whom did the property belong at the time of the conversion? and its object is, to recover the value thereof in damages. The action of detinue is only a broader action; substantially, it is the same, with the addition, that the specific property may be recovered, if to be had, and if not, the alternative value and damages for detention.

The alternative is given, to meet the accidents that may happen to the property; which, in trover would be an unavailing defence. The latter, in England, is most frequently resorted to, because of the wager of law, which would defeat the action of detinue. Under our law, that objection to the action of detinue does not apply; and it is a valuable remedy, particularly in relation to property in slaves; and would be abandoned, if the destruction of the property was to defeat it: the action of trover would be preferred.

351 *According to the form of the action of detinue, also, it cannot be maintained for the hire of the property, and damages for its detention only. In both actions the value of the property must be recovered or nothing: so that in this case if the death of the slave is to avail, the judgment must be for the defendant as to her. No example can be shewn, of a judgment in detinue, for a personal chattel, in which value is omitted. The case from Rolle of charters, has very little application. The action for charters is a mixed action; it partakes of the realty, there may be summons and severance. In detinue for a chattel a capias lieth; not so for charters. (o) But even in that case, the judgment was for the value of the thing, which was substantially the object of the suit. In the absence of all direct precedent, therefore, I infer, even from that case, that no judgment can be rendered in detinue, omitting the value of the property in controversy. An omission, to find the value of the slave Beck, in this case, by the Jury, would have rendered the verdict imperfect, and no judgment could have been given on it, for hire and damages only.

The finding then by the Jury, that the slave Beck was dead, was irrelevant to the issue; otherwise, a verdict for hire and detention of the property, would be a perfect verdict, on the principle, that whatever a Jury may find on a special verdict, they will be presumed to have found in a general verdict, if that verdict is questioned. So much for the nature of the action.

The pleadings, generally, are the best tests of the law. The plea of non detinet traverses the allegations in the declaration, and puts it upon the plaintiff to prove them. As to the possession in the defendant, that need only be proved, either at the suing out of the writ, or at some time before. In the case of Burnley v. Lambert(p) that was the decision of this court. That deci-
352 sion excludes *any other period; it is not incumbent on the plaintiff to prove possession in the defendant at any

(o) Co. Lit. 286.
(p) 1 Wash. 308.

after period; having proved property in himself, and possession in the defendant at or before suing out his writ, and value, the proof of the plaintiff is complete: and it follows, that any negative proof by the defendant as to the possession after the writ, would be improper.

But it is contended, that proof of the death of the slave relates to the value, and not to the possession. Is it correct to say, that proof of the non-existence of the thing is proof of its value? Value is a question of plus or minus. The inquiry pre-supposes the existence of the property, and possession in the defendant. It goes to shew, that he was not in the possession of the slave Beck, at the time of the trial; that is, that he was not in a condition to deliver her to the plaintiff, which is interdicted by the decision before referred to. The plea relates to the time of suing out the writ, or to some previous period as regards the possession, and not to a time subsequent, according to that decision.

Proof therefore, that the defendant had lost the possession, by death, or otherwise, at a later period, was irrelevant to the issue; and the Jury having found the fact, that finding is mere surplusage: the rule being that utile per inutile non vitiatur. For these reasons I think the judgment erroneous; that it ought to be reversed, and that judgment should be rendered for the value of the slave who died after the action was commenced.

ROANE, Judge. This was an action of detinue, brought by the appellant, in the Superior court, to recover three negroes, stated to be of separate and specified values. Among them is the negro Beck, stated in the declaration to be of the value of $400. The damages are laid at $1200. Issue was joined on the plea of non detinet. In September 1817, the Jury found "for the plaintiff, the negro Beck, of the value of 353 $475," and the two other *negroes, at specified values, but find no damages. They further find, that the negro Beck died "since the institution of this suit," to wit, during the present year. The judgment in the Superior court was, that the plaintiff recover the other two negroes, of the values respectively found, if to be had, and if not, their respective values; no judgment being given for Beck or her value, the Jury having found, that she died since the institution of the suit, in the present year.

From this judgment the appellant obtained a supersedeas, to this court, and the question now is, whether the judgment aforesaid, as it omits to give a judgment for the negro Beck, be correct or not. That judgment as to her, can only be justified, by taking the date of the finding, and not that of the institution of the suit as the criterion, as well in relation to the right, or property itself, as to settling its alternative value.

This question is to be decided, as upon the present pleadings. I shall enter, therefore, into no inquiry, whether the action will lie for a negro that is dead, at the time of the institution of the suit; or for one dying after the institution of the suit, and respecting which, the Jury are permitted by the pleadings, (if there be such a case,) to inquire into that fact, as at such posterior time, and at the date of the verdict. In order to simplify this case, too, I will consider this action as having been brought, only for the negro Beck. There can be no difference, in principle, between that case and the one before us.

It is a general principle of law, that the evidence, the pleadings, and the verdict, all have reference to the time of instituting the suit. Thus, as to the evidence, it was held in 1st Munf. 22. [Harrison v. Brook] that an award made after the institution of the suit, was not permitted to be given in evidence on the plea of non assumpsit. As to the pleadings, it was held in the 354 case of Smith v. *Walker(q) that the plea of the act of limitations was bad for referring to the time of the plea, instead of that of the institution of the suit:(r) and a similar plea was held to be bad, and issue joined thereupon immaterial, in the case of Henderson v. Foote.(s) As to the verdict, the case of Burnley v. Lambert(t) is more than an authority. It not only negatives the idea that the verdict relates to the time of its rendition, but asserts that it has relation, as to the possession, to a time anterior to that of the institution of the action, namely, to the day mentioned in the declaration. It, therefore, goes beyond the point that I have occasion to contend for in the present instance, namely, that of the institution of the suit, and is a full and pointed authority. Mr. Marshall as counsel for the appellee, in that case, while he admitted that if the property should perish, or be disposed of, after the action was brought, the plaintiff might recover the alternative value, (which could not be the alternative value, as at the time of rendering the verdict,) contended, that the time of the institution of the action, and not a prior time, formed the criterion as to the proof of possession. He contended for this on the ground that the plea and declaration were in the present tense, and therefore related to the time of the institution of the suit. The court overruled this argument, by saying, that it proved too much: that it would equally prove that possession must be shewn to be in the defendant, not only at the time of issuing the writ, but also at that of rendering the verdict. This decision, therefore, is a clear authority, that notwithstanding the verdict may, also, use words in the present tense, they do not justify an inquiry into the fact of possession as at that time, but relate to the time put in issue by the pleadings. This idea is further corroborated by several cases in this 355 court. In the cases of Newby's *adm'r v. Blakey(u) and Elam v. Bass's ex'rs(v) it was held, that a defendant may protect himself on the plea of non detinet by proof of five years possession of the negroes, before the emanation of the writ. If a plaintiff lies by, without bringing a suit, for more than five years, he is not per-

(q) 1 Wash. 185.
(r) Same in Backhouse v. Jones.
(s) 3 Call 248.
(t) 1 Wash. 308.
(u) 3 H. & M. 57.
(v) 4 Munf. 301.

mitted to recover, and the five years vests a title in the defendant. But this inference would be very unjust, in relation to a plaintiff who has committed no laches, but, on the contrary, has brought his suit within one month after he lost the possession, merely because the time of rendering the verdict was protracted, by the delays of the courts, and the management of the defendant, to a longer period than five years from the inception of the defendant's possession.

These principles, and these cases then, clearly prove, that the Jury were limited by the pleadings, in this case, to the proof, of a possession, as at the time of the institution of the suit, and had no right to receive evidence, or find a verdict, touching the non-existence of that possession, as at the time of rendering the verdict. That was a point ulterior to the one made by the pleadings. It was not in issue, and therefore it was irregular to offer evidence in relation to it, or find it by the verdict.

If the plaintiff could have foreseen, from the pleadings, that such evidence would have been offered, he might have repelled that evidence, and the result might, as to the actual death of the negro, have been entirely different. We can, therefore, not know this fact, in this case, and are to decide the case, as if it were not in the record. That fact is, in truth, not before us, which is precluded by the issue between the parties, and to which the evidence and verdict have been illegally and irregularly extended. We are also to bear in mind, that although the negro is emphatically found to be dead, it is but little more than finding, that she was not in the possession or
356 *power of the defendant, at the time of rendering the verdict. It is unimportant from what cause this want of possession proceeded, whether from the natural death of the subject sued for, or, (for example,) by wilful destruction of it, by the defendant after the institution of the action. In the last case, it would scarcely be contended that the defendant should avail himself of his wrong, to defeat the plaintiff's action, if this fact were even found by a special verdict.

If this evidence, therefore, ought not to have been received, nor the verdict extended to the present point, what is to be done in the actual case before us? The verdict in question is a general verdict, and not a special one. It is not a special one, because it submits no question of law to the decision of the court. It is not a special verdict, for the further reason, that a Jury ought not to submit, in such a verdict, a matter which is not pertinent to the issue, and much less one which is entirely out of that issue. (7 Bac. 4.) If the issue relates to the possession, as at the date of the writ, it is entirely foreign to that issue, to inquire thereof, as at the time of finding the verdict.

This verdict, however, is not bad on account of its finding, also, this matter, which is not in issue in the cause, after having found the negro in question "for the plaintiff." The finding of that which is within the issue, is not vitiated by finding that which is not. In such cases utile per inutile non vitiatur; and that which is not within the issue will be rejected as surplusage, the jury having nothing to do with it. (7 Bac. p. 20.) Thus in an action of assumpsit against an executor, on a promise by his testator, and issue was taken on the plea of non assumpsit, the jury found for the plaintiff, but they likewise found, that the testator was dead before the day on which the promise was alleged to have been made. The verdict was held to be good, and the last part rejected, on the principle of its being
357 surplusage, and not within *the issue. (7 Bac. 22.) In principle, there is no difference between this case, and the one before us. Again, it is a rule, that if the jury find one thing, which is contrary to what is confessed in the pleadings, the verdict, as to so much, is bad, and it is to be rejected as surplusage; for the jury have nothing to do with what is confessed or admitted by the pleadings. (7 Bac. 41.) In the case before us, the pleadings, are not only restricted to the date of the writ, as to the fact of possession, but the existence of the subject seems admitted. On these pleadings, the defendant may object, that he does not detain the negro, but that another man does; or he may say, that he does not detain the plaintiff's negro, because she is his property, and not that of the plaintiff. But on this issue, it could never for a moment be considered, that the existence of the negro was denied. If a tenant in dower pleads, that the demandant's husband did not die seised of the premises, and issue is joined on that plea; and the jury find that he died seised, but further find, that the estate was not liable to dower, the latter part of the verdict is bad, as finding what is virtually confessed by the plea. (7 Bac. 41.)

Again;—it is held that the plea of non cepit in replevin, confines the issue to the taking, and allows the property to be in the plaintiff; and, therefore, no evidence shall be received, or verdict found on this plea, to disprove the property of the plaintiff. (2 Espin. 11.) So in debt on a bond to perform an award made by J. S. the plea was, that J. S., made no such award, and issue; the jury found that J. S. made the award, but also found matter in avoidance thereof; the last part of the verdict was held to be bad, and was rejected, because it was contrary to the issue. (7 Bac. 41.) These cases, by analogy, completely justify a rejection of the last part of the verdict before us; as being contrary to what is put in issue, and is admitted by the pleadings.

358 *The decisions of this court completely shew, that the verdicts of juries may be extended, by the clerk, from the general form in which they are found. This verdict, so extended, would be, that the defendant does detain the negro in question, and that she is of the value of $375. The subsequent finding of the fact, that she is dead, is clearly repugnant to such extended finding, and is to be rejected. By the first part of the verdict, the jury not only find the result in favor of the plaintiff, but find the fact also which justifies that result, and which is repugnant

to, and overrules the latter finding. That complete finding by them, so compounded of law and fact, is not to be varied by any subsequent, and irregular finding, on which they have erected no counter conclusion nor authorised the court to draw one. Such an authority can only be devolved on the court by a special verdict.

If this action were brought for this single negro, who had been for years withheld from the plaintiff, and whose hires were considerable; if on the ground in question the right to the principal subject was defeated, that to the hires or damages could not I apprehend be sustained; and yet, this would be a case of extreme hardship, as, at the time of the emanation of the writ, the right to both was perfect. The damages follow as incidental to the recovery, but cannot be obtained, in this action, without it

It has been argued that you must receive this evidence, as at the time of the verdict, because that time is the criterion as to settling the alternative value. This has never been solemnly established by this court, nor would the inference clearly result from it, if it had. In the case of Bigger's adm'r v. Alderson (1 H. & M. 54,) Judge Carrington, indeed gave this as his opinion, but the other Judges were silent on the subject; and the judgment which was given in that case did not affirm this principle. For any thing appearing in that case, the value was settled at an an-
359 terior time,—and at the *time of suing out the writ. As for the English decisions they are so scanty on the action of detinue, that I can find in them nothing decisive on this point. It is arguing in a circle to say, that unless this be the rule, the plaintiff would get too little for his property. He would so, in relation to a subject of increasing value; but it may be retorted that he would get too much in relation to a subject of a contrary character; and as to a subject of stable value, it is immaterial which rule is to prevail.

If however, this could be considered as the settled law, in relation to the alternative value, it does not follow, that it would attract to it the principal inquiry, relative to the possession of the subject itself. It would not change the issue made up between the parties, as to the right of the property, and which, in terms, at least, also extends to the alternative value. In the case of judgment for the negro by default, or on demurrer, and a writ of inquiry issued thereafter, to ascertain the value, if the time resorted to, as to the last, be that of the verdict, the time in relation to the first is undoubtedly different; it is, at least, that of suffering the judgment, if not that of the date of the writ. I apprehend, therefore, that the position in question is neither shewn to be solemnly settled, nor would the inference contended for, clearly result from it, if it were. As for the criterion now contended for, it would destroy the action of detinue altogether, in cases in which the suit is long protracted, and the subject sued for is of a decaying and perishable nature.

The ground taken however in this opinion, does not extend to cases, in which the subsequent death of the negro is relied on, by plea puis darrein continuance, or otherwise; and in which the plaintiff had, consequently, an opportunity to contest that point upon the evidence. If the criterion assumed by the last part of the verdict, be sustainable, the plaintiff ought to have an opportunity to be heard upon it. I
360 decide nothing however upon *that point, I only decide upon the actual case which is now before us, upon the pleadings.

As long, therefore, as we are, in rendering our judgments, to respect the allegata and probata of the parties; as long as we are to shut our eyes against facts which are not known to us upon the pleadings, and are to reject impertinent matter, which juries may put into their verdicts, we must decide this case for the appellant. We must so decide it, however the case might be, if through the laches of the appellant, the slave had been permitted to die, before his right had attached by bringing the action. My opinion is therefore, and such is the opinion of the court, that the judgment of the Superior court be reversed, and entered, also, for the slave in question, if to be had; and if not for her alternative value.

INDEX.

☞ The quære which occurs two or three times in the volume, as well as in the Index, is not a suggestion of the Reporter; but is merely to intimate, that the position is stated doubtingly by the court; or, that the division of the court prevents the establishment of the principle as a precedent.

ABATEMENT.

The death of one of the demandants in a writ of right, before the trial abates the whole suit.
Carter v. Carr, 145

ANNUITY.

An annuity is a legacy charged on the whole estate not specifically devised.
Trent v. Trent's ex'x, 174

APPEAL BOND.

In actions on appeal bonds, the court of appeals will not consider either judicial errors or clerical misprisions, occurring in the court below in the original suit, in which the party has acquiesced, by not appealing to correct them.
Miller v. M'Luer, 338

APPLICATION.

See Treasurer, 2.

APPOINTMENT.

Where a power of appointment is improperly executed, and a court of equity is required to correct it, equality is the rule.
Knight v. Yarbrough, 27

ARMORY.

The statute of 3d March 1821, appropriating $20,000 to the completion of unfinished work in the armory, intended $20,000 in addition to what had been expended when the act passed.
Staples v. Commonwealth, 213

ATTACHMENT.

1. Judgment on an attachment should not be quashed because the bond given on suing it out, recited only the sum due without mentioning interest.
Smith v. Pearce, 34
2. The defendant in attachment may enter bail and plead without appearing in person. Ibid.
3. The statute allowing persons to interplead in attachment without bail, applies only to attachment for debt, not for rent.
Hallam v. Jones, 142

BAIL.

Appearance bail becoming special bail is entitled to prove the similiter to a replication was added by the clerk without his consent, and may in such case plead, notwithstanding the similiter is added.
Nadenbousch v. M'Rea, 228

BOND.

It is a fatal variance to offer in evidence a bond executed to A. surviving partner of A. B. & Co., on a declaration making profert of a bond to A.
Moore v. Fenwick, 214

BOND—Appeal.

In actions on appeal bonds, the court of appeals will not consider either judicial errors or clerical misprisions occurring in the court below in the original suit, in which the party has acquiesced by not appealing to correct them.
Miller v. M'Luer, 338

BOND—Bail.

Though the name of a person be in the body of a bail bond, and it be returned as executed by him by the sheriff, it is not his bond unless it be in truth executed by him.
Goode v. Galt, 152

BOND—Forthcoming.

Judgment on a forthcoming bond cannot be relieved against in equity on the ground, that a slave which by the condition was to be forthcoming on a given day had runaway and could not be produced, even if a more valuable slave was offered in his stead.
Cole v. Fenwick, 134

BOND—Penal.

Judgment on a penal bond should be for the penalty, to be discharged by the sum actually due.
Moore v. Fenwick, 214

CASE.

Case or trespass will lie for seducing the plaintiff's daughter.
Parker v. Elliotte, 33

CONSIDERATION.

A contract will be set aside in equity for inadequacy of consideration where there is inequality in the condition of the parties.
George v. Richardson, 230

CONTINUANCE.

A continuance should be granted the defendant when the plaintiff has failed to give security for costs after a rule to do so, until the term at which the motion is made.
Jacobs v. Sale, 123

COSTS.

Costs will be allowed the appellee on reversing a judgment injurious to him, if he substantially prevail in the cause.
George v. Richardson, 230

COVENANT.

A covenant "to make over by deed of bargain and sale, and that the wife shall annex such covenants as will ultimately assure the premises to the party," is complied with, by executing a deed of bargain and sale with relinquishment of dower by the wife, though such covenant do not pass the legal title.
Long v. Colston, 98

A party having covenanted to give $20,000 for certain lands in England, payable in money and lands in the U. States, will be entitled to relief for any deficiency in value in the said lands in England short of that sum; the $20,000 being considered an advance, and not a gross sum given for the lands.
Long v. Colston, 98

DECLARATION.

The declaration in a special action on the case, for injury produced by improperly suing out a foreign attachment, must aver both malice and want of probable cause.
Marshall v. Bussard, 9

DEED.

A certified office copy of a deed is admissible as primary evidence.
Commonwealth v. Preston, 235

DEMURRER.

Assigning special causes of demurrer, does not make a demurrer special, which is in its nature general.
Miller v. M'Luer, 338

The joinder in demurrer not being added, is not an available error in an appellate court, when the demurrer has been argued and decided on its merits below, without the objection being made.
Miller v. M'Luer, 338

DETINUE.

The jury having found for the plaintiff in detinue, but that the slave died after suit brought, and no damages; the court must give judgment for the value of the slave as found, though she be dead; the death not being put in issue by plea puis darrein continuance.
Austin's ex'r v. Jones, 341

DEVISE.

1. Lending a slave by name to a devisee until he reach 50 years of age, "then to his heirs for ever"

does not give the absolute property to the first devisee from the death of the testator.
Early v. Early, 124
2. A devise of slaves for life, and if the devisee should die without issue, limitation over; is not too remote to take effect.
Didlake v. Hooper, 194

DOWER.

A provision in lieu of dower will not be disturbed so far as it is only equivalent to dower.
Blanton v. Taylor, 209

ELEGIT.

The title to land should not be disturbed on an elegit when derived by sale to raise the purchase money, no security but the bond of the first purchaser being taken for payment of the purchase money, and a deed of trust which was never recorded.
Childers v. Smith, 196

EQUITY.

1. Where the title to property conveyed in trust to secure the payment of debts is in dispute, a court of equity will injoin a sale by the trustees, tho' the fact was known to all the parties when the deed of trust was executed.
Land v. Tidball, 130
2. A court of equity has jurisdiction to stop proceedings at law, intended to reverse a judgment on a forcible entry, in which a second writ of restitution had been granted, the first being lost without any fault in the plaintiff.
Ashby v. Kiger, 153
3. Where equity stops legal proceedings involving only the right to possession of real property, it will do it without obstructing actions to try the right of property. Ibid.
4. When a Chancellor fails on granting an injunction to require a release of errors, the court of appeals will still respect the principle. Ibid.
5. The dismission of a suit not conclusive on the merits, by one court of equity, will not prevent another co-ordinate court of equity from taking jurisdiction.
Carter v. Campbell, 159
6. Courts of equity, as well as of common law have jurisdiction in suits of paupers for their freedom, and in a case proper for a court of equity, will appoint counsel &c. to conduct the cause for the pauper.
Dempsey v. Lawrence, 333
7. A testator having left the invesment of a charitable fund to the discretion of trustees, a court of equity should not interfere in the mode of investment.
Overseers of Poor of Richmond County v. Tayloe's adm'r, 336

ESTOPPEL.

See Evidence, 5.

EVIDENCE.

1. The testimony of the committing magistrate as to what the defendant swore on the commitment, is proper evidence in an action for malicious prosecution.
Guerrant v. Tinder, 36
2. The release of an heir and distributee to an administrator, of all interest in the matter of controversy, and in the contract with his ancestor, does not restore his competency.
Rowt's adm'r v. Kile's adm'r, 202
3. On the plea of non est factum, it being proved that the son of the plaintiff said he could counterfeit the hand of the defendant, evidence may be given, to shew the infamy of the son's character, circumstances being proved which rendered the execution of the paper sued on, doubtful. Ibid.
4. A certified copy of a deed is admissible as primary evidence.
Commonwealth v. Preston, 235
5. The treasury books are conclusive evidence of the balances on hand at any given time, both against the treasurer and his sureties, without being pleaded as an estoppel. Ibid.

EXECUTOR.

Trespass for the mesne profits of land recovered in ejectment, lies against an executor.
Lee v. Cooke's ex'or, 331
The 64 § ch. 104, 1 Rev. Code, is an extension of the 4th Edw. III. c. 7, de bonis asportatis. Ibid.

FORCIBLE ENTRY.

See Equity, 2, 3.

FRAUD.

The vendor's retaining possession of slaves after he has given an absolute bill of sale for them, is in itself fraudulent.
Williamson v. Farley, 15
The participation of a wife in the fraud of her husband, will not impair her rights.
Blanton v. Taylor, 209

FREEDOM.

The statute of 1792 requiring persons coming into Virginia with slaves to reside, to take certain oaths &c., or else the slaves will be entitled to freedom, has no application to the case of a citizen of Virginia removing to another state with slaves, and after having resided there some time, bringing them back to Virginia, before the statute was repealed.
Barnett v. Sam, 231
Courts of equity as well as of common law have jurisdiction in suits for freedom; and in a proper case for its interference will appoint counsel &c.
Dempsey v. Lawrence, 333
A negro held in servitude in Ohio under a deed executed in Virginia, may assert title to freedom in the courts of Virginia, and recover by operation of the constitution of Ohio.
Griffith v. Fanny, 143

HEIR.

The heir is entitled to the real estate though charged with debts, until convicted of mismanagement.
Trent v. Trent's ex'x, 171

INTEREST.

Back interest by way of penalty for not paying punctually, will be relieved against in equity.
Mosby v. Taylor, 172

ISSUE.

Where a court of equity directs an issue, and the testimony is conflicting, the verdict should be conclusive.
Carter v. Campbell, 159
An issue will be directed to try whether a will alleged to be lost was ever in fact executed, and what were its provisions.
Brent v. Dold, 211
A general replication to the plea of payment, does not constitute an issue, unless so considered and treated by the parties.
Nadenbousch v. M'Rae, 228

JUDGMENT.

The judgment of a foreign court of admiralty is not conclusive that the property and owners are enemies, in a suit between the underwriters and insured.
Burke v. Granberry, 16
See Notes—negotiable, 3, 4.

LAND.

A sale of land by specified boundaries, "supposed to be" a given number of acres, at a fixed price per acre, is a sale by the acre and not in gross.
Carter v. Campbell, 159
Where land is sold at different prices for different parts, a Jury should assess the compensation for a deficiency in quantity.
Carter v. Campbell, 159

LANDLORD.

The landlord of a tenant at will may peaceably enter the premises, but an illegal search for stolen goods makes him trespasser ab initio.
Faulkner v. Alderson, 221

LIEN.

A mortgage of land by a vendee, to secure the payment of the purchase money due by his vendor to a prior vendor, by agreement between all the parties, is a waiver of the general lien, which but for such mortgage, the intermediate vendor would have on the land, to secure to him the payment of the purchase money.
Tayloe v. Adams, 329

LIMITATION—of actions.

The plea of the statute of Limitations is an issuable plea, and sometimes an honest plea.
Tomlin's adm'r v. How's adm'r, 1
It may be pleaded after a new trial has been granted, the Jury having found against the presumption of payment from the staleness of the demand, which presumption prevented its being pleaded on the former trial. Ibid.

LIMITATION—by devise.

Lending slaves to J. S. during life, should he die without issue, remainder over, is not too remote a limitation.
Didlake v. Hooper, 194

LOTTERY.

A deed of trust conveying property, excepting prizes drawn by fortunate adventurers in the lottery; prizes drawn by the maker of the deed and lottery, are within the exception. Quære.
Lyons v. Brown. 105

MILL DAM.

1. A new inquest must be held as to the health of neighbours, overflowing orchards, &c. whenever a mill dam already erected is to be raised higher.
Kownslar v. Ward, 127
2. The verdict on an inquest to assess damages, inquire of health, &c. on raising a mill dam higher, not responding to all the inquiries to be made by the Jury, will be quashed.
Kownslar v. Ward, 127

MORTGAGE.

See Lien.

NEW TRIAL.

In trespass against several defendants, some of whom are found guilty and some not guilty on a joint plea, a new trial granted on motion of those found guilty, will be awarded as to them only, and the other defendants shall not be again jeoparded.
Guerrant v. Tinder, 36

NOTES—negotiable.

1. The sale of notes made to be sold, by a broker, and at more than 6 per cent. discount, is not usurious, unless the purchaser know they are so made to be sold, and that the broker is a mere agent for selling them. Quære.
Taylor adm'r of Holloway v. Bruce, 42
2. Giving further time, or entering into a new contract with the drawer of a negotiable note does not discharge the indorser.
Bennett v. Maule's adm'x, 305
3. Are not notes for the payment of money within the meaning of the act of 1804, p. 508, § 79, 1 Rev. Code, and judgment cannot be rendered in an action of debt on them, without the intervention of a Jury.
Metcalfe v. Battaile, 191
4. On reversing a judgment by default in such action, the defendant will be allowed to plead to the merits in the court below. Ibid.

OVERSEERS OF THE POOR.

Succeed to minister and vestry as trustees of charitable donations by the statute, where there are no minister and vestry.
Overseers of Poor of Richmond County v. Tayloe's adm'r, 336

PLEA.

A general replication of the plea of payment, does not of itself constitute an issue, unless it be so treated by the parties.
Nadenbousch v. M'Rae, 228
See Bail, Demurrer, Limitation of actions.

POWER.

A devise with a power to sell or dispose of at pleasure, among children and grand-children, is not executed unless something be given to each object of the bounty; and giving part to a son-in-law, and none to some of the children and grand-children, will be a void execution of the power.
Knight v. Yarbrough, 27
Where an object of the bounty has received any part, he can entitle himself to a further portion, only by bringing into hotchpot what he has received. Ibid.
Where a power of appointment has been properly executed, and a court of equity is called on to correct it, equality is the rule. Ibid.
See appointment.

PROFERT.

It is a fatal variance to offer in evidence a bond executed to A. surviving partner of A. B., & Co. on a declaration making profert of a bond to A. Quære.
Moore v. Fenwick, 214
Where profert is made in the declaration, the actual production of the paper is indispensable. Ibid.

PURCHASE.

A purchase by the insured under a sentence of confiscation, does not take away the right of indemnification for the entire loss.
Bourke v. Granberry, 16

RELEASE.

The release of an heir and distributee to an adm'r of all interest in the matter of controversy and in the contract with his ancestor, does not make him a competent witness.
Rowt's adm'r v. Kile's adm'r, 202

RELEASE—of Errors.

A court of equity failing on granting an injunction to require a release of errors, the court of appeals will respect the principle.
Ashby v. Kiger, 153

RENT.

See Attachment, 3.

SEDUCTION.

Either trespass or case lies for seducing the plaintiff's daughter.
Parker v. Elliotte, 33

SHERIFF.

The sheriff may amend his return on a bail bond.
Goode v. Galt, 152

SIMILITER.

See Bail.

SURETY.

Giving farther time to the principal discharges the surety.
Hill v. Bull, 149
But giving farther time or entering into a new contract with the drawer of a negotiable note does not discharge the indorser.
Bennett v. Maule's adm'x, 305

SURVEY.

Where a sale of land is by the acre, a right of survey exists whether reserved or not, and may be claimed at any time before the business is closed.
Carter v. Campbell, 159

TRESPASS.

See Seduction.
The landlord of a tenant at will may peaceably enter the premises, but an illegal search for stolen goods, renders him trespasser ab initio.
Faulkner v. Alderson, 221
In trespass quare clausum fregit, the Jury may assess damages for the injury resulting to the character of the plaintiff by an illegal search for stolen goods. Quære. Ibid.

TREASURER.

1. Public monies deposited in bank at any time by the Treasurer as individual property, will be considered part of a larger sum at a subsequent period turned over by him to his successor in office, nothing appearing to the contrary.
Commonwealth v. Preston, 235
2. The treasurer has a right to apply any monies turned over to him by his predecessor, to the extinguishment of any debt due by the default of such predecessor to the commonwealth, such turning over the said money being a payment by the preceding to the succeeding treasurer. Ibid.
3. The nature of the books kept by the treasurer as matter of Evidence. See Evidence, 5.

TRUST AND TRUSTEES.

See Equity, 1, 7.

USURY.

See Notes—negotiable, 1.

VERDICT.

See Mill Dam, 1, 2.

WILL.

Directing by will the "payment of all just debts" charges the whole estate, which charge is not released by a subsequent selection of particular portions to be sold for that purpose.
Trent v. Trent's ex'x, 174
An issue will be directed, to try whether a will alleged to be lost was ever in fact made, and what were its provisions.
Brent v. Dold, 211
See also Devise, 1, 2.

WRIT OF RIGHT.

See Abatement.